CONSUMER FINANCIAL PROTECTION BUREAU | JANUARY 2025

Strengthening State-Level Consumer Protections

Promoting Consumer Protection Federalism

Consumer Financial Protection Bureau

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Executive Summary

Enforcing consumer protection law has long been a state-federal partnership in which the states have often taken the lead. Over the last century, in response to evolving markets, states have refreshed the core standards of fair dealing that form the bedrock of consumer protection law. States should once again refresh their UDAP statutes to address the challenges of the modern economy. For example, increasing corporate concentration has given rise to new forms of abuse. Large companies and their lawyers have developed more advanced tricks, using fine print and product complexity to increase profits at the expense of American families. Modern technology has super-charged the ability to scam and defraud. Companies can use forced arbitration to select their own private judge, prevent injunctive relief, impose secrecy, and make it virtually impossible for consumers to defend themselves against law-breaking companies.

This report recommends that states modernize the standards of fair dealing using models already existing in state or federal law:

- Ban "abusive" practices in state law to end schemes that obscure product features or use power imbalances to gain advantage and increase costs, similar to the Consumer Financial Protection Act.

- Ensure that Attorneys General have adequate investigatory authorities and can pursue remedies that protect consumers and make them whole.

- Remove evidentiary hurdles, such as the requirement that plaintiffs prove individual monetary harm, that frustrate private rights of action.

- Ensure that consumer protection law also protects businesses.

- Authorize forms of private enforcement that can remain viable in the face of forced arbitration.

- Ban common schemes in the modern economy, including junk fees and abuse of personal data.

History of federal-state cooperation in consumer protection

Throughout our country's history, states have enshrined in law standards of fair dealing in the economy. The law of consumer protection has antecedents in the common law. The Tenth Amendment of the U.S. Constitution preserved for the States expansive police powers to regulate commerce,[1] and states have used that power broadly to regulate debt, establish quality warranties, combat fraud, and ensure rights in bankruptcy, often well in advance of the federal government.[2]

At the federal level, modern federal consumer protection law began when President Woodrow Wilson signed the Federal Trade Commission Act, which created the FTC and prohibited unfair and deceptive methods of competition in 1914.[3] Federal consumer protections grew in the post-Great Depression era as Federal policymakers looked for ways to encourage Federal agencies to address consumer interests.[4] This period of growth in protections continued through World War II, when a Federal Office of Price Administration was created to enforce price and quality standards in part to address

[1] *See City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) ("States are accorded wide latitude in the regulation of their local economies under their police powers.").

[2] *See* William Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America 89-90 (1996) (noting that in early America "Legislatures empowered a small army of inspectors, measurers, surveyors, viewers, cullers, weighers, provers, and gaugers, as well as mayors, aldermen, justices of the peace, and private citizens, to protect the public against the evils of unregulated commerce and trade. The fear was fraud and deceit—the same motivation for laws regulating weights and measures and outlawing cheating. But there was also a ubiquitous concern for quality, merchantability, and fair dealing."); Morton J. Horwitz, The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917 (1974) (tracing the shift in nineteenth-century American state courts from a view that "the justification of contractual obligation is derived from the inherent justice or fairness of an exchange" to one holding that "the source of the obligation of contract is the convergence of the wills of the contracting parties.")

[3] Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. § 41.

[4] Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War 71 (Vintage 1st ed. 1996) ("Many advocates of consumption believed that the best way to promote their goals was to organize consumers as a coherent interest group, able to act in much the same way as organized business and labor in promoting their interests. They advocated legislation to protect consumers from misrepresentation and fraud. They insisted on the inclusion of a Consumers' Advisory Board within the National Recovery Administration. They called for the creation of a new, Cabinet-level Department of the Consumer. They promoted 'consumer education,' worked to create 'consumer cooperatives,' and made generally unsuccessful attempts to organize consumer strikes and boycotts.").

inflation,[5] and Congress passed the Wheeler-Lea Act adding the prohibitions against "unfair or deceptive acts or practices" to the FTC Act.[6] In establishing these standards, Congress did not intend to delineate the specific kinds of practices that should be deemed unfair, but rather, create broad standards of fair dealing for the economy.[7] States considered complementary consumer-protection measures. For example, during its 1938 Constitutional Convention, New York considered creating a state-level Consumer Department.[8]

States have long used model laws drafted by lawmakers, reformers, and concerned industry to protect consumers, even predating the passage of the FTC Act. The model *Printer's Ink* statute was many states' first codified law regulating false advertising in the 1910s.[9] The Uniform Small Loans Law, which was drafted in the early twentieth century to combat loan-sharking and create a legitimate small loans industry, established the framework for many states' present-day regulation of small loans.[10] In the 1950s these efforts were consolidated into a broader effort to draft a model general consumer protection statute. In 1958, the American Bar Association (ABA) considered its own model "Uniform State Unfair Competition Act" but chose instead not to release its own model law in favor of encouraging the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) to draft its own "Uniform Code of Unfair Competition."[11] However, some states pursued consumer protection initiatives even before they passed specific consumer-protection legislation. New York Attorney General Louis Lefkowitz encouraged other state attorneys general not to wait for

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[5] Meg Jacobs, *"How About Some Meat?": The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941-1946*, 84 J. Am. Hist. 910, 910-31 (1997). A "consumer agency par excellence," the OPA established a National Consumer Advisory Committee; 5,525 local "little OPAs"; promoted home-grown "victory gardens"; and enlisting hundreds of thousands of volunteers to perform regular price checks on area merchants. "For one of the few moments in history, and certainly the only time at the government's initiation, the possibility of an organized, broad-based, cross-class consumer movement existed." *Id.*

[6] Wheeler-Lea Act, ch. 49, sec. 3, 52 Stat. 111, 111-14 (1938); 15 U.S.C. § 45(a).

[7] *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 243 (3d Cir. 2015) (noting that a Senate committee had identified 20 unfair practices, and realized it could list more, before concluding that "there were too many unfair practices to define").

[8] N.Y. S. Constitutional Convention Committee Rep., Problems *Relating to Executive Admin. & Powers*, vol. 8, at 428-33 (1938).

[9] Comment, *Untrue Advertising*, 36 Yale L. J. 1155, 1156-57 (1927).

[10] Anne Fleming, City of Debtors: A Century of Fringe Finance 47-78 (2018); Fleming, *The Long History of "Truth in Lending,"* 30 J. Pol'y Hist. at 236-271 (2018).

[11] ABA Section of Patent, Trademark, and Copyright Law, Summary of Proceedings 1958-59 43-45 (1958) (includes text of the ABA's considered model act); *see also* Note, *Uniform Deceptive Trade Practices Act: Effect of* Sears *and* Compco, 50 IOWA L. REV. 836, 836-37 (1965) (discussing the history of the ABA resolution and the Uniform Law Commission's development of the model act).

enabling legislation to combat deceptive practices.[12] After several years' work, the Uniform Law Commission released the Uniform Deceptive Trade Practices Act in 1964.[13] This model act prohibited eleven specific practices as deceptive along with any practice "which similarly creates a likelihood of confusion or of misunderstanding" and provided only modest injunctive relief.[14] By 1967, six states had passed the act.[15]

Around the same time, the FTC became increasingly committed to collaborating with state and local law enforcement to police unfair and deceptive acts or practices. Two decades before, the Supreme Court curtailed the FTC's ability to enforce the FTC Act against intrastate practices.[16] When companies were careful enough to keep their unfair practices within state lines or were able to easily move on from one state to the next, the FTC was powerless to do anything about it. The need for comprehensive state-level legislation was becoming increasingly clear to policymakers. "Many state legislatures, instead of following the FTC's lead, continue to pass consumer protection laws on a piecemeal 'emergency' basis," wrote Senator Warren Magnuson and Jean Carper in their 1968 book *The Dark Side of the Marketplace*. "[A] general deceptive practices statute is as essential in building a state consumer protection program as steel girders are in building a skyscraper."[17]

To assist states in developing their own "steel-girder" legislation and enforcement programs, the FTC created a special office of Federal-State Cooperation within the general counsel's office.[18] Working with the Council of State Governments, the FTC

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[12] Natl. Ass'n of Att'ys Gen., Report on the Office of Attorney General 396-97 (1971). Some states that created consumer protection programs without state legislation were Michigan, Missouri, Ohio, New Mexico, Pennsylvania, Texas, and North Carolina. *Id. See also* Hon. Louis Lefkowitz, *Consumer Protection: Meeting the Challenge*, 4 New Eng. L. Rev. 67, 68-69 (1969).

[13] Richard F. Dole, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L. J. 485, 486 (1967).

[14] Dole, Jr., 76 Yale L. J. at 486.

[15] Dole, Jr., *Uniform Deceptive Trade Practices Act: Another Step Toward a National Law of Unfair Trade Practices*, 51 Minn. L. Rev. 1005 (1966).

[16] *F.T.C. v. Bunte Bros.*, 312 U.S. 349, 355 (1941) ("And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished.").

[17] Sen. Warren Magnuson and Jean Carper, The Dark Side of the Marketplace: The Plight of the American Consumer 65-67 (1968).

