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The Honorable Kathleen Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Abusive Acts or Practices Symposium

Dear Director Kraninger:

Thank you for the opportunity to serve as a panelist on the Consumer Financial Protection Bureau's Abusive Acts or Practices Symposium. The contours of the Bureau's abusiveness authority – its limits and how it differs from unfairness and deception – remain unclear to this day. Adding to the complexity is that the Dodd-Frank Act delineates not just one way that an act or practice can be abusive, but rather four, describing each in broad, undefined terms.¹ Whereas deception and unfairness have a long history of case law and guidance to explain them, there is no clear guidance on the meaning or limits of the four types of abusive acts or practices described in the Dodd-Frank Act. This symposium, and what follows from it, presents an opportunity for the Bureau to provide guidance about how it will use its abusiveness authority to protect consumers and avoid regulatory overreach.

The Bureau has different tools to declare an act or practice abusive, but it primarily uses its enforcement authority to do so. In its first nine years, the Bureau has filed 29 enforcement actions alleging abusive acts or practices.² In several cases, the Bureau has prevailed on

¹ 12 U.S.C. § 5531(d).

² *Cash Express LLC* (10/24/18); *Think Finance LLC* (11/15/17); *Freedom Debt Relief LLC* (11/8/17); *Zero Parallel LLC* (9/6/17); *Aequitas Capital Mgmt, Inc.* (8/17/17); *Golden Valley Lending, Inc.* (4/27/17) (since voluntarily dismissed); *RD Legal Funding LLC* (2/7/17); *TCF National Bank* (1/19/17); *Navient Corporation* (1/18/17); *Access Funding LLC* (11/21/16); *TMX Finance LLC* (9/26/16); *Wells Fargo Bank, N.A.* (9/8/16); *All American Check Cashing, Inc.* (5/11/16); *Y King S Corp. d/b/a Herbies Auto Sales* (1/21/16); *D and D Marketing, Inc. d/b/a T3 Leads* (12/17/15) (the Bureau also filed separate complaints against related individuals); *Security National Automotive Acceptance Company LLC* (6/17/15); *Pension Funding LLC* (8/20/15); *NDG Financial Corp.*, 7/31/15; *PayPal, Inc.* (5/19/15); *Nationwide Biweekly Administration, Inc.* (5/11/15); *Fort Knox National Company* (4/20/15); *S/W Tax Loans, Inc.* (4/14/15); *Freedom Stores, Inc.* (12/18/14); *College Education Services LLC* (12/11/14); *Colfax Capital*

motions to dismiss claims for abusiveness, allowing the Bureau to proceed with the claims beyond the initial pleadings stage.³ In some of these decisions, federal district courts also have ruled that: the Bureau's abusiveness standard is not unconstitutionally vague;⁴ the Bureau can declare an act or practice abusive through enforcement and need not first engage in rulemaking;⁵ and abusiveness claims predicated on state law violations do not require dismissal based on federalism concerns.⁶

Because these have been rulings on motions to dismiss, they offer very little guidance on the elements or limits of abusiveness. In *ITT*, the court discussed the Bureau's abusiveness authority in ruling that the standard is not unconstitutionally vague. The court wrote that the legislative history of the Dodd-Frank Act suggests that "abusive" was added, in part, to enable the Bureau to reach forms of misconduct not embraced by the more rigid, cost-benefit standard that had grown up around the terms "unfair" and "deceptive." According to the court, this history suggests that "abusive" conduct is defined according to "a more flexible, expansive standard than had heretofore been present in federal consumer protection law."⁷ The court then went on to say that, in any event, the statute itself provides significant guidance.

But does it really? For example, with respect to the first prong of abusiveness, what does it mean to say an act or practice "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service"?⁸ The phrase "materially interferes" suggests that some level of interference is permissible, but the line is not clear since "materially" is undefined. Similarly, what does the statute mean when it refers to "a" consumer? Does this mean that the Bureau can bring an enforcement action based on a single consumer's experience? It seems unlikely, but the Bureau could argue that the plain language of the statute supports such a case. Similarly, it is unclear whether this prong applies to any consumer's experience, regardless of whether the consumer is acting reasonably. Again, the Bureau could argue that the plain language supports a case on behalf of even the most gullible consumers.

Corp. (7/29/14); *Ace Cash Express, Inc.* (7/10/14); *ITT Educational Services, Inc.* (2/26/14); *CashCall, Inc.* (12/16/13); *American Debt Settlement Solutions, Inc.* (5/30/13).

