

July 3, 2023

Intake—Statement of Policy Regarding Prohibition on Abusive Acts or Practices  
c/o Legal Division Docket Manager  
Consumer Financial Protection Bureau  
1700 G Street NW, Washington, DC 20552.

***Re: Comments of Five Organizations Focused on Protecting Consumers; Docket No. CFPB-2023-0018; Statement of Policy Regarding Prohibition on Abusive Acts or Practices***

The undersigned organizations, focused on protecting and empowering consumers, support the Consumer Financial Protection Bureau’s (“CFPB”) Statement of Policy Regarding Prohibition on Abusive Acts or Practices (“Policy on Abusive Acts”). Abusive practices impact wide swaths of American consumers and have an especially negative impact on vulnerable and marginalized communities. The undersigned welcome this Policy Statement as it provides consumers, financial service providers, and advocates with an analytical framework of the protections afforded to them under the Consumer Financial Protection Act of 2010. We applaud the CFPB for its continued efforts to protect and help consumers in the financial marketplace by further clarifying abusive acts and practices, collecting public feedback to further refine this statement as needed, and educating the public on abusive acts and practices.

In 2010, as the nation struggled to emerge from the Great Recession, Congress created a government agency dedicated to protecting ordinary consumers from the financial institutions whose predatory practices played a key role in causing the crisis. In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress gave the Consumer Financial Protection Bureau broad powers to protect consumers. The Consumer Financial Protection Act of 2010 (“CFPA”) prohibits any “covered person” or “service provider” from “engag[ing] in any unfair, deceptive, or abusive act or practice.” It further outlines two abusiveness prohibitions covering abusive acts or practices that materially interfere with the ability of a consumer to understand a term or condition of a consumer financial product or service, or that take unreasonable advantage of a consumer’s lack of understanding of material risks, costs or conditions, inability to protect their own interest, or a consumer’s reasonable reliance on a covered person to act in their best interest.<sup>1</sup>

While the CFPB’s Policy on Abusive Acts does not provide an exhaustive repository of abusive acts and practices covered by the CFPA, it does provide enforcement agencies, consumers, and service providers with concrete examples of how courts and the CFPB analyzed elements of abusiveness in specific instances. In addition, the Policy on Abusive Acts should highlight the way that sales personnel in a physical setting can materially interfere with the ability of consumers to understand credit agreements and other financial products or services that are entered into electronically. This interference could take the form of oral statements misrepresenting or distracting the consumer from written disclosures; rushed pressure to sign; impediments to the consumer seeing the disclosures, such as distance from the electronic monitor or even turning the monitor away from the consumer; or actively blocking the consumers’ view of critical terms,

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<sup>1</sup> CFPA section 1031(d), 12 U.S.C. 5531(d).

among other modes of interference. This type of interference can be found in payday loan stores, auto dealers, pet stores and other retailers that offer high-cost credit, and in other settings.

The undersigned respectfully submit the following recommendations to be considered by the CFPB as an additional framework through which the Bureau, consumers, and service providers may identify violative acts and practices in specific consumer markets. These comments focus on abusive practices in predatory lending, auto financing, and financial services in jails and prisons, as well as the abusive practice of forcing consumers into arbitration. But there are many other areas of financial products and services that present abusive acts and practices, and we do not mean by these comments to minimize attention to other areas.

### I. Predatory Lending Is Abusive

The CFPB explains that predatory lending was a root cause of the 2007-08 financial crisis and was a core motivation behind Congress's decision to create the CFPB and imbue it with new powers, including its power over abusive acts and practices. Congress "concluded that the manner in which agencies had enforced the prohibitions on unfair and deceptive acts or practices was too limited ...."<sup>2</sup> One of the key ways that Congress addressed that limitation was by prohibiting abusive practices in addition to unfair and deceptive ones.

The Policy Statement includes references throughout to ways in which predatory lending may be abusive. However, the most direct discussion is in the introduction rather than in connection with the elements of the abusive standard.

It would be helpful to have more discussion within the elements of the abusive standard, stating more directly that predatory lending is abusive and providing more examples of scenarios that fit the elements of abusive. This is important given the tight connection between predatory lending and the very reason that the ban on abusive conduct was enacted.

