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**BY ELECTRONIC SUBMISSION**

Rohit Chopra  
Director  
Consumer Financial Protection Bureau  
1700 G Street N.W.  
Washington, DC 20552

*Request for Comment*  
*Statement of Policy Regarding Prohibition on Abusive Acts or Practices*  
(Dkt. No. CFPB-2023-0018)

Dear Director Chopra:

We, the undersigned attorneys general for twenty states and the District of Columbia, along with the Hawaii Office of Consumer Protection (collectively, the “State AGs”),<sup>1</sup> write in response to the Consumer Financial Protection Bureau’s (“CFPB” or “the Bureau”) request for comment on a proposed statement of policy (the “Statement”) regarding the prohibition on abusive acts or practices in the federal Consumer Financial Protection Act (“CFPA”). The State AGs wholly endorse the Statement, which provides helpful guidance and instructive examples to participants in consumer financial markets while avoiding any constrictive or unneeded limitation on a unique and critical regulatory enforcement mechanism. As detailed further below, the CFPA’s prohibition on abusive acts or practices was intended, in the wake of the financial crisis, to help fill gaps in then-existing consumer protection laws that had failed to mitigate or prevent key causes of that crisis, and the Statement is wholly consistent with that important objective.

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<sup>1</sup> Hawaii is represented on this matter by its Office of Consumer Protection, an agency which is not part of the State Attorney General’s Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii. For simplicity purposes, the entire group of signees to this letter will be referred to as the “State AGs” or individually as “State AG” and the designations, as they pertain to Hawaii, refer to the Executive Director of the State of Hawaii’s Office of Consumer Protection.

In 2008, the United States experienced the most severe financial recession since the Great Depression. While the underlying causes of that recession are complex and multifaceted, there is little debate that abusive subprime mortgage lending and the associated collapse of the real estate market played a central role.<sup>2</sup> In response, Congress enacted the CFPA, which created the Bureau,<sup>3</sup> codified the authority of the State AGs to enforce state and federal consumer protection laws,<sup>4</sup> and—for the first time—enacted prohibitions on abusive conduct in consumer financial markets<sup>5</sup> as a supplement to existing prohibitions on deceptive and unfair conduct. Congress’s purpose was clear: existing laws had been insufficiently flexible and adaptive to prevent the recent financial crisis, and new regulatory tools were necessary to prevent future abuses.<sup>6</sup>

The statutory language of the new abusiveness provision, in particular, reflected an intentional effort to provide a flexible enforcement mechanism that could tackle conduct harmful to consumers that was not being adequately addressed by available enforcement mechanisms or consumer-initiated litigation. The CFPA does not include any scienter requirement anywhere in its definition of abusive acts or practices.<sup>7</sup> Unlike the CFPA’s unfairness standard, consumers need not show that they could not reasonably have avoided harm from abusive acts or practices,<sup>8</sup> and there is no statutory safe harbor if the acts or practices in question could be shown to have benefits that outweighed the harm caused.<sup>9</sup> Indeed, the CFPA does not specify any particular level or quantum of harm that must be shown to establish that particular acts or practices are abusive.<sup>10</sup>

The Bureau’s treatment and application of the CFPA’s prohibition on abusive acts or practices has been fully consistent with Congress’s intent. In particular, the Bureau has avoided unnecessarily restrictive regulatory action that might cabin an otherwise flexible and adaptive legal prohibition or create safe harbors or other exceptions narrowing its application. Instead, the

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<sup>2</sup> See generally Fin. Crisis Inquiry Comm., *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* at 67–80 (2011), available at [https://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_full.pdf](https://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf).

<sup>3</sup> 12 U.S.C. § 5491.

<sup>4</sup> 12 U.S.C. § 5552.

<sup>5</sup> 12 U.S.C. § 5531(d).

<sup>6</sup> See, e.g., S. Rep. No. 111-176, at 172 (Apr. 30, 2010) (“Current law prohibits unfair or deceptive acts or practices. The addition of ‘abusive’ will . . . cover practices where providers unreasonably take advantage of consumers.”); Sheila C. Bair, *Improving Federal Consumer Protection in Financial Services*, House Committee on Financial Services (June 13, 2007) (proposing abusiveness prohibition be added to HOEPA because it “is a more flexible standard to address some of the practices that make us all uncomfortable”), available at <https://www.govinfo.gov/content/pkg/CHRG-110hhrg37556/html/CHRG-110hhrg37556.htm>.

<sup>7</sup> See generally 12 U.S.C. § 5531(d).

<sup>8</sup> Compare 12 U.S.C. § 5531(c)(1)(A) (prohibiting unfair acts or practices where there is “a reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers”) with 12 U.S.C. § 5531(d) (prohibiting abusive acts or practices so long as it is shown that the act or practice “materially interferes” with consumer understanding or “takes unreasonable advantage” of a consumer’s lack of understanding, inability to protect herself, or reasonable reliance).

