Pennsylvania Attorney General Josh Shapiro

Statement submitted to the Consumer Financial Protection Bureau

For the symposium on

Abusive Acts or Practices

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Presented by

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I. Introduction: the CFPB Should not Promulgate a Rule or Guidance to "Clarify" the Meaning of Abusiveness

This submission was prepared at the request of the Consumer Financial Protection Bureau (CFPB) for its June 25, 2019 symposium on Abusive Acts or Practices. The symposium is part of the CFPB's work to consider "whether rulemaking or other activities may be helpful to clarify the meaning of abusiveness" under the Consumer Financial Protection Act of 2010 (CFP Act). The CFPB invited the author to speak on a panel entitled "Abusiveness in Practice." The members of the panel have experience litigating for and against the CFPB and state agencies in cases involving allegations of "abusive" acts or practices.[1] Each panelist was asked to submit a written statement.

This submission offers four reasons why the CFPB should not promulgate a rule or guidance to "clarify" the meaning of abusiveness. First, the purported cloud of uncertainty created by the prohibition on "abusive" acts or practices has been exaggerated. The "abusive" prohibition does not stifle innovation any more than the prohibitions on unfairness or deception do. Second, when it passed the CFP Act, Congress intentionally created a new standard that goes beyond unfairness and deception. An attempt to further define or narrow the abusiveness definition would contravene the intent of Congress and could violate the CFP Act. Third, the plain meaning of the statutory definition of "abusive" has four clear prongs, which is why the courts have had no trouble interpreting it. Finally, the CFPB and states have not "pushed the envelope" when it comes to enforcing "abusive," and they are likely to continue to exercise caution in applying it.

II. Industry Groups Have Long Complained of the Purported Harm of Uncertainty Created by the "Abusive" Standard, but They Cannot Point to Any Consumer-Friendly Innovation that is being Stifled by this Uncertainty

Consumer finance industry representatives have long complained about the supposed chilling effect that the uncertainty around the CFP Act's prohibition on "abusive" acts and practices imposes on the market for consumer financial products and services. These complaints rose to a fever pitch during the legislative debates, as demonstrated by this quotation from Edward Yingling, President and CEO of the American Bankers Association, in his testimony before the House Financial Services Committee at a September 30, 2009 hearing about the proposed Consumer Financial Protection Agency:

> The broad powers and the vague legal terms used (such as "abusive" and "fair dealing") will create great uncertainty in the markets, as no one will know what the new rules of the road are for many years. This will undoubtedly cause firms to cut back on the extension of credit and to avoid testing new products and services in the marketplace for fear they will run afoul of future legal standards.

Despite the American Bankers Association's 2009 warnings and the more measured complaints from industry since President Barack Obama signed the CFP Act into law on July 21, 2010, history has shown these concerns to be misplaced. Indeed, no industry participant or trade group has been able to point to a product or product feature that a company was hoping to introduce to market, but which it did not introduce, solely due to the uncertainty of the meaning of "abusive." Nor has anybody been able to show that firms have cut back on the extension of credit (as the American Bankers Association warned they would) as a result of the introduction of the "abusive" standard. In fact, much as the fears that the CARD Act would severely constrain availability of credit cards were overblown,[2] the impact of "abusive" on the market has been greatly exaggerated.

It should surprise no one that the introduction of new products and services has not been stifled solely by uncertainty over "abusive." This is because, as discussed below, the prohibitions on "unfair" and "deceptive" acts and practices (UDAP) are, like the "abusive" prohibition, broad concepts that do not lend themselves to bright line tests. Thus it is unlikely – if not impossible – for a company to come up with a product that is certainly *not* unfair or deceptive but which might be abusive. It makes sense, then, that Congress's decision to add an "abusive" prohibition has not actually prevented companies from introducing products that would otherwise be under a pure UDAP analysis.