#### *A. Predatory lenders often materially interfere with consumers' ability to understand the terms or conditions of a consumer financial product.*

Below are just a few examples of how companies may materially interfere with consumers' ability to understand high-cost, predatory loans. Some of these cases are already cited in the Policy Statement, some are not. Either way, it would be helpful to include more details.

A federal court allowed a claim of abusive conduct to proceed to trial where the CFPB alleged that a bank materially interfered with a consumer's ability to understand their options as to whether their account would include an overdraft feature. The bank did this by interfering with customers' ability to read the applicable notice about their options, refusing to provide customers with information when requested, using a script that effectively replaced language established by federal law with the bank's own notice, hiding the disclosure among other disclosures, and

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<sup>2</sup> 88 Fed. Reg. at 21884.

otherwise preventing consumers from understanding the option that the bank effectively selected for them.<sup>3</sup>

The CFPB and a number of state attorneys general have brought a complaint against a company that offered financing of immigration bonds for its abusive actions targeted at consumers who did not speak English or who could not read.<sup>4</sup> The company rushed the enrollment process and omitted or misrepresented material terms of the company's written agreement to clients and co-signers before they were enrolled. The CFPB alleged that the company materially interfered with consumers' ability to understand the terms and conditions of the company's offers of credit.

The CFPB brought a complaint against a check casher that offered payday loans, alleging that it materially interfered with the ability of consumers to understand the terms of its services. The check casher had a policy of never telling consumers the fee (even when asked), blocking the fee amount on the receipt, minimizing the time the consumer had to see the fee, interfering with the consumer's ability to see posted signs that disclosed the fee, and misrepresenting information about the fee.<sup>5</sup> According to the CFPB's complaint, the company's failure to disclose—and its misrepresentation of the nature of the loans—materially interfered with the ability of consumers to understand the risks or costs of the loans.

A CFPB administrative consent order found the manner in which an auto title pawn lender marketed its product to be an abusive practice. It distracted consumers by discussing the cost of a long-term loan when in fact the lender only offered thirty-day loans at higher interest rates.<sup>6</sup>

Another way in which predatory lenders interfere with consumer understanding is the pricing of open-end credit using complicated fee schedules rather than periodic interest, failing to disclose an annual percentage rate (APR), and showing repayment schedules that look shorter than they are. The National Consumer Law Center described some of these practices with respect to Elevate's Elastic Line of Credit in recent comments to the Federal Deposit Insurance Corp. (FDIC) in connection with the Community Reinvestment Act examination of Republic Bank & Trust, which is part of Elevate's rent-a-bank scheme.<sup>7</sup>

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<sup>3</sup> Consumer Fin. Prot. Bureau v. TCF Nat'l Bank, 2017 WL 6211033 (D. Minn. Sept. 8, 2017). *See also* Consent Order, In re TD Bank, N.A., CFPB No. 2020-CFPB-0007 (Aug. 20, 2020), available at <https://files.consumerfinance.gov>; Complaint, Consumer Fin. Prot. Bureau v. TCF Nat'l Bank, No. 0:17-cv-00166 (D. Minn. Jan. 19, 2017), available at [www.nclc.org/unreported](http://www.nclc.org/unreported).

<sup>4</sup> Complaint, Consumer Fin. Prot. Bureau v. Nexis Servs., Inc., No. 5:21-cv-00016 (W.D. Va. Feb. 22, 2021), available at <https://files.consumerfinance.gov>.

<sup>5</sup> Complaint, Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., No. 3:16-cv-00356-WHB-JCG (S.D. Miss. May 11, 2016), available at <https://files.consumerfinance.gov>.

<sup>6</sup> Consent Order, In re TMX Fin. L.L.C., CFPB No. 2016-CFPB-0022 (Sept. 26, 2016), available at <https://files.consumerfinance.gov>.

<sup>7</sup> Comments of National Community Reinvestment Coalition, NCLC et al. to FDIC re Community Reinvestment Act exam for Republic Bank & Trust of Kentucky at 5-7 (Mar. 30, 2023), <https://www.nclc.org/wp-content/uploads/2023/03/Republic-Bank-and-Trust-CRA-Comment-1.pdf> (Republic Bank CRA Letter).

The following are examples of the opaque and misleading pricing disclosures by Elevate’s Elastic. The disclosures for other high-cost lines of credit, such as those from Enova’s NetCredit,<sup>8</sup> Propel’s Credit Fresh,<sup>9</sup> and Propel’s MoneyKey<sup>10</sup> are similarly indecipherable.