[18] Paul Rand Dixon, Commissioner, Fed. Trade. Comm'n, *Remarks Before Public Seminar of the Fla. Dep't of Agriculture and Consumer Servs.*, at 3-6 (Mar. 8, 1974); *Consumer Interests of the Elderly: Hearing Before the Subcomm. on Consumer Interests of the Elderly of the S. Special Comm. on Aging*, 90th Cong. 223 (1967) (Appendix 3, Item 2) (FTC Press Release).

unveiled the first version of its Unfair Trade Practices and Consumer Protection Act ("Consumer Protection Act") in 1967.[19] It updated the model legislation twice, in 1969 and 1970. States rapidly adopted the legislation: by 1971, 36 states had passed legislation based on the model act.[20] According to the FTC's annual reports, this office fielded hundreds of requests for assistance each year. In addition to the Federal-State Cooperation office, the FTC convened consumer protection coordinating committees, comprised of federal, state, and local law enforcement, consumer advocates, and others in major metropolitan areas to support consumer protection programs.[21] Despite the substantial influence of the FTC, federal-state cooperation remained a two-way street during this period. Around the same time, Congress passed several consumer financial protection statutes, including the Truth in Lending Act and the Equal Credit Opportunity Act, drawing upon antecedent protections in state law.[22]

The Consumer Protection Act provided state attorneys general significant new powers to protect consumers. It declared unlawful all "unfair or deceptive acts or practices in the conduct of any trade or commerce," including the eleven practices prohibited by the Uniform Law Commission's Deceptive Trade Practices Act.[23] To investigate suspected violations of the law, state attorneys general could issue civil investigative demands.[24] Like the Deceptive Trade Practices Act, the Consumer Protection Act originally relied predominantly on injunctive relief, with an additional penalty of $25,000 for violations of an injunction.[25] Attorneys general could also petition a court for an order for dissolution, suspension, or forfeiture of a corporation which violated the terms of an injunction.[26]

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[19] Council of State Governments, 1967 Suggested State Legislation A-71 (hereinafter "CSG").

[20] Fed. Trade Comm'n, Annual Report of the Fed. Trade Comm'n for the Fiscal Year Ended June 30, 1971 17 (1971).

[21] Paul Rand Dixon, Commissioner, Fed. Trade. Comm'n, Remarks Before Public Seminar of the Fla. Dep't of Agriculture and Consumer Servs. 3-6 (Mar. 8, 1974); *Consumer Interests of the Elderly: Hearing Before the Subcomm. on Consumer Interests of the Elderly of the S. Special Comm. on Aging*, 90th Cong. 223 (1967) (Appendix 3, Item 2) (FTC Press Release).

[22] *See, e.g.*, Sylvia Beckey, Cong. Res. Serv., Women and Credit: Available Legal Remedies Against Discriminatory Practices 2-56 (1974) (surveying pre-ECOA state laws prohibiting credit discrimination), *reprinted in Credit Discrimination: Hearings Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency*, 93rd Cong. 509-615 (1974); Fleming, *The Long History of 'Truth in Lending'*, *supra* note 10, at 238 (observing that "lenders and policymakers fiercely argued over the design of state-level cost disclosure mandates for decades, with each segment of the lending industry advocating for the form that best served its interests").

[23] CSG, 1967 Suggested State Legislation A-73 -74; (CPA 1967, §§ 1-2).

[24] CSG, 1967 Suggested State Legislation A-75; (CPA 1967, § 6).

[25] CSG, 1967 Suggested State Legislation A-77; (CPA 1967, § 7).

[26] CSG, 1967 Suggested State Legislation A-77, 78 (CPA 1967, § 8).

Commissioner Paul Rand Dixon believed that state-federal cooperation in consumer protection would lead to better, more efficient law enforcement, particularly for low-income consumers.[27] In order to build a more consistent national consumer protection regime, and to provide newer enforcement programs the benefit of caselaw developed by the FTC, the FTC proposed an amendment to the model act in 1969 requiring state courts interpreting it to give "due consideration and great weight" to FTC Act regulations and federal caselaw.[28] The FTC also again proposed supplementing state lists of prohibited practices with a broader prohibition against "engaging in any act or practice which is unfair or deceptive to the consumer."[29] The next year, in 1970, the FTC proposed improvements to the model act aimed at enforcement and administrability, which included rulemaking authority,[30] additional remedies such as restitution, and expanded investigative powers for attorneys general, including to compel testimony under oath.[31] Under the amended model act, county and city attorneys could also initiate their own suits with the approval of the attorney general.[32] Private litigants could also recover actual damages, fees and costs, or seek equitable relief, and any permanent injunction, judgment, or order issued as a result of an action brought by the attorney general would serve as *prima facie* evidence in private and class actions that the respondent engaged in unlawful conduct.[33]

By the mid-1970s, most states had adopted some version of the FTC's model act. States have largely maintained the fundamental structure of the model act, and some have since added additional practices to their core prohibitions. After 1970 however the FTC would never release another version of the Consumer Protection Act. And the next few years would be challenging for the FTC as business interests mobilized against its

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[27] *Consumer Interests of the Elderly: Hearing Before the Subcomm. on Consumer Interests of the Elderly of the S. Special Comm. on Aging*, 90th Cong. 50 (1967) ("To the extent that the State or local official could take over the treatment of those matters primarily involving intrastate or local commerce, under laws promising results reasonably comparable to the results which could be achieved by the Commission, the public should benefit, not only in quicker and more precise action, but in less expensive government....[T] he need to take action against deceptive practices by local businessmen, has become even more apparent in low-income markets where those least able to afford the loss are frequently the prime object of such practices.").

[28] CSG, 1969 Suggested State Legislation C-5.

[29] CSG, 1969 Suggested State Legislation C-4.

[30] CSG, 1970 Suggested State Legislation 147 (CPA, 1970 § 3(b)) ("The attorney general may make rules and regulations interpreting the provisions of Section 2 of this Act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a)(1) of the [FTC Act]").

[31] CSG, 1970 Suggested State Legislation 150-51 (CPA 1970, §§ 11-12).

[32] CSG, 1970 Suggested State Legislation 152 (CPA 1970, § 17).

[33] CSG, 1970 Suggested State Legislation 148-49 (CPA 1970, § 8).

regulatory authority, particularly its efforts to issue rules prohibiting unfair practices. In 1980, the FTC clarified how it applied the law of unfairness in a transformational policy statement, released as a letter to members of Congress.[34] In the years that followed, the FTC pursued fewer enforcement actions and rulemakings combatting unfair practices. Notably, although some states followed the FTC in applying this new unfairness standard, others did not.[35]

In the years that followed, the Savings & Loan (S&L) crisis showed what happens when both state and federal regulators fail to be vigilant. As savings and loans struggled under the high inflation of the 1970s and early 80s, Congress sought to deregulate the sector, hoping that it could grow out of its challenges.[36] Instead, deregulation enabled a white-collar crime wave that would lead to the abolition of the savings and loans' federal regulator, the Federal Home Loan Bank Board, and a bailout that cost taxpayers hundreds of billions of dollars.[37] In some states, particularly in California and Texas, regulators exercised weak oversight of real estate appraisals, which provided an opportunity for fraud. In its examination of the causes of the S&L crisis, Congress "documented the pervasive use of faulty and fraudulent real estate appraisals by unscrupulous thrift managements,"[38] which enabled S&Ls to make fraudulently oversized loans. These concerns, and particularly the potential financial consequences for the federal government, led Congress to establish the Appraisal Subcommittee of the Federal Financial Institutions Examination Council, which oversees the appraisal regulatory framework for federally related transactions, including monitoring the

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[34] Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), appended to *International Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984).

[35] FTC Commissioner Rohit Chopra, Comment Letter on Proposed Rule Defining Unfair or Deceptive Practices, at 2 (May 28, 2020) ("States, which generally look to the FTC for guidance in applying their own unfairness prohibitions, did not do so here, with only a small fraction adopting the FTC's definition. This helped states act earlier and more aggressively than their federal counterparts to protect consumers against pervasive unfair practices, including abusive subprime lending and manipulative cigarette advertising."). Congress eventually codified the unfairness standard articulated by the FTC in 1994. Pub. L. No. 103-312, § 9, 108 Stat. 1691 (1994), *codified at* 15 U.S.C. §45(n).

[36] S. Rep. No. 96-368, at 4-5 (1979) (Transition to a more competitive climate is always painful. Nonetheless, the thrift industry must adjust to the new realities if it is to survive and prosper in the years ahead. . . .The thrift industry, if it is to survive, must begin by taking steps today in order to be able to compete effectively in tomorrows' financial marketplace. . . . Clinging to the Regulation Q ceilings will simply regulate the thrift industry into extinction."); Pub. L. No. 96-221, Depository Institutions Deregulation and Monetary Control Act, 94 Stat. 132 (1980).

[37] William Black, The Best Way to Rob a Bank is to Own One xv (2013 ed.) ("Over 1,000 [Savings and Loan] insiders were convicted of felonies. Studies of the worst failures almost invariably find control fraud.").