III. The Bureau Should Not Contravene the Intent of Congress, Which Created the New "Abusive" Prohibition Because the Existing UDAP Prohibition Failed to Prevent the Predatory Lending that Caused the Great Recession

Congress created the "abusive" prohibition to reach conduct beyond that which violates the pre-2010 UDAP prohibition.[3] Courts understand that "abusive" goes beyond UDAP because reading "abusive" to be wholly overlapping with UDAP would render it mere surplusage. Congress was wise to use broad terms in defining "abusive" because this will allow the prohibition to evolve with the markets and avoid becoming outdated. As an FTC staff comment letter explained, unfair and deceptive were, like abusive, designed to be broad in scope in order to protect against existing harmful practices and those that might arise in the future:

> Congress deliberately chose to frame Section 5 of the FTC Act in general terms because it recognized that defining the terms "unfair" and "deceptive" with specificity would create the risk that the acts and practices described would become outdated or easily evaded. From 1938 until 1964, the Commission often brought cases simply alleging that respondents violated the law by engaging in "unfair or deceptive acts or practices," without attempting to distinguish between the concepts of unfairness and deception.

Lydia B. Parnes, Peggy L. Twohig, Thomas B. Pahl, and Allison I. Brown, *FTC Staff Comment Letter to Office of Thrift Supervision re OTS-2007-15*, December 12, 2007. Any attempt to narrow the definition of "abusive" would undermine the goal of principals-based regulation: to prevent predatory companies from inventing new ways to cheat consumers and evade the law.

Pennsylvania Courts have long followed federal cases construing Section 5 of the FTC Act in applying our UDAP law, the Pennsylvania Unfair Trade Practices and Consumer Protection Law. 73 P.S. §201-1, *et seq.* Our Courts have similarly taken note of the need for flexibility in defining relevant legal standards. The Pennsylvania Supreme Court ruled that the statute should be broadly construed reflecting its understanding that "fraud is infinite" and that the statute's broad prohibitions are not to be "eluded by new schemes which the fertility of men's invention would construe." *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 480 (1974).

Like Pennsylvania UDAP law, "abusive" must be broad in order to keep up with the fertility of human invention. Calls for the CFPB to redefine abusive to narrow it and eliminate uncertainty are impractical and fly in the face of Congress's intent in creating a new prohibition that goes beyond unfair and deceptive.

A. The CFP Act Does Not Require or Authorize the CFPB to Issue a Rule or Guidance that Narrows the Definition of Abusive Acts or Practices

The CFPB is neither required nor permitted to further define "abusive" by rule or guidance. First, Congress did not require the CFPB to further define "abusive." When Congress wanted to require CFPB to do rulemaking, it did so explicitly, as it did dozens of times throughout the CFP Act.[4] Second, the plain language of the UDAAP rulemaking section (§ 1031(b)) merely permits the CFPB to identify as "abusive" (or unfair or deceptive) *particular* acts or practices. It does not authorize the agency to further define or narrow the entire concept of "abusive" (or unfair or deceptive).[5] This section provides:

> (b) RULEMAKING.—The Bureau may prescribe rules applicable to a covered person or service provider *identifying as unlawful* unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

12 U.S.C. § 5531(b) (emphasis added). This authority explicitly empowers the Bureau to write rules that "identify[] as unlawful" certain "abusive acts or practices." The plain meaning of this section is clear: the CFPB may define *specific* acts or practices as unlawful abusive practices, as it did when it promulgated the payday rule.

However, in empowering the CFPB to identify specific acts or practices as abusive, Section 1031(b) does *not* empower the Bureau to narrow the statutory definition.[6] If the Bureau were to attempt to narrow it through rulemaking, such an effort would likely be subject to legal challenge by consumer advocates and/or state attorneys general. Moreover, such a move would contravene the stated policy of Acting Director Mulvaney and Director Kraninger to follow the statute as written and "go no further."[7]

B. If the CFPB Wishes to Eliminate or Narrow "Abusive," It Should Propose Legislation to Congress that Would Do So

The opponents of "abusive" know perfectly well that the only way to kill the abusiveness prohibition is an Act of Congress. The industry has tried for many years to pass legislation that would have eliminated "abusive." Now that a legislative change seems unlikely, the opponents of "abusive" are pushing guidance or rulemaking as an alternative. Since 2011, the House Financial Services Committee has reported out multiple bills that would have removed "abusive" altogether from the CFP Act. The full House passed at least one of them: the

Financial CHOICE Act of 2017.[8] Among other things, this bill would have eliminated the CFPB's "abusive" authority as well as its unfairness and deception authorities.[9] But, after holding hearings on the bill, the Senate Banking Committee did not vote on the CHOICE Act, and it did not become law.