For a consumer who selects a monthly billing cycle, the Elastic website discloses this pricing:<sup>11</sup>

**Monthly Billing Cycle**

Fee	Amount	How it is Charged	Example
<b>Cash Advance Fee</b>	10% of the amount of each Cash Advance	We deduct the Cash Advance Fee from the amount of the Cash Advance you request.	\$500 Cash Advance Request  -\$50 Cash Advance Fee  =\$450 Elastic Cash delivered to you
<b>Carried Balance Fee</b>	\$10-\$350, depending on your Carried Balance  <a href="#">View the Carried Balance Fee Chart</a>	Charged every Billing Cycle that you have a Carried Balance on your Statement.	If a Statement shows you have a Carried Balance of \$2400.00, you will be charged a Carried Balance Fee of \$190.00.

Based on this chart, many consumers might understand the APR to be 10% and the cost of a \$500 advance to be \$50 – even though that is only the cost for the first month. The complicated description above and lack of an APR disclosure make it nearly impossible for the average consumer – or even the sophisticated consumer lawyer – to understand the cost. Even if the consumer clicks on the link to “View the Carried Balance Fee Chart,” that would still yield a complicated chart that does not allow consumers to understand the APR and could lead them to think it is 10%.<sup>12</sup>

If the consumer uses the Elastic website tool to put in a specific amount of credit,<sup>13</sup> the result still is displayed in a way that interferes with consumers’ understanding. Putting in \$1,000 for the cash advance and a biweekly billing yields a prominent box showing a \$50 cash advance fee. But that

<sup>8</sup> NetCredit, *Kentucky Personal Loans & Lines of Credit Rates and Terms*, <https://www.netcredit.com/rates-and-terms/kentucky>.

<sup>9</sup> <https://www.creditfresh.com/line-of-credit/cost-of-credit/>.

<sup>10</sup> <https://www.moneykey.com/line-of-credit-loans-online/cc-flow-rates/>.

<sup>11</sup> *What an Elastic Line of Credit Costs*. <https://www.elastic.com/what-it-costs/>.

<sup>12</sup> *What an Elastic Line of Credit Costs*. <https://www.elastic.com/what-it-costs/>

<sup>13</sup> *Id.*

is only the fee for the first two weeks. Below that box is a payment schedule showing the payment for the first three payments, listing two additional \$35 fees. But even that schedule is misleading, as it would take 20 minimum payments to repay the loan, and the total fees are \$365.

**Elastic Cash Amount** the amount of money Elastic will send you

<p>Available Credit: \$4,500.00</p> <p><b>\$ 1,000.00</b> ▲▼</p> <p>Cash Advance</p>	<p><b>\$50.00</b></p> <p>5% Cash Advance Fee</p>	<p><b>\$950.00</b></p> <p>Elastic Cash</p>
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**Billing Cycle** (select one)

Bi-Weekly	Semi-Monthly	Monthly
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**Billing Cycle** (select one)

Bi-Weekly	Semi-Monthly	Monthly
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Additional AutoPay Amount  
Total Number of Payments

\$	0.00	20
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Bi-Weekly Payment Schedule*					View More Payments <span>▼</span>
Payment	Balance	<small>ⓘ</small> Cash Advance Fee	Carried Balance Fee	<small>ⓘ</small> Additional Autopay Amount	Required Payment
<b>\$50.00</b>	\$1,000.00	\$50.00	-	-	\$50.00
<b>\$85.00</b>	\$950.00	-	\$35.00	-	\$85.00
<b>\$85.00</b>	\$900.00	-	\$35.00	-	\$85.00

**We Recommend Paying More than the Required Payment**

If you make only the Required Payment, it can take as long as 10 months to repay your Balance. We encourage you to pay more than the Required amount to reduce the cost of borrowing.

See our [Terms and Conditions](#) for more details.

Only by clicking on the faint caret to the right of “View More Payments” can the consumer see the full payment schedule if the consumer makes the minimum payment-- the payment amount that most of the financially struggling consumers who take out these loans are likely to make.

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These types of practices are abusive because they materially interfere with consumers’ understanding and take advantage of their lack of understanding of the full cost of the credit and full length of time that it will likely take to repay the loan.