[38] H. R. Rep. No. 101-54, pt. 1, at 311 (1989).

entities responsible for establishing appraisal standards.[39] Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act,[40] which made sweeping changes to the financial sector, including replacing the Federal Home Loan Bank Board with the Office of Thrift Supervision. The Resolution Trust Corporation, which resolved bankrupt savings and loans, shut down in 1995.[41]

This story repeated itself in the 2007-2008 mortgage crisis. During the early 2000s, some states attempted to address some of the problems in the mortgage market, but federal regulators sided with the industry and its abusive practices over the states and consumers. The Financial Crisis Inquiry Commission (FCIC) excoriated federal financial regulators for thwarting state law enforcement efforts: "the Office of the Comptroller of the Currency and the Office of Thrift Supervision, caught up in turf wars, preempted state regulators from reining in abuses."[42] Former Illinois Attorney General Lisa Madigan told the FCIC that the OCC was "particularly zealous in its efforts to thwart state authority over national lenders, and lax in its efforts to protect consumers from the coming crisis."[43] When states challenged OCC rules preempting state consumer protections in 2007, the Supreme Court ruled against them.[44]

In order to prevent the predatory practices and regulatory failures that created the Crisis from happening again, Congress passed the Consumer Financial Protection Act, which created the Consumer Financial Protection Bureau, and added requirements to prohibit set-up-to-fail mortgage lending.[45] Congress also granted states the authority to enforce federal consumer financial law.[46] In doing so, Congress both renewed federal consumer

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[39] H. R. Rep. 101-54, pt. 1, at 481-82 (1989) ("[W]ith respect to licensing qualifications…some States may establish requirements that are insufficient to protect Federal financial and public policy interests.... [T]he Federal government has compelling financial and public policy interests in the establishment of uniform appraisal standards and a nationwide system of State certified and licensed appraisers.").

[40] Pub. L. No. 101-73, 103 Stat. 183 (1989).

[41] Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, 107 Stat. 2369 (1993) (transferring responsibilities to the FDIC by 1995).

[42] Fin. Crisis Inquiry Comm'n, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States xxiii (2011) (official gov't ed.).

[43] FCIC Report, *supra* note 42 at 13.

[44] *Watters v. Wachovia Bank, NA*, 550 U.S. 1 (2007).

[45] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1376 (2010).

[46] 12 U.S.C. § 5552(a)(1) (providing that "the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is

protection efforts and realigned the federal government to the more traditional view of joint federal-state enforcement of consumer protection. As the Senate Banking Committee report on the legislation that would become Dodd-Frank explained, "[i]f States were not allowed to take the initiative to enact laws providing greater protection for consumers," then Congress and federal regulators "would lose an important source of information and reason to adjust standards over time."[47] Today's challenges require a renewed commitment to federal-state cooperation and dynamism in consumer protection.

located in that State and that has jurisdiction over the defendant, to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law. A State regulator may bring a civil action or other appropriate proceeding to enforce the provisions of this title or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law (except as provided in paragraph (2)), and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity.").

[47] S. Rep. 111-176 at 174-75.

The CFPB's work empowering the states to protect consumers

Below are some of the efforts the CFPB has made to support state-level consumer protection.

Joint investigations

The CFPB frequently works alongside state attorneys general to take action against companies whose illegal practices cross state lines. For example, in January 2023, the CFPB and the New York State Office of the Attorney General sued Credit Acceptance Corp. (CAC) for tricking consumers into high-cost loans on used cars. The CFPB alleged that the corporation set up borrowers to fail by using a lending model that predicted how much money it would collect over the life of the loan but was indifferent to a consumer's ability to repay the loans in full. The Bureau also alleged that CAC incentivized dealers to push unnecessary add-on products and turned a blind eye to the fact that consumers were misled. These practices violated the CFPA and New York state law.[48] The CFPB's investigation of a wide array of failures and abuses by student loan servicer Navient kicked off a series of actions by state and federal agencies that led to a state attorney general-led settlement that included nearly two billion in cancelled debt and ultimately to a CFPB action permanently banning Navient from federal student loan servicing.[49] Earlier this year, the CFPB joined forces with seven attorneys general to file suit against Strategic Financial Solutions and its multistate web of shell companies.[50]

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[48] CFPB, *CFPB and New York Attorney General Sue Credit Acceptance for Hiding Auto Loan Costs, Setting Borrowers Up to Fail* (Jan. 4, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-sue-credit-acceptance-for-hiding-auto-loan-costs-setting-borrowers-up-to-fail/.

[49] Pa. Att'y Gen., *Attorney General Josh Shapiro Announces $1.85 Billion Landmark Settlement with Student Loan Servicer Navient* (Jan. 13, 2022), https://www.attorneygeneral.gov/taking-action/attorney-general-josh-shapiro-announces-1-85-billion-landmark-settlement-with-student-loan-servicer-navient/; CFPB, *CFPB Bans Navient from Federal Student Loan Servicing and Orders the Company to Pay $120 Million for Wide-Ranging Student Lending Failures* (Sept. 12, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-bans-navient-from-federal-student-loan-servicing-and-orders-the-company-to-pay-120-million-for-wide-ranging-student-lending-failures/.

[50] CFPB, *CFPB and Seven State Attorneys General Sue Debt-Relief Enterprise, Strategic Financial Solutions, for Illegally Swindling More Than $100 Million from Financially Struggling Families* (Jan. 19, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-seven-state-attorneys-general-sue-debt-relief-

This enterprise claimed to offer debt-relief services, but as alleged in the complaint, SFS did little more than collect hundreds of millions of dollars in fees after making false promises of legal representation in debt-settlement negotiations. In addition to alleging violations of the CFPA, SFS also allegedly violated various provisions of state law, which state attorneys general were able to assert as part of the same suit.

An important component of working with our state partners is sharing information. Recently, the CFPB created a Nonbank Registry to help track repeat offenders and better understand trends in the consumer financial marketplace.[51] Covered nonbanks subject to certain public orders are required to register those orders with the CFPB. Importantly, this registry includes violations of certain state consumer protection laws, which can be helpful to the CFPB in identifying whether nonbanks may also be violating the CFPA. Moreover, the CFPB intends to make the registry public so that other law enforcement agencies can use the information collected by the CFPB to enhance their own supervisory and enforcement work and better identify threats and trends in the marketplace. The CFPB anticipates that this registry will lead to deeper partnerships with state and local consumer protection agencies.

Removing obstacles to state-level consumer protection

Federal law should be a floor, not a ceiling, for the protection of consumers. When Congress passed the CFPA, it sought to reinforce the states' power to protect consumers. Congress intended federal law to establish "minimum standards" for consumer protection and not to "preclude[] the States from enacting more protective standards."[52] Congress believed that state regulatory or law enforcement activity sends an "important signal" that Congress and federal regulators may also need to act. "If States were not allowed to take the initiative to enact laws providing greater protection for consumers,

enterprise-strategic-financial-solutions-for-illegally-swindling-more-than-100-million-from-financially-struggling-families/; Stacey Cowley and Emma Goldberg, *He Grew Up in the Shadow of the 'Wolf of Wall Street.' Then He Got Into Debt Settlement*, N.Y. Times (Feb. 10, 2024), https://www.nytimes.com/2024/02/10/business/strategic-financial-solutions-sasson-jordan-belfort.html.

[51] *Registry of Nonbank Covered Persons Subject to Certain Agency and Court* Orders, 88 Fed. Reg. 56028 (July 8, 2024); *codified at* 12 C.F.R. Part 1092.

[52] S. Rep. 111-176 (Apr. 30, 2010) to accompany S. 3217 at 174. ("Section 1041 confirms that the Consumer Financial Protection Act (CFP Act) will not preempt State law if the State law provides greater protection for consumers. Federal consumer financial laws have historically established only minimum standards and have not precluded the States from enacting more protective standards. This title maintains that status quo.").

the Federal Government would lose an important source of information and reason to adjust standards over time."[53] As a result, the CFPA provides that state laws are not preempted so long as they provide greater protection for consumers.[54] This "floor-not-ceiling" structure is present in several other federal consumer financial laws, including the Electronic Fund Transfer Act, Gramm-Leach-Bliley Act, the Equal Credit Opportunity Act, and the Fair Credit Billing Act.[55]

In support of that mission, the CFPB has taken action to support state laws that provide additional protections to consumers. For example, the Bureau determined that state disclosure laws covering lending to businesses are not preempted by the Truth in Lending Act.[56] Several states have sought to require providers of commercial-purpose credit to provide applicants TILA-like disclosures to applicants. By establishing that these laws are not inconsistent with TILA, the Bureau made way for several more states to consider legislation. The CFPB has also reiterated that Congress intended states to jointly police the credit reporting markets. In 2022, the Bureau issued an interpretive rule explaining that the preemptive scope of certain provisions of the Fair Credit Reporting Act (FCRA) are narrow and provided examples of state laws that could expand consumer protections.[57] This statutory clarity was especially important for state-level protections around medical debt. In the period since the CFPB issued the interpretive rule, several states, including California, Colorado, Connecticut, New York, and Virginia have passed laws prohibiting medical debt from appearing on their residents' credit reports.[58] The CFPB has supported these state-level efforts, including by explicitly supporting proposed legislation while lawmakers consider it.[59]

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[53] S. Rep. 111-176 at 174-75.

[54] *See* 12 U.S.C. § 5551.

[55] 12 U.S.C. § 1666j (FCBA); *id.* § 1693q (EFTA); *id.* § 1691d (ECOA); 15 U.S.C. § 6807 (GLBA).

