



1700 G Street NW, Washington, D.C. 20552

March 11, 2024

Via electronic mail

The Honorable Kathy Hochul
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Dear Governor Hochul:

The Consumer Financial Protection Bureau's (CFPB) Office of Policy Planning and Strategy is pleased to provide this submission regarding proposed legislation in the State of New York on bolstering consumer protection law.

The CFPB is an independent bureau within the Federal Reserve System and an executive agency charged by Congress with promoting fair, transparent, and competitive markets. The CFPB is also the lead federal agency charged with administering the prohibition on abusive conduct in connection with the provision of consumer financial products or services.

Prohibition on Abusive Conduct

We understand that New York is considering adding the prohibition on abusive conduct to New York's existing laws prohibiting deceptive conduct. The creation of the federal prohibition on abusive conduct was a significant milestone in the history of consumer protection. In the wake of the financial crisis in 2010, Congress passed the CFPB's authorizing statute, the Consumer Financial Protection Act (CFPA), which banned abusive conduct. The passage of this landmark legislation was in large part a response to the proliferation of set up to fail products, such as the subprime mortgages that were the basis of the 2007-2008 financial crisis. By adding the abusive prohibition, Congress recognized that the existing prohibitions on unfair and deceptive acts or practices were not adequate to prevent the economic meltdown. As it had done many times before, Congress amended the law to address new challenges.

While the addition of the abusive prohibition was a response to 21st century harms, it is firmly rooted in the American legal tradition of ensuring fair dealing. Last April, the CFPB published a Policy Statement on Abusive Acts or Practices in order to assist consumer financial protection enforcers in identifying wrongdoing. The statement explained that the abusive prohibition is part of a long history of Congress granting additional tools to government enforcers at both the federal and state level to address market failures, including through the passage of the Federal Trade Commission (FTC) Act in 1914 and the Wheeler-Lea Act in 1938.

Congress had the foresight to structure the CFPA to allow state regulators and attorneys general to bring actions to stop abusive conduct. *See* 12 U.S.C. § 5552(a). As Director Chopra has noted, the CFPB does not have a monopoly when it comes to policing abusive conduct. State actors are often at the front line of identifying abuses on the ground and can act swiftly to protect consumers. Today we see lawbreakers innovating new ways to take advantage of consumers – whether through digital dark patterns, novel schemes to set up consumers to fail, or exploiting captive consumers who have no choice but to deal with a particular business.

As you consider legislation in this area, we believe the “reasonable reliance” component of the abusive prohibition is critical. This component of the federal prohibition recognizes that people often reasonably expect that certain businesses will help them make difficult financial decisions, and there is potential for betrayal or exploitation of that trust.

The reasonable reliance language was part of a careful and deliberate multi-part prohibition crafted by Congress in response to widespread concerns about mortgage brokers who accepted payment for steering consumers into set up to fail mortgages during the financial crisis.

The CFPB has brought numerous actions based on the reasonable reliance component of the abusive prohibition to stop businesses from exploiting consumers’ trust in order to scam and defraud them. In 2014, the CFPB sued ITT Educational Services, the for-profit college chain, for positioning its financial advisors as subject matter experts on how to finance college but then pushing students into unaffordable loans. In 2016, the CFPB sued Access Funding, a structured-settlement-factoring company, for taking advantage of cognitively impaired victims of lead-paint poisoning by steering them to an attorney who purported to act as an independent advisor but failed to do so. And more recently, in 2021, the CFPB took action against an online debt-settlement company, SettleIt, for steering consumers into high-cost loans by affiliated lenders while keeping consumers in the dark about its relationships with its affiliate lenders. Language in SettleIt’s call scripts even included “we are not owned or operated by any of your creditors.”

These examples demonstrate the importance of the reasonable reliance component of the abusive ban and its real world impact for people.

Prohibition on Unfair Conduct

We also understand that New York is considering adding the prohibition on unfair acts or practices to help protect against bad business conduct. The prohibition on unfairness is a critical standard of fair dealing which was codified in federal law 100 years ago and has longer roots in common law. The FTC, CFPB, and states have used the prohibition on unfairness to combat everything from illegal junk fees to deficient data security practices.

Prohibition on Deceptive Conduct

Finally, we understand that New York is considering clarifying that an act or practice may be deceptive even when the representation is not directed at a consumer. This position is in alignment with the CFPA’s federal prohibition on deceptive conduct, which bars deceptive acts or practices without limitation – and hence including targeting other parties beyond a consumer –

if the deception is in connection with the offering or provision of consumer financial products or services.

Honest business conduct should not rely on trickery or manipulation, and such conduct should be stopped regardless of whether or not the deception happens to be directed at the consumer.

Thank you for your consideration. We hope this information is valuable to you as you consider these legislative reforms. Please do not hesitate to reach out if there is any assistance we can provide.

Sincerely,

/s/ Brian Shearer

Brian Shearer

Assistant Director

Office of Policy Planning and Strategy

Identical letters sent to:

The Honorable Carl E. Heastie, Speaker, New York State Assembly

The Honorable Crystal D. Peoples-Stokes, Majority Leader, New York State Assembly

The Honorable William A. Barclay, Minority Leader, New York State Assembly

The Honorable Nily Rozic, Chair of the Committee on Consumer Affairs and Protection, New York State Assembly

The Honorable Andrea Stewart-Cousins, President Pro Tempe and Majority Leader, New York State Senate

The Honorable Robert G. Ort, Minority Leader, New York State Senate

The Honorable Kevin Thomas, Chair of the Committee on Consumer Protection, New York State Senate