*B. Predatory lenders operating in retail or mobile settings may materially interfere with consumers’ ability to understand disclosures and agreements entered into electronically.*

The disclosures and loan agreements of predatory lenders are often difficult for consumers to understand even if the consumer takes out the loan on a desktop computer with an attached printer and full access to the information. When loans are taken out on mobile devices or in brick-and-mortar settings, sales personnel have an even greater ability to materially interfere with the consumer’s ability to understand the product or service. It would be helpful to include some examples.

Many consumers’ only internet access is through mobile devices, and lenders are undoubtedly aware of the fact that many take out their loans on those devices whether or not they have other internet access. They may fail to design their websites to make the loan disclosures understandable in that context, and even may hide key terms in fine print that is especially difficult to access and understand on a mobile device.

Consumers may also be forced to view disclosures and enter into agreements electronically despite being in an in-person setting such as a retail store, auto dealer or auto mechanic. We have heard reports and seen CFPB complaints about lenders or sales personnel that have actively interfered with consumers’ ability to understand the products’ terms. Techniques include controlling the click-through process and clicking past information quickly; using their hands or arms to obscure information; holding the device at a distance, making the text difficult to understand; providing misleading oral descriptions of the disclosures or product terms; taking advantage of time pressures after the consumer has spent a long time already in the store; and even signing the consumer’s name. Some of these tactics are described in National Consumer Law Center’s summaries of

complaints against EasyPay Finance<sup>14</sup> and American First Finance.<sup>15</sup> These types of practices are abusive.

*C. Fintech and other products that deny they are credit, or that tips and other payments are charges, fees, or interest, materially interfere with consumers' understanding and take advantage of consumers' lack of understanding.*

A variety of fintech and other financing products inaccurately deny that they are loans or credit or that they are covered by state or federal lending laws.<sup>16</sup> These include earned wage advances,<sup>17</sup> income share agreements,<sup>18</sup> shared appreciation home financing,<sup>19</sup> and property assessed clean energy (PACE) loans.<sup>20</sup>

By mischaracterizing their products, these lenders materially interfere with consumers' understanding. They also take advantage of consumers' lack of understanding. The draft Policy Statement cited one case, *CFPB v. Pension Funding*,<sup>21</sup> that dealt with improper denial that a product was a loan, but the parenthetical does not mention that aspect of the case. It would be helpful to have more detail on that case, as well as other examples where it could be abusive to mischaracterize a product as something other than credit.

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<sup>14</sup> See [Letter from NCLC et al. to FDIC Acting Chairman Martin Gruenberg re: Community Reinvestment Act examination of Transportation Alliance Bank](#) (June 30, 2022); Stop the Debt Trap, [Predatory Auto Repair Loans By TAB Bank and EasyPay Finance](#) (May 2022); Stop the Debt Trap, [Predatory Puppy Loans by TAB Bank and EasyPay Finance](#) (Feb. 2022).

<sup>15</sup> See [Letter from NCLC et al. to FDIC Chairman Martin Gruenberg re Community Reinvestment Act examination of FinWise Bank](#) at 9, 12-14 (Mar. 14, 2023).

<sup>16</sup> A key question for many of these products is whether they create “debt,” payment of which is deferred. For a discussion of why even “non-recourse” loans and conditional obligations to repay still create debt and thus credit, see NCLC, Truth in Lending § 2.1a.2 (10<sup>th</sup> ed. 2019), updated at [library.nclc.org](#).

<sup>17</sup> A discussion of why earned wage advances are credit under the Truth in Lending Act (TILA) is available at NCLC, Truth in Lending § 2.5.9a (10<sup>th</sup> ed. 2019), updated at [library.nclc.org](#). A discussion of why earned wage advances are credit under state credit laws is available NCLC, Consumer Credit Regulation § 9.10.4 (3d ed. 2020), updated at [library.nclc.org](#). See also Calif. Dept. of Fin'l Prot'n & Innov., [Initial Statement Of Reasons For The Proposed Adoption Of Regulations Under The California Consumer Financial Protection Law And The California Financing Law, California Deferred Deposit Transaction Law, And California Student Loan Servicing Act Pro 01-21](#) (May 17, 2023) (“DFPI Initial Statement of Reasons”).