[56] *Truth in Lending; Determination of Effect on State Laws (California, New York, Utah, and Virginia)*, 88 Fed. Reg. 19214 (Mar. 31, 2023) (preemption determination).

[57] *The Fair Credit Reporting Act's Limited Preemption of State Laws*, 87 Fed. Reg. 41042 (July 11, 2022) (interpretive rule).

[58] Sen. Bill No. 1061, 2023-2024 Reg. Sess. (Cal. Sept. 24, 2024); H. Bill No. 23-1126, 2023 Reg. Sess. (Colo. Aug. 7, 2023), 2023 Colo. Sess. Laws 2239; Sen. Bill. No. 395, 2024 Gen. Assemb., 2024 Sess. (Conn. May 9, 2024), 2024 Conn. Pub. Acts 24-6; Sen. Bill No. S4907A, 2023-2024 Reg. Sess. (N.Y. Dec. 13, 2023); H. Bill No. 1370, 2024 Gen. Assemb., 2024 Sess. (Va. Apr. 8, 2024).

[59] *See, e.g.*, Letter from Brian Shearer, Assistant Dir., Office of Pol'y Planning and Strategy, to the Hon. Matt Lesser, Conn. State Senate (Apr. 11, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-letter-to-connecticut-state-legislature-on-barring-medical-bills-on-credit-reports/.

Preventing companies from ignoring state laws

Frequently, companies with a "move fast and break stuff" mindset believe that violating state laws and regulatory programs is a smart path to profitability. Often, "breaking stuff" simply means ignoring consumer protections, which is also deeply unfair to companies that try in good faith to comply with state law. Federal law can provide an important defense to this regulatory race to the bottom, where companies try to gain an edge over their competition by seeing what they can get away with. When companies ignore state law, it can cause them to also violate federal prohibitions on unfair, deceptive or abusive acts or practices.

The CFPB has acted against companies for alleged violations of federal law that began as apparent failures to comply with state law. For example, in 2013, the CFPB sued CashCall, Inc., its owner Paul Reddam, and related companies for attempting to collect on loans that were void or uncollectible because they violated state interest-rate caps or state lender licensing requirements.[60] In recent years, the CFPB has filed actions against other companies for similar violations of federal law that began with refusals to comply with longstanding state consumer protections.[61] Bank of America entered into a consent order with the CFPB in 2022 for, among other practices, sending funds to creditors in violation of state-law prohibitions on out-of-state garnishments.[62]

Citing companies for federal-law violations that began with their failure to comply with state law has been a regular feature of the CFPB's examinations as well. For example, during the COVID-19 pandemic, the CFPB conducted a broad assessment of financial institutions' garnishment or setoff practices and found that many institutions failed to comply with state protections from garnishment for unemployment insurance or

[60] *CFPB v. CashCall, Inc.*, 35 F.4th 734, 747 (9th Cir. 2022) ("Each state's usury and licensing laws still apply, and lenders must fairly and transparently represent to consumers the requirements of applicable state law. That is not federalizing state usury law, as CashCall would have it; it is simply applying the CFPA's prohibition on deceptive acts.") (internal citations omitted).

[61] Complaint, *CFPB v. SoLo Funds, Inc.*, No. 2:24-cv-4108 (C. D. Cal. filed May 17, 2024); Stipulated Consent Order, *CFPB v. Think Finance, LLC*, No. 4:17-cv-00127 (D. Mont. issued Feb. 6, 2020).

[62] *In re Bank of America, N.A.*, CFPB No. 2022-CFPB-0002 (May 4, 2022) (consent order). Bank of America also failed to disclose to courts in states that restricted the garnishment of out-of-state accounts that the garnishment notice pertained to bank accounts located out-of-state; and Bank of America froze accounts and sent funds to creditors even though prohibited by state law.

economic impact payments, or processed garnishments in violation of prohibitions against out-of-state garnishment.[63]

Encouraging states to enforce the CFPA

The CFPB has ensured that state enforcement agencies can make greatest possible use of their authority to directly enforce the CFPA. The CFPB issued an interpretive rule explaining that States can enforce the Consumer Financial Protection Act, including the provision making it unlawful for covered persons or service providers to violate any provision of federal consumer financial protection law; that States can pursue claims and actions against a broader range of entities than the CFPB; and that CFPB enforcement actions do not put a halt to state actions.[64]

[63] CFPB, *Supervisory Highlights*, Issue 28 (Fall 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf.

[64] *Authority of States to Enforce the Consumer Financial Protection Act of 2010*, 87 Fed. Reg. 31940 (May 26, 2022) (interpretive rule).

New challenges require stronger consumer protections

The state laws enacted in the 1960s and 70s represented a tremendous advance in consumer protection, and those laws continue to protect consumers. But after a half-century, these laws require updates to account for case law that has diluted their efficacy over time, economic changes that threaten consumers, and newer technologies and practices that present new opportunities for companies to exploit consumers.

One major change in the last half-century has been an increasingly small number of firms exerting control over our economic lives. Concern about domination by economic elites is a concern as old as the American Republic. Alexis de Tocqueville warned that the "industrial aristocracy" was "the direction in which the friends of democracy should constantly fix their anxious gaze; for if ever aristocracy and the permanent inequality of social conditions were to infiltrate the world once again, it is predictable that this is the door by which they would enter."[65]

In recent decades, a smaller and smaller number of economic powers has gained control over our daily lives. For example, one study found that market concentration levels have increased in 75 percent of U.S. industries in the first two decades of the 21st century, with a mean increase in market concentration of over 90 percent.[66] Another study by the Federal Reserve Bank of Philadelphia found that concentration of insured deposit funding among the top four commercial banks in the United States has risen from 15 percent in 1984 to 44 percent in 2018.[67] At the same time, there is evidence that the U.S. economy is becoming less dynamic, with declining rates of startups and a "diminished role for dynamic young businesses in the economy."[68] Economic concentration has also

[65] Alexis de Tocqueville, Democracy in America 648 (Gerald Bevan trans., Penguin Books 2003) (1835).

[66] Gustavo Grullon, Yelena Larkin and Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 Rev. of Finance 697, 704 (2019) ("The concentration index has increased in 80% of the industries, and the magnitude of the change is concentrated in the extreme range of the spectrum. Specifically, the median increase in HHI is 41%, while the mean increase is 90%.").

[67] Dean Corbae and Pablo D'Erasmo, Fed. Reserve Bank of Phila., Rising Bank Concentration, Staff Rep. No. 594 (Mar. 2020).

[68] Ryan Decker, John Haltiwanger, Ron Jarmin, and Javier Miranda, *The Role of Entrepreneurship in US Job Creation and Economic Dynamism,* 28 J. of Econ. Perspectives 3 (2014) ("Evidence along a number of dimensions and a variety of sources points to a US economy that is becoming less dynamic. Of particular interest are declining business startup rates and the resulting diminished role for dynamic young businesses in the economy.").

been associated with lower wages, suggesting concentrated markets shift power from workers to large corporations.[69]

The fewer firms there are competing in the marketplace, the easier it is for those firms to gain leverage over consumers and coerce them into accepting low-quality services or paying high prices, or committing other unfair, deceptive, or abusive practices. The supposed efficiencies of greater size routinely fail to result in lower prices or better-quality services for consumers, and instead often lead to higher profits.[70] For example, in the credit card market, the CFPB recently uncovered how large issuers of credit cards often offer worse terms to consumers than small issuers.[71] Another concerning example of concentration in consumer financial products and services is the payment systems market. The CFPB released a report documenting how Google and Apple refuse to permit third-party payment apps to access the necessary technology to execute tap-to-pay contactless payments.[72] Apple eventually changed course, but nonetheless imposed what one app-maker called "new Apple taxes on payments they don't process."[73]

Another area of growing concern is the use and abuse of consumer data. Consumers' data is frequently collected and sold to fuel unwanted advertisements, or worse. Last year, the President issued an executive order identifying the access of Americans' personal data by countries of concern through data brokers as an "unacceptable risk to the national security of the United States."[74] Researchers have found that foreign adversaries can purchase sensitive personal information about servicemembers and

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[69] José Azar, Ioana Marinescu, and Marshall Steinbaum, *Labor Market Concentration*, 57 J. of Hum. Res. S167, S197 (2022) ("We have shown that concentration is high, and increasing concentration is associated with lower wages.")

[70] During the same time that concentration increased, corporate profits adjusted for inflation have significantly increased. Fed. Reserve Bank of St. Louis, Corporate Profits After Tax (without IVA and CCAdj), FRED Economic Data (last accessed Dec. 27, 2024), https://fred.stlouisfed.org/graph/?g=dhB.

[71] CFPB, *Credit Card Data: Smaller Issuers Offer Lower Rates (*Feb. 16, 2024), https://www.consumerfinance.gov/data-research/research-reports/credit-card-data-small-issuers-offer-lower-rates/.

[72] CFPB, *Big Tech's Role in Contactless Payments: Analysis of Mobile Device Operating Systems and Tap-to-Pay Practices* (Sept. 7, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-highlights-role-of-big-tech-firms-in-mobile-payments/; Rohit Chopra, Director, CFPB, Address at the Annual Fintech Conference of the Fed. Res. Bank of Phila. (Sept. 7, 2023), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-federal-reserve-bank-of-philadelphias-annual-fintech-conference/. The CFPB also issued a rule defining larger participants in this market. *Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications*, 89 Fed. Reg. 99582 (Dec. 10, 2024).