<sup>9</sup> See 12 U.S.C. § (c)(1)(B) (act or practice is unfair so long as there is not a reasonable basis to conclude that the substantial injury it causes “is not outweighed by countervailing benefits to consumers or to competition”).

<sup>10</sup> See generally 12 U.S.C. § 5531(d).

meaning and scope of abusive acts and practices primarily has been developed through individual enforcement actions brought by the State AGs, the CFPB, or both. This approach harnesses the American common-law tradition of legal development in the context of particular facts and circumstances, providing notice and guidance to consumer financial market participants.<sup>11</sup> It also ensures that the understanding of abusiveness remains flexible and is not prematurely ossified and made unable to respond to new innovations or unexpected developments in consumer financial markets that might cause harm in the future.<sup>12</sup> And it is entirely consistent with the history of the FTC Act, under which the FTC brought enforcement actions to halt deceptive or unfair acts or practices without adopting definitions, limits, or other cabining rules for decades.

The proposed Statement’s clear analytical framework will promote compliance with the CFPA and is consistent with the Bureau’s approach to date. The Statement helpfully describes in general terms the types of practices that are likely to be abusive, such as those that result in misaligned incentives between providers and consumers,<sup>13</sup> those that set consumers up to fail,<sup>14</sup> and those that take advantage of a lack of consumer bargaining power.<sup>15</sup> And in doing so, it relies on existing CFPB enforcement actions, thereby pointing market participants to clear examples of particular conduct that the Bureau considers abusive.<sup>16</sup>

The Statement’s emphasis on flexibility and guidance—rather than on definitions and limitations—is particularly important to the State AGs’ ability to protect consumers. As the Bureau recently recognized,<sup>17</sup> the State AGs play a central and important role in enforcement of the state and federal consumer protection laws that exist in the United States, including the CFPA. The Statement also correctly accounts for the realities of modern consumer financial markets, which the State AGs have observed through their consumer protection work, including:

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<sup>11</sup> See Adam J. Levitan, *‘Abusive’ Acts and Practices: Towards a Definition?* at 11, Georgetown University Law Center (June 19, 2019) (“The common lawmaking process allows for a more careful definition of ‘abusive’ than a rulemaking because it continually tests the doctrine through new factual situations that allow for on-going learning and tailoring of the doctrine rather than a one-time off-the-rack rulemaking.”), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_levitin-written-statement\\_symposium-abusive.pdf](https://files.consumerfinance.gov/f/documents/cfpb_levitin-written-statement_symposium-abusive.pdf).

<sup>12</sup> For example, in the decade-plus since the CFPA’s enactment, an entire consumer financial market involving so-called fintech firms that provide financial services over the internet and through mobile device apps has exploded, becoming a dominant source of consumer access to banking and lending services, among others. See, e.g., Nat’l Consumer Law Center, *Data on Earned Wage Advances and Fintech Payday Loan ‘Tips’ Show High Cost for Low-Wage Workers* (Apr. 2023), available at <https://www.nclc.org/wp-content/uploads/2023/04/Data-on-Earned-Wage-Advances-and-Fintech-Payday-Loan-22Tips22-Show-High-Costs-for-Low-Wage-Workers.pdf>.

<sup>13</sup> CFPB, *Statement of Policy Regarding Prohibition on Abusive Acts or Practices* at 12 (Apr. 3, 2023), available at [https://files.consumerfinance.gov/f/documents/cfpb\\_statement-of-policy-regarding-prohibition-abusive-acts\\_2023-03.pdf](https://files.consumerfinance.gov/f/documents/cfpb_statement-of-policy-regarding-prohibition-abusive-acts_2023-03.pdf) (“In many circumstances, it is unreasonable for an entity to benefit from, or be indifferent to, negative consumer outcomes resulting from one of the circumstances identified by Congress.”).

<sup>14</sup> See *id.* at 11 (noting that one of the main concerns of Congress in enacting the CFPA was to address “financial products and services that may be ‘set up to fail.’”).

<sup>15</sup> *Id.* at 17.

<sup>16</sup> See, e.g., *id.* at 18 (citing enforcement actions where the CFPB found abusive acts or practices).

<sup>17</sup> CFPB, *Authority of States to Enforce the Consumer Financial Protection Act of 2010*, 87 FR 31940, 31940–43 (May 26, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-05-26/pdf/2022-11356.pdf>.