If the opponents of "abusive" wish to eliminate or narrow the CFPB's authority to prevent abusive acts and practices, they should press their legislators pass a statute that revises the CFP Act. As discussed, the CFP Act does not permit narrowing or repeal by rule or otherwise, and any attempt at such narrowing or repeal other than by statutory amendment would likely be met with litigation by consumer advocates and the states.

C. If the CFPB Wishes to Clarify the Meaning of "Abusive," It Should Wait Until the CFPB and Courts Have Had More Time to Develop the Law By Applying "Abusive" to Concrete Facts

Finally, even if the Bureau decides to release guidance that further clarifies the meaning of abusive acts or practices, along the lines of the FTC statements on unfairness and deception, it should wait to do so until it has more practical enforcement and supervisory experience interpreting the standard. The FTC did not write its policy statements until 1980 and 1983, after decades of experience applying the standards to concrete facts in the context of litigation. As a result, both policy statements provide many examples from real cases, with ample citations to FTC's own administrative decisions as well as appellate court decisions, including from the U.S. Supreme Court. The CFPB, if it decides guidance is necessary, should wait to allow the courts to do their job of interpreting the statute.

IV. The Consumer Financial Protection Act's Prohibition on Abusive Acts and Practices is Sufficiently Clear Based on the Plain Meaning of the Statute

This section will discuss some of the cases in which courts have interpreted the meaning of "abusive." But first, to state the obvious: there is significant overlap between the prohibitions on unfairness, deception, and abusiveness. For this reason, the vast majority of the CFPB actions that allege abusive conduct also allege unfairness or deception. The significant overlap between the three prohibitions is the reason that industry representatives have been unable to identify a product or product feature that could potentially be "abusive" but is not unfair or deceptive. In addition, as discussed below, the CFPB and the states have not pushed the envelope when it comes to enforcing "abusive," which means that the boundaries have not yet been tested.

The CFP Act defines "abusive" as follows:

> (d) ABUSIVE.—The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—
>
> > (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
> >
> > (2) takes unreasonable advantage of—

> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
>
> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
>
> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

12 U.S.C. § 5531(d). This definition has four independent prongs. That is, a violation of any of the four, or more than one of them, is a violation of the "abusive" prohibition.

A. The Meaning of Abusive Acts and Practices Will Develop Over Time Through Litigation and Court Decisions

Federal and state courts were created by the Constitution, Congress, and the state legislatures to interpret the Constitution, statutes, and regulations. The CFPB should let them do their job. Every time Congress creates a new standard, there is a period of time when some uncertainty may exist as to what conduct violates that standard and what does not. This is perfectly normal, and the Courts are well equipped to interpret new standards. This was true also in the era when deception and unfairness were new legal doctrines. In time, abusiveness will be just as well defined in the case law as are these other two standards. The fact that "abusive" is a new standard does not make it inherently problematic. If it did, then Congress and the states could never pass laws creating new standards.

B. Courts Have Had No Trouble Interpreting the Meaning of an Abusive Act or Practice, Despite the Relative Lack of Prior Case Law

The statutory definition of "abusive" is already quite clear, and it will become clearer each year. Close to a dozen courts have had to interpret "abusive," and no court has had to venture beyond the plain meaning of the language to interpret it. Thus, even if the CFPB were authorized to promulgate a rule narrowing the definition of abusive, there is no confusion or disagreement among the courts that would necessitate such a rule. As examples, this submission will discuss three court decisions. However, this submission will not provide an exhaustive review of the case law, nor will it dwell on the constitutional issues, which have largely been settled by the courts.[10]