[73] James Pothen, *Apple opens up payments under EU pressure*, Payments Dive (Jan. 26, 2024), https://www.paymentsdive.com/news/apple-contactless-payment-european-union-eu-processor-dma/705707/.

[74] Exec. Order No. 14117, 89 Fed. Reg. 15421 (Mar. 1, 2024).

"military locations and movements."[75] Scammers have also greatly benefited from the under-policing of data brokers. In 2015, the Federal Trade Commission sued a data broker for illegally selling payday loan applicants' financial information to a fraudster that raided millions from hundreds of thousands of consumers' accounts.[76] Relatedly, consumers are under-protected when companies fail to safeguard their personal data. Although all 50 states have enacted laws on data breaches which generally require companies to notify regulators or affected consumers,[77] consumers often cannot seek recovery, either independently or through class actions, for the harms they suffer as a result of the breach.

Another major problem is the proliferation of junk fees. Corporate management uses junk fees to increase revenue (and costs for families) without incurring competitive backlash. Fundamentally, a junk fee is a way of increasing the price of a good without having to increase the sticker price that consumers use to compare products or services from different providers. Junk fees take the form of unnecessary, unavoidable, or fake fees, but can also take the form of overcharging a captive customer. The FTC recently described how junk-fee practices have spread across numerous sectors of the economy, including hotels, live-event ticketing, transportation, telecommunications, housing, education, and financial services.[78] In December, the FTC finalized a rule banning bait-and-switch pricing and other junk-fee tactics in the live-event ticketing and short-term lodging industries.[79] Junk fees have made it increasingly difficult for consumers to truly understand the value of the products and services they buy. If consumers cannot effectively comparison shop, the marketplace's competitive mechanism breaks down.

The idealized arms-length dealing between equal parties that informs law-school contracts courses is increasingly divorced from the reality of modern commerce, especially online. One team of researchers examining online terms of use, privacy

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[75] Justin Sherman *et al.*, Data Brokers and the Sale of Data on U.S. Military Personnel 14 (Tech. Policy Lab, Sanford Sch. of Pub. Pol'y, Duke U. (Nov. 2023).

[76] Default Judgment and Order for Permanent Injunction as to Defendants Sequoia One, LLC and Gen X Mktg. Group, LLC, No. 2:15-cv-0152-JCM-CWH (D. Nev. Nov. 14, 2016).

[77] Nat'l Ass'n of Attys. Gen., *Data Breaches*, https://www.naag.org/issues/consumer-protection/consumer-protection-101/privacy/data-breaches/ (last visited Dec. 27, 2024) "(All 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have established data breach laws to protect consumers. These laws generally require organizations to notify individuals in the case of a data breach involving certain personal identifying information.").

[78] *Trade Regulation Rule on Unfair or Deceptive Fees*, 88 Fed. Reg. 77420 (Nov. 9, 2023) (to be codified at 16 C.F.R. Part 464) (proposed rule).

[79] Press Release, FTC, *Federal Trade Commission Announces Bipartisan Rule Banning Junk Ticket and Hotel Fees* (Dec. 17, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/12/federal-trade-commission-announces-bipartisan-rule-banning-junk-ticket-hotel-fees.

policies, and other online contracts described a "decoupling of contract doctrine and consumer reality in the smartphone age of online contracting."[80] Consumers rarely read these contracts,[81] and even if they did, many of them would be difficult for them to understand. One recent study found that sign-in-wrap contracts—a common form of contract used online—are largely unreadable by the general public, according to scientific readability metrics.[82] Another study examining the format of contracts found that most online agreements lack basic organizational features such as tables of contents or informative headings that help consumers understand and locate relevant information in the contract.[83] These form contracts with complex, technical terms and serious financial implications are frequently—or exclusively—presented on a phone screen. Recently, the CFPB has alleged that companies committed an abusive act or practice under the CFPA by designing contracts or applications that make it difficult for consumers to read or understand the agreement.[84]

Increasingly, companies have found ways to use fine print to evade or undermine state law. Clauses purporting to waive causes of action, limiting liability, or restrict the time frame, forum, and venue for vindicating consumer rights have become ubiquitous. Even

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[80] Tim Samples, Katherine Ireland, Caroline Kraczon, *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, 39 Berk. Tech. L. J. 47, 56-57 (2024) ("Most users, of course, do not read TOUs. And few would understand them even if they did. Nonetheless, courts often treat TOUs as valid, enforceable contracts. Whether the consumer has read a TOU is irrelevant. Whether or not the consumer reasonably could read a TOU is also irrelevant. Because courts approach modern TOUs with traditional contract doctrines, concepts like reasonable notice are adapted to the online contracting environment. Determinations of notice often turn on small details like font and color scheme, the conspicuousness of hyperlinks, and interface design. Courts tend not to question the practicality or the reasonable feasibility of reading a TOU. The existence of an opportunity to read will suffice if notice of the terms is deemed conspicuous. Although the law imposes a duty to read contracts on consumers, there is no symmetrical duty to make contracts readable or understandable. Gaps like these create tensions for courts, especially in consumer contracting disputes."); *see also* Robin Bradley Kar and Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 Harv. L. Rev. 1135, 1141-42 (2019) ("With each small change in technology, courts tried valiantly to extend traditional contract law concepts and principles to these new settings. But much like the proverbial frog in the pot of boiling water, these attempts to stretch older terms and concepts to new situations ultimately kept the surface of contract law looking the same while obscuring a more fundamental break in function. The last two decades have brought the law into a qualitatively different phase of development. Incremental attempts to preserve the coherence of legal doctrines have passed a tipping point, resulting in a qualitative break in the meaning and function of central concepts in the law.").

[81] Ian Ayres and Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 Stan. L. Rev. 545, 546-47 (2014) (describing various studies indicating consumers do not read form contracts, as well as examples of companies including risible terms such as agreements to sell consumers' souls and cash prizes that have gone unnoticed).

[82] Uri Benoliel and Shmuel Becher, *The Duty to Read the Unreadable*, 60 Bos. Coll. L. Rev. 2255, 2277-78 (2019) (explaining that 99.6 percent of the contracts in the study's sample received a score were below recommended readability measures and comparable to the readability scores of articles in academic journals).

[83] Uri Benoliel and Shmuel Becher, *Messy Contracts*, 2024 U. of Ill. L. Rev. 893, 917-18 (2024) (explaining sample results indicating that most contracts lack features such as tables of contents or informative headings which aid the reader in locating information).

[84] Complaint, *CFPB v. Acima Holdings, LLC*, No. 2:24-cv-00525-DBB (D. Utah filed July 26, 2024).

where states have declared that clauses such as these are void, companies have continued to include them in their consumer contracts.[85] When states enact statutory protections for consumers, they expect companies to respect those rights, not try to contract their way out of them. In addition, states provide private rights of action to consumers so that they do not need to wait for state agencies to act; when a company frustrates consumers' ability to exercise those rights, including with arbitration clauses, the burden to protect consumers and honest businesses shifts to regulators and law enforcement.

For these reasons, the time to strengthen state-level consumer protection has come. Since its founding, the CFPB has promoted state-level consumer protection. Now, just as the FTC did before in the 1970s, the CFPB supports states in strengthening their own state-level consumer protection laws.

[85] The CFPB recently explained how including unlawful or unenforceable terms in contracts for consumer financial contracts or services may violate the prohibition on deceptive acts or practices under the CFPA. *Consumer Financial Protection Circular 2024-03: Unlawful and Unenforceable Contract Terms and Conditions*, 89 Fed. Reg. 51955 (June 21, 2024). *See also* Edward K. Cheng, Ehud Guttel, and Yuval Procaccia, *Unenforceable Waivers*, 76 Vanderbilt. L. Rev. 571, 574 (2023) ("Even within the reported case law alone, we have discovered dozens of cases, from dozens of states, in which defendants or their successors continued to require the same or equivalent liability waivers even after having them declared unenforceable by courts.").

Proposals to strengthen state-level consumer protection

We have developed a list of recommendations that states could adopt to strengthen their consumer protection laws.

Incorporate 'abusive' into state law

One important improvement of the CFPA over the FTC Act is the inclusion of the prohibition on "abusive" acts or practices, which Congress added in recognition that enforcers did not or could not use the unfairness and deception standards to prevent widespread set-up-to-fail mortgage schemes.[86] The prohibition on "abusive" practices has some advantages over unfairness and deception that can be useful for dealing with contemporary problems, and the CFPB recommends that states incorporate it into their consumer protection statutes.