³ *CFPB v. Think Fin., LLC*, 2018 WL 3707911, at *10 (D. Mont. Aug. 3, 2018); *CFPB v. All-American Check Cashing, Inc.*, 3:2016-cv-00356-DPJ-JCG at 11 (S.D. Miss. Mar. 21, 2018), ECF No. 236; *CFPB v. Access Funding, LLC*, 270 F.Supp.3d 831, 844 (D. Md. 2017); *CFPB v. TCF Nat'l Bank*, 2017 WL 6211033, at *2 (D. Minn. Sept. 8, 2017); *CFPB v. Navient Corp.*, 2017 WL 3380530, at *21 (M.D. Pa. Aug. 4, 2017); *CFPB v. NDG Fin. Corp.*, 2016 WL 7188792, at *14-15 (S.D.N.Y. Dec. 2, 2016); *CFPB v. D and D Mktg., Inc.*, 2016 WL 8849698, at *5-8 (C.D. Cal. Nov. 17, 2016); *CFPB v. CashCall, Inc.*, 2015 WL 9591569, at *1-2 (C.D. Cal. Dec. 30, 2015); *CFPB v. ITT Educ. Servs.*, 219 F. Supp. 3d 878, 906 (S.D. Ind. 2015). See also *CFPB v. RD Legal, LLC*, 332 F. Supp. 3d 729, 778 (S.D.N.Y. 2018) (denying motion to dismiss Dodd-Frank Act abusiveness claim by the New York Attorney General).

⁴ *All-American Check Cashing*, No. 3:2016-cv-00356 at 8; *ITT Educ. Servs.*, 219 F. Supp. 3d at 904-06.

⁵ *Think Finance*, 2018 WL 3707911, at *3; *Navient*, 2017 WL 3380530, at *6-9; *D and D Mktg.*, 2016 WL 8849698, at *7-8.

⁶ *All-American Check Cashing*, No. 3:2016-cv-00356 at 11; *CashCall*, 2015 WL 9591569 at *2.

⁷ *ITT Educ. Servs.*, 219 F. Supp. 3d at 905.

⁸ 12 U.S.C. § 5531(d)(1) (2010) (emphasis added).

One can ask similar questions about other abusiveness prongs. For example, what does it mean to take “unreasonable advantage of”:

- “a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service”;⁹
- “the inability of the consumer to protect the interests of the consumer in selecting or using” a product or service;¹⁰ or
- “the reasonable reliance by the consumer on a covered person to act in the interests of the consumer?”¹¹

None of these terms are defined.

It has been suggested that these terms cannot be defined in the abstract and will have to be determined based on the facts and circumstances in a matter.¹² The problem with that approach is that it will take many years – likely, decades – to develop the contours of the Bureau’s abusiveness authority through court cases. To date, there have been no litigated decisions on abusiveness beyond the motion to dismiss stage, and there have been no circuit court opinions defining abusiveness.

The Dodd-Frank Act’s prohibition of unfair, deceptive, or abusive acts or practices, like the FTC Act’s prohibition of unfair or deceptive acts or practices, is meant to be broad and flexible to carry out the Bureau’s consumer protection mandate. But that does not mean the Bureau cannot provide guidance on how it intends to exercise its abusiveness authority. This would be helpful both to the Bureau’s staff in carrying out the agency’s mission and to those subject to the Bureau’s authority. The enforcement cases to date have not shown how abusiveness is different from unfairness or deception, and they have been inconsistent in applying different abusiveness prongs to similar facts and circumstances. The result is that enforcement can appear arbitrary and results-oriented or – as some have put it – as “regulation by enforcement.”

There are different ways that the Bureau could provide guidance, without limiting its broad legal authority to protect consumers. At a minimum, the Bureau should use its abusiveness authority carefully and sparingly, to show through cases (and its other tools) how abusiveness is unique and different from unfairness and deception. In future enforcement cases, the Bureau should avoid abusiveness claims where it also alleges (or could allege) unfairness or deception for the same conduct (“overlapping UDAAP claims”). To date, it appears that the Bureau has alleged overlapping UDAAP claims simply as a litigation strategy,

⁹ *Id.* § 5531(d)(2)(A) (emphasis added).

¹⁰ *Id.* § 5531(d)(2)(B) (emphasis added).

¹¹ *Id.* § 5531(d)(2)(C) (emphasis added).

¹² *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs. & Bailouts of Pub. & Private Programs*, 112th Cong. 112-107, at 69 (2012).

which has worked so far. For example, in denying motions to dismiss, courts have conflated the deception and abusiveness standards, relying on alleged misrepresentations (*i.e.*, deception) to uphold abusiveness claims.¹³ Similarly, in *CashCall*, where the Bureau alleged that the collection of void loans was unfair, deceptive, and abusive, the court granted summary judgment to the Bureau on its deception claim, finding it unnecessary to address whether the conduct was also unfair and abusive.¹⁴ In other words, courts have not had to grapple with the meaning of abusiveness. But while this might work for the Bureau as a litigation strategy, the market also looks at enforcement cases for policy guidance. Stand-alone abusiveness claims that show how abusiveness is different from deception and unfairness would provide useful direction to industry.