1. CFPB v. ITT Educational Services, Inc.

One of the more thorough discussions of the "abusive" prohibition was handed down by the U.S. District Court for the Southern District of Indiana in March 2015. *CFPB v. ITT Educational Services, Inc.*, 219 F.Supp.3d 878. The CFPB had sued a predatory for-profit college for allegedly coercing students into subprime loans. In the March 2015 opinion, the court denied ITT's motion to dismiss the three UDAAP counts – two of which alleged abusiveness – and provided an extensive discussion of two of the four "abusive" prongs: (1) whether the CFPB had alleged facts sufficient to show that ITT took unreasonable advantage of the inability of consumers to protect their interests in selecting or using a consumer financial product or service, and (2) whether the CFPB alleged facts sufficient to show that ITT took unreasonable advantage of the reasonable reliance of consumers on ITT to act in the consumers' interests.

First, the Court addressed the meaning of "unreasonable advantage" in rejecting ITT's argument that it did not take unreasonable advantage because it did not receive fees or interest from the private student loans at issue. The Court wrote:

> [T]he Bureau has, in fact, alleged that ITT derived an advantage from its conduct. In the absence of evidence indicating that we should do otherwise, we construe the language of a statute according to its "plain language, giving the words used their ordinary meaning." *Lara Ruiz v. I.N.S.,* 241 F.3d 934, 940 (7th Cir.2001) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd. P'ship,* 507 U.S. 380, 388, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The ordinary meaning of "to take advantage of" is "to make use of for one's own benefit," to "use to advantage," or to "profit by." Webster's Third New Int'l Dictionary 2331 (3d ed.1993). Here, the Bureau has alleged that signing up students for the private loans enabled ITT to clear the "doubtful assets" represented by the Temporary Credit off its balance sheets, converting it into "immediate income and cash-on-hand." Compl. ¶ 114. In fact, the Bureau's allegations quote senior ITT officials stating that ITT designed the loan programs precisely in order to derive such an economic benefit from them. Compl. ¶¶ 134–137. Given the Bureau's allegations about the unfair nature of the students' predicament, the Complaint sufficiently pleads that ITT derived "unreasonable advantage" from its conduct, according to the term's ordinary, broad meaning.

Id. at 918. Further, the Court rejected ITT's argument that its conduct did not constitute "unreasonable advantage" because it was similar to the conduct of college financial aid offices across the country. The Court wrote, "the Bureau has alleged conduct that—we hope—is not simply par for the course; at any rate, the 'everyone else is doing it' defense does not support a motion to dismiss absent an argument that the allegations are legally invalid or factually implausible." *Id.* at 918, n. 35.

The Court went on to discuss what the statute means by "inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service inability to protect their interests." The Court rejected ITT's argument that the statute somehow required the CFPB to prove that the *defendant* had contributed to the consumer's inability to protect their interests. The Court wrote:

> Regardless of who caused the students' vulnerability, the Bureau's burden here is to show that they were, in fact, unable to protect their own interests. As we have discussed before in connection with "coercion" and the lack of a reasonable alternative, ITT's argument relies too heavily on a formalistic reading of the statutory requirement. It is likely true, as ITT asserts, that students never lost the theoretical power to defend their interests, in the sense that they could have walked away from ITT entirely and refused to take out new debt. *See* Def.'s Br. 28. A reasonable reading of the statutory language, however, is that it refers to oppressive circumstances—when a consumer is unable to protect herself not in absolute terms, but *relative to*

> the excessively stronger position of the defendant. *See, e.g., Ting v. AT & T,* 319 F.3d 1126, 1148–1149 (9th Cir.2003) (noting that, under doctrine of procedural unconscionability, a literal, physical lack of consumer choice is not necessary to show oppressiveness). *See also* Carey Alexander, *Abusive: Dodd–Frank Section 1031 and the Continuing Struggle to Protect Consumers,* 85 St. John's L.Rev. 1105, 1114–1119 (2011) (discussing the legislative history of the "abusive" standard as consistent with the understanding that it is a statutory codification of the common-law doctrine of unconscionability). As we have already discussed, the Complaint sufficiently alleges that such oppressive circumstances existed *920 here. We therefore conclude that Count Two of the Complaint states a claim for relief.