For example, "material interference," which is one form of abusive acts or practices, accurately describes many common tactics used online against consumers, such as pop-up or drop-down boxes, multiple click-throughs, or dark patterns.[87] Although these practices can often be described as a deceptive act or practice under the CFPA, the FTC Act, and similar state statutes, an "abusive" claim can more easily capture modern dark pattern schemes than a theory of deception. Another important feature is that, unlike unfairness, it requires no showing of consumer injury to establish liability, which allows the CFPB to police tactics that "Congress presumed to be harmful or distortionary to the proper functioning of the market."[88] The abusive standard prohibits companies from profiting off certain circumstances like gaps in understanding, unequal bargaining power, or consumer reliance. While these circumstances often lead to consumer harm, those harms can sometimes be indirect—like the financial crisis following several years

[86] *Improving Federal Consumer Protection in Financial Services*, Hearing Before the H. Comm. On Fin. Servs., 110th Cong. 40 (2007) ("If you are looking at the statutory language in this area, you might consider adding the term "abusive." "Abusive" is a standard that is contained in [the Home Ownership and Equity Protection Act] that the Fed is looking at using in the context of mortgage lending. But 'abusive' is a more flexible standard to address some of the practices that make us all uncomfortable.") (testimony of Sheila C. Bair, Chair, Fed. Deposit Ins. Corp.).

[87] *Statement of Policy Regarding Prohibition on Abusive Acts or Practices*, 88 Fed. Reg. 21883, 21885 (April 12, 2023) ("Material interference may include actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide information relevant to the ability of a consumer to understand terms and conditions. Interference can take numerous forms, such as buried disclosures, physical or digital interference, overshadowing, and various other means of manipulating consumers' understanding.").

[88] *Id.* at 21884.

after the proliferation of set-up-to-fail mortgages in the early 2000s. Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. In April 2023, the CFPB issued a Policy Statement to summarize those actions and explain how the CFPB analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and the market on how to identify violative acts or practices.

By incorporating "abusive" into their consumer protection laws, states can fill the gaps left by similar prohibitions on unfair or deceptive practices and deter practices that distort competition in the marketplace. State attorneys general and regulators may already combat abusive practices directly, in either state or federal court, under the CFPA.[89] By incorporating "abusive" into their general consumer protection statutes however, states will be able to combat abusive practices in markets beyond consumer financial products and services.

Some states have already incorporated "abusive" into their consumer protection statute or have considered legislation to do so.[90] The Bureau supports these proposals and welcomes the opportunity to consult with state lawmakers and other officials on the development of any such legislation. When states do incorporate "abusive" into their state law, the Bureau suggests that states include a rule of construction ensuring that "abusive" is interpreted in a way that is consistent with the framework summarized in the CFPB's 2023 policy statement, which would facilitate consistent enforcement of consumer protection law across jurisdictions.

The CFPB recommends that states consider incorporating the following language, which is drawn from the CFPA, into their statutes:

§ **Abusive Acts or Practices Prohibited.** Abusive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

§ **Abusive Definitions.** "Abusive" means an act or practice which:

(a) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

[89] 12 U.S.C. § 5552(a).

[90] *See, e.g.*, S. 795, 2023-24 Reg. Sess. (N.Y. 2023) ("Consumer and Small Business Protection Act"); Cal. Fin. Code § 90003(a)(1) (making it unlawful to "[e]ngage, have engaged, or propose to engage in any unlawful, unfair, deceptive, or abusive act or practice with respect to consumer financial products or services."). Notably, for "abusive," California law requires state courts to interpret "abusive" in a manner consistent with the CFPA, with any inconsistency being resolved in favor of greater consumer protection. Cal. Fin. Code § 90009.

(b) takes unreasonable advantage of—

(1) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(2) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(3) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

§ **Rule of Construction.** It is the intent of the Legislature that, in construing Section 1, the meaning of the prohibition on abusive acts or practices will be consistent with the framework summarized in the Policy Statement on Abusive Acts or Practices issued on April 3, 2023.

Stronger remedies and tools for investigation and enforcement

State enforcers should have robust investigative powers. If companies can easily stall investigations, enforcement agencies may be less willing to invest their scarce resources. The Bureau believes that state enforcement agencies such as attorneys general should have a relatively unimpeded process to initiate consumer protection investigations. For example, state attorneys general should not have to petition a court prior to issuing a subpoena or civil investigative demand. As a force multiplier, some states have granted municipalities and cities authority to bring consumer protection cases, and other states should consider following that example. In addition, state regulators should have the tools they need to stay informed on market developments, and to assist their legislatures in developing new laws. Thus, the Bureau believes that some states may want to consider providing state attorneys general or other regulators an authority similar to the Bureau's market-monitoring authority, which can provide vital information about risks to consumers or other developments in the marketplace.[91]

State agencies should be able to pursue the remedies necessary to protect consumers. The CFPA grants the CFPB the authority to seek "any appropriate legal or equitable relief" for violations including, without limitation, various forms of monetary relief.[92]

[91] *See* 12 U.S.C. § 5512(c).

[92] 12 U.S.C. § 5565.

Unfortunately, many states do not provide their consumer protection agencies similar authority nor are they as expansive. Although some states have flexible authority to seek equitable relief,[93] others do not. This is especially important when state law enforcement deal with repeat offenders or egregious practices. In such cases, some states permit law enforcement to seek revocation of the company's corporate charter or license to do business in the state.[94] The authority to pursue punitive damages should also be widely available.

Also, states should consider holding corporate officers personally liable when doing so supports their consumer protection missions. Corporate officers who fail to properly oversee the employees, systems, and practices under them should be held accountable when they violate the law. State law often permits law enforcement to hold officers or controlling shareholders individually liable,[95] and the CFPB recommends that state law enforcement agencies consider how officer liability plays a role in their programs.

Finally, states may also consider creating funds similar to the CFPB's Civil Penalty Fund,[96] which is used to compensate victims of lawbreaking companies when a company is found to have violated the law but is insolvent and cannot cover the damages.

The CFPB recommends that states consider whether to:

- Grant State Attorneys General and State Regulators market-monitoring authority similar to the CFPB's authority in 12 U.S.C. § 5512(c).
- Grant municipality and city enforcers authority to bring claims for violation of state unfair, deceptive, or abusive acts or practice laws that harm their residents.
- Provide pre-suit investigatory power to state enforcers similar to the CFPB's authority in 12 U.S.C. § 5562.
- Grant enforcers authority to obtain full relief for their residents, similar to the remedies available to the CFPB as spelled out in 12 U.S.C. § 5565(a)(2).

[93] *See* Mont. Code Ann. § 30-14-133 (permitting "any other equitable relief" but not punitive damages).

[94] *See, e.g.*, 815 Ill. C. Stat. § 505/7(a) (permitting the Attorney General to seek "revocation, forfeiture or suspension of any license, charter, franchise, certificate or other evidence of authority of any person to do business in this State" as redress for UDAPs).

[95] *See, e.g.*, *Joseph Gen. Contracting, Inc. v. Couto*, 119 A.3d 570 (Conn. 2015) (looking to FTC Act caselaw to determine whether corporate officers can be individually liable under the CUTPA and holding in the affirmative); *Grayson v. Nordic Const. Co.*, 599 P.2d 1271, 1273-74 (Wash. 1979) (en banc) (finding that officer liability was appropriate even where piercing the corporate veil on an alter ego theory was not); *People v. Dollar Rent-A-Car Systems, Inc.*, 211 Cal.App.3d 119, 132 (1989) (finding that the trial court properly imposed liability on a majority stockholder and CEO because he "he knew or reasonably should have known" about the violative practices).

[96] Section 1017 of the CFPA created the Civil Penalty Fund. Pub. L. No. 111-203, § 1017, *codified at* 12 U.S.C. § 5497. *See also* 12 C.F.R. Part 1075 (CFPB rules governing use of the Fund).

Eliminate requirement to prove monetary injuries

Unfair, deceptive, and abusive acts or practices can have profound consequences on consumers' lives—including lost time or ability to work or becoming a more likely victim of fraud and identity theft. Many acts or practices cost people money, but sometimes that cost is hard to quantify, sometimes the harm has not occurred yet, and sometimes unfair, deceptive, or abusive practices cause non-monetary harm. The CFPB, FTC and other agencies do not need to prove precise monetary harm to bring a claim under federal consumer protection law. However, federal courts have limited the ability of private plaintiffs to pursue certain non-economic claims in federal court,[97] and several states statutorily limit or prohibit recovery for hard-to-quantify harms by requiring consumers to prove that they suffered a loss of "money or property."[98] In addition, many state laws also require litigants to prove "reliance" on a deceptive statement, something that federal law does not require. This can have the practical effect of making deception claims very difficult – a company can get away with a blatant lie because an enforcer has a hard time proving exactly who saw or heard the lie, an especially difficult task in a class action case.[99] The nature of digital advertising, in which many different versions of an ad may be used, and in which it may be difficult to determine who received which ads, further complicates this task. And in a few states, courts have required plaintiffs to prove the violation has public impact or is "consumer-oriented," preventing individuals from deterring harmful conduct before it harms others.[100]

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[97] *See, e.g.*, *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) (misleading alerts in consumers' credit files that were not disseminated to third parties do not constitute a concrete injury for standing purposes).

[98] *See, e.g.*, Ore. Rev. Stat. § 646.638; N.J. Stat. Ann. 56:8-19; Conn. Gen. Stat. Ann. §42-110g; W. Va. Code §46A-6-106; Iowa Code Ann. § 714H.5. For a comparison of state law and the ALEC model act on which this language is based, including the ascertainable-loss requirement, *see* Dee Pridgen, *Wrecking Ball Disguised as Law Reform: ALEC's Model Act on Private Enforcement*, 39 N.Y.U. L. & Soc. Chng. 279 (2015). Some of the states which limit actionable harms to "money or property" include Oregon, New Jersey, Connecticut, West Virginia, and Iowa. Ore. Rev. Stat. § 646.638; N.J. Stat. Ann. § 56:8-19; Conn. Gen. Stat. Ann. §42-110g; W. Va. Code §46A-6-106; Iowa Code Ann. § 714H.5.