Another way for the Bureau to provide guidance would be through a policy statement on abusiveness, like the FTC policy statement on unfairness.¹⁵ The Bureau finds itself in a similar position to the FTC in 1980 when it issued its unfairness policy statement. At the time, the FTC Act did not define unfairness, and case law relied on nebulous factors like whether an act or practice “violates established public policy” or is “unethical or unscrupulous.” The FTC recognized “the concept of consumer unfairness is one whose precise meaning is not immediately obvious . . . and that this uncertainty has been honestly troublesome for some businesses and some members of the legal profession,” going on to say that, “[a]t the same time, though, we believe we can respond to legitimate concerns of businesses and the Bar by attempting to delineate in this letter a concrete framework for future application of the Commission’s unfairness authority.”¹⁶ The FTC policy statement explained the Commission’s views of the boundaries of its unfairness jurisdiction and set forth a three-part test that later was codified in the FTC Act¹⁷ and the Dodd-Frank Act.¹⁸ An act or practice is unfair when: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or competition.

Similarly, in 1983, the FTC issued a policy statement on deception.¹⁹ The FTC “reviewed the decided cases to synthesize the most important principles of general applicability” and “attempted to provide a concrete indication of the manner in which the Commission will enforce its deception mandate.”²⁰ As set forth in this FTC policy statement, an act or practice is deceptive when: (1) there is a representation, omission or practice that is likely to mislead the

¹³ See, e.g., *TCF National Bank*, 2017 WL 6211033, at *2-3; *Access Funding*, 270 F. Supp.3d at 850.

¹⁴ *CFPB v. CashCall, Inc.*, CV 15-7522-JFW (RAOx), 2016 WL 4820635, at *11 (C.D. Cal. Aug. 31, 2016), *appeal filed*, No. 18-55479 (9th Cir. Apr. 12, 2018).

¹⁵ *FTC Policy Statement on Unfairness*, Fed. Trade Comm’n (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

¹⁶ *Id.*

¹⁷ 15 U.S.C. § 45(n) (2012).

¹⁸ 12 U.S.C. § 5531(c) (2010).

¹⁹ *FTC Policy Statement on Deception*, Fed. Trade Comm’n (Oct. 14, 1983), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

²⁰ *Id.*

consumer; (2) the consumer's interpretation of the representation, omission or practice is reasonable under the circumstances; and the misleading representation, omission, or practice is material, *i.e.*, likely to affect a consumer's choice of, or conduct regarding, the product or service. Since 1983, the FTC has sought to flesh out the meaning of deception through additional guidance, such as on the use of endorsements and testimonials in advertising, deceptively formatted advertisements, and online advertising and marketing. In addition, there is a rich body of case law on deception. The Bureau looks to the FTC policy statement on deception as well as FTC case law and other guidance in applying the Dodd-Frank Act's prohibition on deception.

The FTC policy statements on unfairness and deception have withstood the test of time, providing meaningful guidance on the boundaries of these prohibitions. Deception prevents lies or half-truths that prevent consumers from making voluntary and informed choices in the marketplace. Similarly (but not identically), unfairness protects consumers from unjustified consumer injury – that is, harm that consumers cannot reasonably avoid and that is not outweighed by other benefits. Like deception, the unfairness doctrine protects informed consumer choice, even if the choice may not be in the consumer's best interest.

Likewise, the Bureau could issue guidance on the meaning and boundaries of abusiveness, although it does not yet have the benefit of decided cases like the FTC did with its unfairness and deception policy statements. Still, the Bureau could provide guidance on how it intends to use its abusiveness authority beyond just the statutory language. For example, the Bureau could say that the term "materially interferes" has the same meaning as in deception law, *i.e.*, an act or practice "materially interferes" with a consumer's understanding if it is likely to affect the consumer's choice of, or conduct regarding, the product or service. Similarly, the Bureau could explain that it will apply the abusiveness prohibition to protect consumers acting reasonably under the circumstances, as in deception law. Or the Bureau could say that one cannot take "unreasonable advantage" of consumers if the consumer can reasonably avoid the harm, as with unfairness. These are just a few examples of how guidance could be helpful to the marketplace and to members of the legal profession.

Guidance would be most helpful in explaining the boundaries, or limiting principles, of abusiveness. What conduct is abusive, but not already unfair or deceptive? Will the Bureau use its abusiveness authority if an act or practice does not cause consumer harm? Will the Bureau use its abusiveness authority to protect informed consumer *choice* or will it seek to protect consumers from making *bad* choices? Explaining the boundaries of abusiveness is not an easy task, and it's one that would benefit from a robust notice and comment process.

Sincerely,



Lucy Morris