<sup>18</sup> A discussion of why income share agreements are credit under TILA is available at NCLC, Truth in Lending § 2.5.9b and in [Consent Order, In re: Better Future Forward, Inc., et al.](#), No. 2021-CFPB-0005 (CFPB Sept. 7, 2021). A discussion of why income share agreements are credit under state credit laws is available in NCLC, Consumer Credit Regulation § 14.8a (3d ed. 2020), updated at [library.nclc.org](#) and in the DFPI Initial Statement of Reasons.

<sup>19</sup> A discussion of why shared home value appreciation products are credit under TILA is available at NCLC, Truth in Lending § 2.5.9c.

<sup>20</sup> A discussion of why PACE loans are credit under TILA is available at NCLC, Truth in Lending § 2.4.9.3.3 and in our [Comments to CFPB Regarding Advance Notice of Proposed Rulemaking for Residential Property Assessed Clean Energy \(PACE\) Financing Docket No. CFPB-2019-0011](#) (May 7, 2019).

<sup>21</sup> Complaint, [Consumer Fin. Prot. Bureau v. Pension Funding, L.L.C.](#), No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015), available at <https://files.consumerfinance.gov>.

In *Pension Funding*, the CFPB made clear that it can be an abusive practice to deny that credit is credit. The CFPB alleged abusive practices by a company that offered cash for assignment of consumers' pension rights, finding that the defendants "obscured the true nature of the credit transaction by denying that their product was a loan" and referring to it using various other terms (calling it a pension advance or similar terms).<sup>22</sup> The defendants also denied there was any interest, misrepresented that the product was superior to other loans, and implicitly threatened criminal prosecution for failure to make payments.

While not directly alleging abusive conduct, the CFPB also found that a provider of income share agreements deceived consumers about the nature of its products by falsely representing that its products are not loans and by failing to provide required disclosures under the Truth in Lending Act (TILA).<sup>23</sup> These practices also materially interfered with consumers' understanding and were therefore abusive.

As noted above, one of the ways in which Pension Funding's actions were abusive was by representing that there was no interest. Similarly, fintech lenders materially interfere with consumers' understanding – and take advantage of that lack of understanding – is by not charging explicit interest or "mandatory" fees and instead burying costs in purportedly voluntary "tips" and expediting fees to disguise the costs of credit. These payments may be abusive because the lenders fail to disclose an annual percentage rate or because they seek payments that exceed interest or fee caps under state law. These practices can also be abusive when companies claim that the payments are voluntary while the lender engages in various tactics to make it difficult for the consumer to avoid paying or to impose consequences that the consumer does not understand if they do not tip enough.

For example, the California Department of Financial Protection and Innovation (DFPI) has found:

Even though tip-based financing is a young market, the DFPI has already identified multiple strategies that lenders use to make tips almost as certain as required fees and these charges can be quite costly. These approaches include:

- 1) Disabling a service if a borrower does not tip;
- 2) Setting default tips and using other user interface elements to making tipping hard to avoid;
- 3) Making it difficult to set a \$0 tip or not advertising that a particular payment is optional; and
- 4) Claiming that tips are used to help other vulnerable consumers or for charitable contributions.<sup>24</sup>

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<sup>22</sup> Complaint, [Consumer Fin. Prot. Bureau v. Pension Funding, L.L.C.](#), No. 8:15-cv-01329 at 17 (C.D. Cal. Aug. 20, 2015), available at <https://files.consumerfinance.gov>.

<sup>23</sup> CFPB, Press Release, [CFPB Takes Action Against Student Lender for Misleading Borrowers about Income Share Agreements](#) (Sept. 7, 2021).

<sup>24</sup> DFPI Initial Statement of Reasons at 61-62.



Consent decrees against SoLo Funds by the California DFPI,<sup>25</sup> the Connecticut Banking Commissioner,<sup>26</sup> and the District of Columbia Attorney General<sup>27</sup> have also revealed how a lender can use “tips” and other purportedly voluntary payments to materially interfere with consumers’ understanding and to take advantage of that lack of understanding. The consent decrees show that virtually all SoLo borrowers paid “lender appreciation tips” and the majority also paid “donations” despite claims that those payments were voluntary. The decrees reveal false and misleading information provided by SoLo, including disclosure of a 0% APR even though the recommended tip and donation resulted in an APR of about 511%<sup>28</sup> and the actual APR paid rose as high as 4,280%,<sup>29</sup> well in excess of the legal interest and fees allowed in those jurisdictions.