[99] *See, e.g.*, *Schlaifer Nance Co. v. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir. 1997) ("The question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive.").

[100] *See* Brake v. Slochowsky & Slochowsky, 504 F. Supp. 3d 103 (E.D.N.Y. 2020) (holding landlord's attorney's repeat filing of eviction actions to be a private matter); Zawahir v. Berkshire Life Insurance, 22 A.D.3d 841 (App. Div. 2d Dep't 2005) (finding that insurance company's cessation of payments under disability policies constituted a private contract dispute and was therefore not consumer-oriented); *In re* Domino's Pizza, 2018 WL 1587593 (S.D.N.Y. Mar. 27, 2018) (finding no consumer-oriented conduct where employer filed fraudulent tax returns misrepresenting the wages it had paid); Parrino v. Sperling, 648 N.Y.S.2d 702 (N.Y. App. Div. 2d Dep't 1996) (dismissing warranty claim under GBL § 349 because the sale of a customized wheelchair was "private in nature").

In order to protect consumers from serious but hard-to-quantify harms, states should ensure that their laws can be enforced without a requirement to prove ascertainable loss and without a requirement to prove reliance on a misleading claim, and should ensure claims can reach non-economic injuries, including lost time, loss of privacy, or loss of security.[101] Relatedly, states should ensure that the "economic loss" doctrine – holding that plaintiffs cannot recover in tort economic losses to which their entitlement comes from a contract – does not apply to claims arising under their consumer protection laws.[102]

The CFPB recommends that states consider adding the following language, or similar, to their state prohibitions on unfair, deceptive, and/or abusive acts or practices:

§ **Burden of Proof.** A public or private enforcer need not prove the following in order to establish a claim under § [cross-reference to state UDAAP standard]:

(a) Ascertainable loss to consumers or the class;
(b) Reliance by consumers on a misleading or false claim;
(c) Monetary harm.

Exercise authority to ensure consumer protections also protect businesses

For many entrepreneurs, the boundary between one's personal or household finances and those of their business may be hazy—or not exist at all. The products and services businesses use, and the way they interact with financial institutions, may not be any different than other consumers. Yet, a business may not be protected in the same way as other consumers even if they suffer the same harms. Furthermore, an unfair, deceptive, or abusive practice that is business-to-business can have follow-on effects on individuals. For example, if a supplier deceives a manufacturer about the quality of an input product, that quality issue can pass-through to the end product that individuals purchase.

[101] The FTC has brought some recent cases recovering money for victims for lost time. See https://consumer.ftc.gov/consumer-alerts/2023/12/payments-people-who-wasted-time-pre-approved-credit-karma-credit-card-offers-are-you-eligible; https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-actions-against-companies-making-deceptive-pandemic-loan-promises-lead-record-59-million-damages.

[102] Some courts have held that the economic loss doctrine does not apply to state consumer protection statutes. *See, e.g.*, *Earl v. NVR, Inc.*, 990 F.3d 310 (3d Cir. 2021); *Ulbrich v. Groth*, 78 A.3d 76 (Conn. 2013).

The Bureau therefore encourages states to exercise or expand their consumer protection authority to protect businesses. [103] Some states are already expanding consumer protection laws into business-to-business transactions. For example, Massachusetts has a long-standing cause of action for businesses harmed by unfair or deceptive acts or practices in its consumer protection statute.[104] Illinois recently considered extending TILA-like protections for small businesses.[105] New York recently considered legislation that would reject previous state-court interpretations of its General Business Law that required a deceptive practice to be "consumer-oriented" to be unlawful.[106] The CFPB supports these reforms and welcomes the opportunity to assist states in developing legislation. In addition, where necessary, the CFPB will make determinations, where appropriate, that such legislation is not inconsistent with relevant federal consumer financial law.

The CFPB recommends that states consider adding the following definition, or a similar definition, to their state prohibitions on unfair, deceptive, and/or abusive acts or practices:

> *Consumer*. The term "consumer" means an individual, company, or organization, or an agent, trustee, or representative acting on behalf of an individual, company, or organization.

[103] The Federal Trade Commission Act protects businesses as well as individuals. The word "consumer" appears in the FTC Act, but it is not defined, and it is construed broadly. *See* S. Rep. No. 93-151 at 27 (1973) ("The use of the word 'consumer' . . . is to be read in its broadest sense"). The FTC has long exercised its consumer protection authority to protect small businesses, franchisees, workers, and other individuals and entities. *See, e.g.*, *FTC v. IFC Credit Corp.*, 543 F.Supp.2d 925, 941 (N.D. Ill. 2008) ("Consistent with its Congressional mandate, the FTC has concluded that small businesses and religious and other not-for-profit organizations are consumers and are entitled to protection from deceptive and unfair acts and practices."); *Orkin Exterminating Co., Inc.*, 108 F.T.C. 263 (1986), *aff'd*, *Orkin v. FTC*, 849 F.2d 1354 (11th Cir. 1988) (affirming relief granted to Orkin's customers, which included businesses).

[104] Mass. Gen. Stat. ch. 93A, § 11.

[105] H. Bill No. 3064, 2023 and 2024 Leg., 103rd Gen. Assemb. (Ill. 2023) ("Small Business Truth in Lending Act") (violations of the Small Business TILA constitute violations of Illinois' Consumer Fraud and Deceptive Business Practices Act); https://www.consumerfinance.gov/about-us/newsroom/state-disclosure-laws-business-lending-consistent-with-truth-in-lending-act/; https://ilga.gov/legislation/BillStatus.asp?DocNum=3064&GAID=17&DocTypeID=HB&LegID=148215&SessionID=112&SpecSess=&Session=&GA=103.

[106] S. 795, 2023-24 Reg. Sess. (N.Y. 2023) ("Consumer and Small Business Protection Act") ("This legislation…rejects the limitation, imposed by courts, that prohibited conduct be 'consumer oriented,' have an impact on the public at large, or be part of a broader pattern."); *Himmelstein v. Matthew Bender & Co.*, 37 N.Y.3d 169, 176 (N.Y. 2021) ("[T]here is no textual support in GBL § 349 for a limitation on the definition of 'consumer' based on use.").

Revitalize private enforcement

Corporate lawbreaking reduces trust in essential institutions and is a societal problem comparable to property crime. In 2023, the CFPB sent more than 1.3 million consumer complaints about potential consumer protection law violations to companies in the few markets the CFPB oversees.[107] By comparison, the Federal Bureau of Investigation estimates there were 70,000 burglaries, 20,000 robberies, 170,000 motor vehicle thefts, and 380,000 larceny claims during that time. Law enforcement nationwide recovered $1.8 billion in stolen property in 2023,[108] the same amount that the CFPB paid out of the civil money penalty fund to compensate the victims of one financial company.[109]

But the government resources allocated to consumer protection enforcement pale in comparison to local, state, and federal criminal enforcement. That is why, 50 years ago, many states created private rights of action to deputize consumers to enforce consumer law.[110] But recent developments have severely constrained consumers' ability to enforce the law, including case law around standing to bring cases in federal court and more restrictive standards for certifying a class action. Most glaringly, companies now use arbitration clauses that force consumers to bring cases before an arbitrator of the company's choosing, and the Federal Arbitration Act has been interpreted to preempt state attempts to prohibit forced arbitration.[111] This means cases are prosecuted in secret

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[107] CFPB, Consumer Response Annual Report 3 (2023), https://files.consumerfinance.gov/f/documents/cfpb_cr-annual-report_2023-03.pdf.

[108] FBI Crime Data Explorer (last visited Jan. 3, 2025), https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/property-crime.

[109] CFPB, *CFPB Announces Return of $1.8 Billion in Illegal Junk Fees to 4.3 Million Americans Harmed in Massive Credit Repair Scheme* (Dec. 5, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-return-of-1-8-billion-in-illegal-junk-fees-to-4-3-million-americans-harmed-in-massive-credit-repair-scheme/.

[110] David A. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 Bos. U. L. Rev. 559, 606 (1968) ("Coordination of public and private remedies and procedures is at least as essential as federal and state cooperation. The fact that most consumer injuries result from local practices demonstrates a special need for a coordinate system of local law remedies and enforcement. This need is best appreciated when viewed in light of the dual positions of the consumer as he becomes involved in the various transactional relationships throughout the spectrum of consumer transactions. Existing law has failed to take the need for a coordinate system of remedies and enforcement into account and only a couple of draft or proposed acts consider it at all."). According to the FTC, Professor Rice's article influenced the drafting of the private and class-action provisions of the 1970 model act. CSG, 1970 Suggested State Legislation 144. *See also* Nat'l Assn. of Atty's Gen., Report on the Office of Attorney General 401-02 ("Ordinarily the amount involved in a consumer transaction is not sufficient to interest a private practitioner, with the result that thousands of consumers suffer small losses, without remedy or relief being available. This section [Section 8 of the model act] remedies this situation and provides, in private actions, another front on which objectionable business practices can be combatted.").