- The Statement clarifies that both acts and omissions can materially interfere with the ability of a consumer to understand terms and conditions, and that this interference can “take numerous forms.”<sup>18</sup> The State AGs frequently observe how disclosures buried in fine print or warnings that require navigating through several pages in a website functionally provide no disclosure at all, and have, for example, brought enforcement actions to halt abusive subprime installment lending that employed electronic acceptance of lengthy and dense adhesion agreements.<sup>19</sup>
- The Statement explains that while evidence of intent can provide a basis for inferring material interference, and thus abusiveness, it is not required. As the Statement rightly points out, the mere fact that a financial product is designed to prevent consumers from understanding its terms suggests intentionality.<sup>20</sup> One State AG has brought an enforcement action against an abusive payday lending model that takes advantage of consumers’ lack of understanding regarding the legality of credit to push predatory loans that violated state usury law.<sup>21</sup>
- The Statement makes clear that taking unreasonable advantage of a consumer’s lack of understanding about a product or pushing products that set consumers up to fail are abusive acts or practices. This method of demonstrating abusiveness is particularly important given that financial products and services have become increasingly complex.<sup>22</sup> For example, enforcement actions brought by some State AGs against student loan servicers have revealed how consumers frequently do not understand the various available repayment options and the consequences of selecting one versus another.<sup>23</sup> Similarly, another State AG has sought to halt lending models that pushed consumers into highly expensive loans that the lender did not expect them to repay but from which the lender would profit in any event.<sup>24</sup>
- The Statement notes that consumers’ inability to choose their provider, such as a debt collector or loan servicer, can impair their ability to protect their own interests.<sup>25</sup> Again, State AG enforcement actions against student loan servicers

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<sup>18</sup> *Statement of Policy*, *supra* n. 12, at 5.

<sup>19</sup> Complaint, *Comm. of Penn. v. Mariner Finance, LLC*, No. 22 Civ. 3253, ECF No. 1 (E.D. Pa. Aug. 16, 2022), available at <https://www.attorneygeneral.gov/wp-content/uploads/2022/08/2022-08-16-Mariner-Fiance.pdf>.

<sup>20</sup> *Statement of Policy*, *supra* n. 12, at 6–10.

<sup>21</sup> Second Amended Complaint, *Comm. of Penn. v. Think Finance, Inc.*, No. 14 Civ. 7139, ECF No. 205 (E.D. Pa. Dec. 21, 2017), available at <https://ecf.paed.uscourts.gov/doc1/153116803633>; Complaint, *People of the State of Ill. v. CMK Invs., Inc.*, No. 204 CH 4694 (Ill. Cir. Ct. Mar. 18, 2014), available at [https://ag.state.il.us/pressroom/2014\\_03/ALL\\_CREDIT\\_LENDERS\\_03-18-2014\\_16-26-53.pdf](https://ag.state.il.us/pressroom/2014_03/ALL_CREDIT_LENDERS_03-18-2014_16-26-53.pdf).

<sup>22</sup> *Statement of Policy*, *supra* n. 12, at 10–12.

<sup>23</sup> Complaint, *Comm. of Penn. v. Navient Corp. et al.*, Case No. 17 Civ. 1814, ECF No. 1 (M.D. Pa. Oct. 5, 2017), available at <https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf>.

<sup>24</sup> Complaint, *CFPB v. Credit Acceptance Corp.*, No. 23 Civ. 38, ECF No. 1 (S.D.N.Y. Jan. 4, 2023), available at [https://ag.ny.gov/sites/default/files/cac\\_complaint.pdf](https://ag.ny.gov/sites/default/files/cac_complaint.pdf).

<sup>25</sup> *Statement of Policy*, *supra* n. 12, at 15–16.

confirm this dynamic: consumers become uniquely vulnerable to unlawful conduct when they lack the option to take their business elsewhere.

- The Statement explains that reasonable reliance by a consumer is likely to occur where an entity holds itself out as acting in a consumer’s best interests.<sup>26</sup> This is a commonsense outcome that State AGs observe many times, particularly in the context of for-profit, online universities. Where representatives purposefully build rapport with consumers or make claims that their goal is to help benefit consumers financially or otherwise, consumers reasonably expect that they are being told the truth and can trust the information provided.<sup>27</sup>

For all of the above reasons, the State AGs support the CFPB’s proposed Statement regarding the CFPA’s prohibition of abusive acts and practices and applaud the Bureau’s effort to provide guidance to participants in consumer financial markets regarding the types of business practices that may trigger the CFPA’s prohibition without unduly or unnecessarily constraining what was always intended to be a flexible regulatory enforcement tool.

Respectfully submitted,



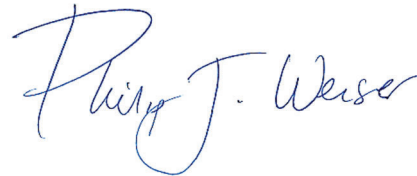
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<sup>26</sup> *Id.* at 17–18.

<sup>27</sup> Second Amended Complaint, *People of the State of Ill. v. Alta Colleges, Inc.*, No. 14 Civ. 3786 (N.D. Ill. Sep. 30, 2014), available at <https://ecf.ilnd.uscourts.gov/doc1/067114767843>.



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