Id. at 919–20. Rejecting ITT's challenge to the second "abusive" count, the Court wrote, "'Reasonable reliance' is a familiar concept in tort law, and it is a question of fact generally not appropriate for resolution on a motion to dismiss, or even summary judgment." The Court then explained that the CFPB had alleged facts sufficient to survive the motion to dismiss:

> The Bureau has alleged that, throughout their time at the school, ITT staff represented to students that they would "work in the interests of [their] students to better their lives." Compl. ¶¶ 29–32. This included orally assuring prospective students of large salaries, "usually ... six figures," upon graduation. *Id.* at ¶¶ 40–42. According to the Complaint, "[s]ome ITT students accepted the ITT Private Loans because they believed ITT Financial Aid staff was acting in their interests in signing them up for such loans, and they believed, based on ITT's representations, that ITT in general was acting in their interest to better their lives." Compl. ¶ 141. Thus, the Bureau has alleged both that ITT students relied upon staff members' representations as to the private loans, and that students act in reasonable reliance on the school's misrepresentations as to the nature and role of the financial aid staff. *See* Compl. ¶¶ 95–96 ("Despite words and actions to the contrary, ITT staff was not trained, nor was the staff instructed, to safeguard students' financial interests.... Most of ITT's metrics for evaluating the performance of Financial Aid staff were related to how many students had completed financial aid packages....").

Id. at 920. The extensive quotations above represent just part of the *ITT* Court's thorough discussion of the abusiveness prohibition.

2. *CFPB v. Navient Corporation*

In 2017, the U.S. District Court for the Middle District of Pennsylvania denied Navient Corporation's motion to dismiss. In its opinion, the Court discussed Count I of the CFPB's Complaint, which alleged a violation of the fourth prong of "abusive" (the act or practice takes unreasonable advantage of "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer"). The Court wrote: "Navient's alleged practice is abusive under the CFP Act if Navient took unreasonable advantage of a borrower's reasonable reliance that Navient would act in the borrower's interest."

Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530, at *19 (M.D. Pa. Aug. 4, 2017).

The Court summarized the CFPB's allegations about statements Navient made on its webpage, which encouraged struggling borrowers to call Navient to "help you by identifying options and solutions, so you can make the right decision for your situation." *Id.* The Court continued:

> The Complaint further alleges that, when borrowers called, Navient representatives did not give complete information on income-driven repayment plans and instead pushed borrowers into forbearance. Finally, the Complaint alleges that this was both detrimental to borrowers and beneficial to Navient. This is sufficient at the pleading stage to allege that Navient took unreasonable advantage of borrowers' reasonable reliance on Navient's statements that Navient would give them adequate information to properly choose a repayment plan.

Id. (internal citations omitted). The Court considered and rejected another argument from Navient: that the CFPB had failed to plead a violation of the fourth "abusive" prong because borrowers could not reasonably rely on Navient since it did not have a fiduciary duty to the borrowers. The Court wrote:

> Navient's focus on whether the law imposes an underlying duty is misplaced for two reasons. First, the statutory language does not state that a duty is an element of an abusive act or practice but instead states that a loan servicer cannot take unreasonable advantage of "the reasonable reliance by the consumer" that the loan servicer will "act in the interests of the consumer." The concept of reasonable reliance, however, is not always paired with a preexisting legal duty. *See, e.g.*, Restatement (Second) of Contracts § 90 ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."). It is therefore enough that a borrower's reliance that a loan servicer will act in their interest is reasonable, irrespective of whether a legal duty actually exists on the part of the loan servicer to act in the borrower's interest.
>
> Second, although Navient contends that the Complaint alleges only omissions, the Complaint alleges that Navient placed reliance inducing statements on their webpage. Thus, even assuming the truth of Navient's arguments that there must be some underlying legal duty in order for a borrower's reliance to be reasonable, the Court is satisfied that Navient's active conduct created a duty to act in accordance with their own statements.

Id. at *20. As with *ITT*, the quotations above are only part of the extensive analysis the *Navient* Court wrote on the meaning of "abusive."