[111] *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (describing the Federal Arbitration Act a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any

before a private judge the company selected, and cases may not lead to changes in business practice; arbitrators can compensate an individual, but they usually cannot prohibit a company from continuing to break the law and harming other people.

In the absence of federal policies that would allow states to prohibit forced arbitration, states can amend their consumer protection laws to add causes of action that allow private enforcers to enforce the law even if there is an arbitration clause as to the consumer's individual claims. For example, the Supreme Court has held that the Federal Arbitration Act does not mandate enforcement of arbitration clauses that waive a person's right to bring a case on behalf of the state.[112] This would not be a unique or novel enforcement feature—California's Private Attorney General Act[113] allows consumers to bring representative claims on behalf of California and the False Claims Act allows whistleblowers to bring *qui tam* cases on behalf of the United States.[114] In addition, courts have held that where an arbitration clause prevents arbitration of "public injunctive relief" remedies, those can be pursued in court.[115] And recently, some states have sought to supplement government enforcement by granting organizational standing to nonprofits to bring cases on behalf of the general public.[116]

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state substantive or procedural policies to the contrary."); *but see New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019) (observing that courts "are not free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal" and that "the Court should respect the limits up to which Congress was prepared to go when adopting the Arbitration Act.") (internal citations and quotation marks omitted).

[112] *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022) (holding that California state law prohibiting waiver of Private Attorney General Act (PAGA) "representative" claims are "not preempted by the FAA," but that state law could not interfere with a contract to arbitrate individual claims). The Court dismissed the plaintiff's representative PAGA claims, but only because the plaintiff's individual claims could be compelled into arbitration, and the Court interpreted California's PAGA to require plaintiffs to have an individual claim in order to have statutory standing to bring a representative claim. As Justice Sotomayor stated in her concurrence, "California's legislature is free to modify the scope of statutory standing under PAGA," which would allow representative claims to proceed in court if standing was not conditioned on the presence of a parallel individual claim. Viking River Cruises, 596 U.S. at 664 (J. Sotomayor, concurring). Furthermore, Justice Sotomayor noted that the matter of statutory standing under PAGA is a matter of state law, and if state courts disagreed with the Court's reading, "California courts, in an appropriate case, will have the last word." *Id.* The Supreme Court of California has since ruled that the U.S. Supreme Court misread California law, and that workers have statutory standing to bring a representative claim in court even if their individual claim is compelled to arbitration. Adolph v. Uber Technologies, 14 Cal.5th 1104, 1114 (Cal. 2023) ("Where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA").

[113] Cal. Lab. Code § 2698 *et seq*.

[114] 31 U.S.C. §§ 3729-3733.

[115] *See Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 830–31 (9th Cir. 2019).

[116] *See, e.g.*, D.C. Code § 28-390(k) (granting nonprofit organizations and public interest organizations the ability to seek a variety of remedies for violations of DC's consumer protection law, including $1,500 statutory or trebled damages, punitive damages, injunctive relief, on behalf of the public or a class of consumers).

The CFPB recommends that states consider supplementing public enforcement resources with private enforcement that can be effective against companies that use arbitration clauses. To do so, legislatures should consider explicit and carefully crafted amendments to UDAAP laws to:

- Create representational or *qui tam* causes of action on behalf of the state modeled after California's Private Attorney General Act or the False Claims Act,
- Add "public" injunctive relief as a remedy, similar to California's Unfair Competition Law, and
- Give nonprofit and public interest organizations authority to prosecute damages cases against companies, similar to the District of Columbia's Consumer Protection Procedures Act.

In any such statute, states should be careful to include attorney fee-shifting to incentivize cases. For representational and organizational cases, legislatures should consider adding substantial monetary remedies, including trebled and statutory damages, and the ability for both enforcing parties and their attorneys to be compensated based on a percentage of the returns to consumers or the state. For representative claims, Attorneys General should maintain some form of oversight and objection right to cases brought and settlements entered on behalf of the state.

Provide strong and enforceable consumer data and privacy rights

Corporations are constantly finding new ways to harvest and monetize consumers' data. These practices can place consumers at greater risk of becoming victims to scammers, stalkers, or even hostile foreign powers.[117] There are several federal laws which the CFPB and other regulators rely on to protect consumers' privacy – including the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, the Children's Online Privacy Protection Act, the Consumer Financial Protection Act and the FTC Act. As the Bureau discussed in a recent report, many states have passed laws to provide their residents with additional rights and protections, such as the right to obtain from businesses a description of the data they collect (or even the right to look at the data directly), the right to direct a

[117] Sherman et al, *supra* note 75.

company to delete the nonpublic personal information the company has about them, the right to obtain from a company the data it has collected about them in a way that can be given to another business, and the right to ask a business to correct inaccurate information about them.[118] However, many of these state laws specifically exempt financial institutions, financial data, or both if they are subject to the Gramm-Leach-Bliley Act.[119]

The CFPB recommends that states consider doing the following, where appropriate:

- Give consumers a right to delete data about them.
- Require companies to only collect the minimum data necessary to provide their product or service.
- Prohibit use of collected data for reasons other than providing the consumer a product or service they have requested.
- Prohibit the sale or transfer of personal data to third parties (including data brokers) that are unrelated to the provision of a requested product or service, with limited exceptions like credit bureaus.
- Prohibit certain uses of data, including (1) use of personal data on minors for purposes of advertising; (2) use of information about medical debts for credit underwriting; (3) use of financial information for targeted advertising or product pricing; and (4) use of public records for purposes of determining eligibility for receipt of public utilities or other essential services.
- Enshrine protections to ensure that consumers can meaningfully exercise their rights, such as imposing time limits on companies to respond to consumers' data-related requests, prohibiting companies from retaliating against consumers for exercising their data privacy rights, prohibiting conditioning the provision of services based on consenting to certain data uses, and requiring specific consent for the collection, use, and sale of consumer data.
- Remove exemptions in state consumer data privacy laws for financial institutions or data covered by the Gramm-Leach-Bliley Act.
- Provide a strong private right of action and public enforcement mechanism.
- Hire personnel with technology backgrounds and expertise into public enforcement teams.

[118] CFPB, *State Consumer Privacy Laws and the Monetization of Consumer Financial Data* (2024), https://www.consumerfinance.gov/data-research/research-reports/state-consumer-privacy-laws-and-the-monetization-of-consumer-financial-data/.

[119] *Id.* at 17-19 (discussing exemptions for entities or data covered by the GLBA).

Create bright-line prohibitions of junk fees

Competitive markets depend on fair and transparent pricing, where consumers can easily compare prices among several different providers. But junk fees make it difficult, if not impossible, for consumers to make these kinds of comparisons.[120] Companies have become adept at hiding the true price of their products by funneling revenue generation away from front-end sticker prices. Junk fees often take the form of unnecessary, unavoidable, or fake fees, but can also take the form of an add-on or ancillary service that a company can overprice because the customer is captive. While many of these practices are already prohibited under general unfair and deceptive prohibitions, the prevalence of these practices suggests that a bright-line prohibition would help to safeguard consumers and competition. Some states statutes have extensive lists[121] of prohibited practices in addition to broader prohibitions against unfairness or deception and may prefer to pursue that approach for junk fees.

States should consider adding language along the following lines to their state prohibitions on unfair, deceptive, and/or abusive acts or practices:

§ Prohibition of Junk Fees

(a) **Hidden Fees Prohibited.** It is an unfair and deceptive practice for any business to offer, display, or advertise any price of a good or service without clearly and conspicuously disclosing the total price.

(1) In any offer, display, or advertisement that represents any price of a good or service, a business must disclose the total price more prominently than any other pricing information. However, where the final amount of payment for the transaction is displayed, the final amount of payment must be disclosed more prominently than, or as prominently as, the total price.

(2) A business must disclose clearly and conspicuously, before the consumer consents to pay for any good or service:

i. The nature, purpose, and amount of any fee or charge imposed on the transaction that has been excluded from total price and the identity of the good or service for which the fee or charge is imposed; and

ii. The final amount of payment for the transaction.

[120] CFPB, Price Complexity in Laboratory Markets (April 2024), *available at* https://files.consumerfinance.gov/f/documents/cfpb_price-complexity-in-laboratory-markets_2024-04.pdf.

[121] *See, e.g.*, Va. Code Ann. § 59.1-200 (listing 82 prohibited practices).

(b) **Misleading Fees Prohibited.** It is an unfair and deceptive practice for any business to misrepresent the nature and purpose of any amount a consumer may pay, including the refundability of such fees and the identity of any good or service for which fees are charged.

(c) **Price Gouging Captive Consumers Prohibited.**

(1) It is an unfair and deceptive practice to charge consumers who have already purchased a good or service more for any additional goods or services (including add-ons, concessions, or ancillary services) than a reasonable approximation of the costs to the business of providing that additional good or service, if the consumer cannot purchase the additional good or service from multiple providers.

(2) If additional goods or services are provided by a third-party partner, it is an unfair and deceptive practice to receive kickbacks or revenue sharing from that third-party partner.

(3) It is an unfair and deceptive practice to charge fees for additional goods or services that consumers reasonably expect to be part of the originally purchased good or service.