3. *CFPB v. NDG Financial Corp.*

Similarly, in 2016 the U.S. District Court for the Southern District of New York had no trouble interpreting the meaning of "abusive" in denying a motion to dismiss. The CFPB alleged, among other things, a violation of the first abusiveness prong, which covers an act or practice that "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service." The defendants had argued that, "by failing to identify specific loans or consumers affected, the CFPB cannot allege the elements of an abusiveness claim." *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 15-CV-5211 (CM), 2016 WL 7188792, at *14 (S.D.N.Y. Dec. 2, 2016). The Court disagreed with defendants, holding that the CFPB had pleaded sufficient facts to survive the motion to dismiss. Analyzing the first "abusive" prong, the Court wrote:

> Falsely representing to consumers that the loans they sought (1) are valid and must be repaid and (2) are not covered by state or federal law "materially interferes" with consumers' ability to understand the terms and conditions of their loans. It should be patently obvious to any lender that most consumers will be completely unaware of the details of their state's usury laws, such that misrepresenting the nature of those laws will interfere with the consumer's ability to understand the loan agreement's terms and to make an informed choice about the loan.

Id. at *15. This analysis is less extensive than the *ITT* and *Navient* analysis, but it nonetheless demonstrates that the Court did not struggle to understand the statute's meaning.

V. The CFPB and States Have Not "Pushed the Envelope" with "Abusive"

Congress intentionally made the abusiveness prohibition broad to ensure that prohibitions would protect against harm from rapidly evolving markets. The bounds of the "abusive" authority have not been tested. There are several manners in which the CFPB and states could have gone farther than they have in enforcing the abusiveness prohibition. First, they could have brought far more abusiveness claims than they have in the eight years since the enforcement provisions of the CFP Act took effect. Second, states could have asserted claims of abusive practices without regard to the statutory definition.[11] Third, the CFPB or states could have urged courts to adopt a more expansive interpretation of "abusive," as some academics have advocated. For example, Patrick M. Corrigan has suggested that the CFPB could broaden "abusive" to "remove exploitation of consumer misunderstanding." 18 N.Y.U. J. Legis. & Pub. Pol'y 125, 154. As he explains in discussing a predatory zero-interest loan that ITT Tech made to students, which it later forced them to refinance into subprime loans, "Behavioral economic theory would posit that these easily available, no-interest loans are a typical example of non-salient product features with high back-end costs." *Id.* Viewed in this context, the CFPB and states have not "pushed the envelope" when it comes to enforcing the "abusive" prohibition. Nor is the CFPB likely to push the envelope soon, given its current leadership.

VI. Conclusion: the CFPB Should Leave the Development of "Abusive Acts or Practices" Law to the Courts

This submission makes the case that: (1) there is no need for the CFPB to develop rules or guidance that would further define "abusive" because it is not actually stifling innovation; (2) the CFPB is not authorized to further define or narrow "abusive"; (3) the plain meaning of the statutory definition is clear, which is why the courts have had no trouble interpreting it; and (4) the CFPB and states have not pushed the envelope when it comes to enforcing "abusive."

As the CFPB and many industry lawyers have said, the best way companies can avoid litigation is by developing a robust compliance management system (CMS) that monitors consumer complaints, tests internal systems, and carefully reviews all product features before they are rolled out to customers. Implementing a strong CMS requires significant resources and attention from senior executives and the board. Many companies have struggled to implement a strong CMS. But those firms that are properly implementing CMS need not fear the "abusive" prohibition. They will catch any problems and address them long before they rise to the level of a public enforcement action with an abusive acts or practices claim.

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[1] Since 2017, Nicholas F. B. Smyth has been the Assistant Director of the Bureau of Consumer Protection under Pennsylvania Attorney General Josh Shapiro. In this role, he is responsible for managing the Attorney General's consumer financial protection litigation and investigations. Previously, he worked for the U.S. Department of the Treasury, where he helped revise and draft the Consumer Financial Protection Act of 2010, including its prohibition on "abusive" acts and practices. Later he served as a CFPB Enforcement Attorney, where, among other matters, he helped investigate and litigate *CFPB v. ITT Educational Services, Inc*., discussed in section IV(B)(1).

[2] *See, e.g.*, "CFPB Finds CARD Act Helped Consumers Avoid More Than $16 Billion in Gotcha Credit Card Fees," December 3, 2015, available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-card-act-helped-consumers-avoid-more-than-16-billion-in-gotcha-credit-card-fees/ (finding that the total cost of credit fell 2% since the CARD Act and available credit increased by 10%).

[3] This submission will not attempt a comprehensive review, which others have already done, of the history of the "abusive" prohibition. *See, e.g.*, Patrick M. Corrigan, *'Abusive' Acts and Practices: Dodd-Frank's Behaviorally Informed Authority Over Consumer Credit Markets and its Application to Teaser Rates*, 18 N.Y.U. J. Legis. & Pub. Pol'y 125 (2015).

[4] *See, e.g.*, Section 1025(e)(4)(E)(requiring that the CFPB "prescribe rules to provide safeguards from retaliation against the insured depository institution, insured credit union, or other covered person described in subsection (a) instituting an appeal under this paragraph, as well as their officers and employees."), 1075(a)(requiring that the CFPB "prescribe regulations in final form ... to establish standards for assessing whether the amount of any interchange transaction fee described in paragraph (2) is reasonable and proportional to the cost incurred by the issuer with respect to the transaction.").

[5] Although Section 1022(b)(3) does permit the CFPB to exempt certain covered persons or products from specific rules or requirements, it would violate Section 1031 if the CFPB were to attempt to use Section 1022 to issue a wholesale exemption of the consumer finance industry from the abusiveness prohibition.

[6] Incidentally, Congress has never required any consumer protection agency to define "abusive." It came close to doing so in the 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act, which required the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. § 6102(a). But even this language does not require a definition of "abusive." Rather, it simply requires the FTC to prohibit specific acts or practices that it deems to be "other abusive telemarketing acts or practices." Pursuant to this statute, the FTC issued the Telemarketing Sales Rule that identified particular practices as abusive.

[7] *See, e.g.*, "Strategic Plan of the CFPB for Fiscal Years 2018-2022," at 2 ("If there is one way to summarize the strategic changes occurring at the Bureau, it is this: we have committed to fulfill the Bureau's statutory responsibilities, but go no further.").

[8] News reports described the House passage of the CHOICE Act as a "party line" vote. But Rep. Walter Jones (R-N.C.) voted against the legislation. In a statement, he said that the bill, should it become law, would "harm America's service members." He was particularly concerned about provisions in the bill that would prevent the CFPB from regulating payday loans.

[9] See Section 735, "Removal of Agency UDAAP Authority," available at https://www.congress.gov/bill/115th-congress/house-bill/10/text#toc-H3864DE0D35454FFBB10FBBFEBA8E1024.

[10] It is well settled law that the "abusive" prohibition is not unconstitutionally vague. For example, the *Morgan Drexen* court wrote, "an 'abusive' practice is specifically limited to four circumstances, each of which specifies the type of harm to be prevented. *See* 12 U.S.C. § 5531(d). No more 'determinate criterion' is required." *Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1090 (C.D. Cal. 2014). Thus, this submission to the CFPB focuses on the cases where courts have interpreted the meaning of "abusive" – as opposed to deciding whether it passes constitutional muster. (One court has held that the CFPB's structure is unconstitutional, but even that court did not find that "abusive" is unconstitutionally vague. *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018). The CFPB appealed the decision, and the case is currently before the Second Circuit.)

[11] It is arguable that the CFP Act's definition of abusive does not limit the meaning of "abusive" generally. Instead, the statute merely limits the meaning of "abusive" with respect to actions taken by the CFPB. Thus, the statute could be read to allow state attorneys general and regulators to enforce the abusiveness prohibition using a broader understanding of the meaning of abusive act or practice. This argument has not been tested in Court because not a single one of the more than one hundred agencies empowered to enforce the law has decided to test it.