DFPI’s consent decree with Solo Funds also outlines a number of techniques used to coerce “tips”:

Pop-up messaging in the Platform urged Borrowers to offer the maximum tip amount to have their loan request fulfilled. One such pop-up claimed that Borrowers who offered the maximum tip amount were two times more likely to have their loan funded. Any Borrower or prospective Borrower new to the Platform must offer a tip or would be less likely to have their loan request fulfilled.<sup>30</sup>

DFPI also found that Solo Funds solicited and made it difficult not to pay “donations”:

Before receiving a loan, the Borrower was also presented with a pop-up prompting the Borrower to pay a donation to SoLo for providing the Platform. The donation was also expressed as a percentage of the loan amount and could be no more than 9%. When making a loan request, Borrowers could not dismiss the donation request prompt; the only way to disable the donation request pop-up was to toggle an unadvertised setting buried in the Platform’s general settings pane. Further, this setting had to be turned off each time the Borrower took out a loan.<sup>31</sup>

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<sup>25</sup> Consent Order, In re Comm’r of Fin’l Prot’n & Innov. v. Solo Funds, Inc. at 6 (DFPI May 8, 2023), <https://dfpi.ca.gov/enf-s/solo-funds-inc/> (“DFPI SoLo Funds Consent Order”).

<sup>26</sup> Temporary Order to Cease and Desist, In re: Solo Funds Inc., at 3 (Conn. Banking Comm’r May 4, 2022), <https://portal.ct.gov/-/media/DOB/Enforcement/Consumer-Credit/2022-CC-Orders/Solo-Funds-Inc--Temp-CDRestNOI-CDCPOLER.pdf>.

<sup>27</sup> Office of the Attorney General of the District of Columbia, Press Release, [AG Schwalb Secures Settlement With Fin-Tech Lender to Safeguard District Consumers From Deceptive Practices](#) (May 10, 2023); [Consent Judgment and Order](#), District of Columbia v. SoLo Funds, Inc., No. 2023 CAB 002665 (Sup. Ct. D.C. May 8, 2023).

<sup>28</sup> See NCLC, Press Release, [CA, CT, DC Issue Orders Against Fintech Payday Loans that Solicit “Tips”](#) (May 18, 2018).

<sup>29</sup> Temporary Order to Cease and Desist, In re: Solo Funds Inc., ¶ 19 (Conn. Banking Comm’r May 4, 2022), <https://portal.ct.gov/-/media/DOB/Enforcement/Consumer-Credit/2022-CC-Orders/Solo-Funds-Inc--Temp-CDRestNOI-CDCPOLER.pdf>.

<sup>30</sup> DFPI SoLo Funds Consent Order at 6.

<sup>31</sup> DFPI SoLo Funds Consent Order. at 7.

While Solo Funds “claims that Borrowers would have been able to retract previously-agreed upon tips and/or donations if Borrowers contacted SoLo’s general customer support in advance of the loan repayment date[,] Borrowers were never advised that they may renege on their prior commitment to make a tip or donation.”<sup>32</sup>

NCLC comments to the CFPB on junk fees also detail the ways in which lenders can push people into “tipping” and how they use inflated expedite fees that up to 90% of borrowers pay as a disguised cost of credit.<sup>33</sup>

These practices regarding the use of “tips,” expedite fees and other purportedly voluntary charges materially interfere with consumers’ ability to understand the costs of credit, take advantage of that lack of understanding, and take advantage of consumers’ inability to protect their interests. The CFPB should list examples in the Policy Statement.

Finally, the CFPB must rescind a 2020 advisory opinion on earned wage advances that is being used as cover for abusive misrepresentations that products are not credit under federal or state law.<sup>34</sup> While the 2020 CFPB opinion dealt only with programs that are completely free, under different leadership, the faulty and legally inaccurate discussion of when a product creates and allows deferred repayment of “debt” has been taken out of context to claim that these advances are not “credit” under the Truth in Lending Act. As the National Consumer Law Center urged nearly two years ago,<sup>35</sup> the CFPB must rescind that advisory opinion to prevent lenders from using it in their continued effort to materially interfere with consumers’ understanding of these products.

*D. Lending with insufficient regard to ability to repay is abusive.*

The CFPB explains that at the “core” of the 2007-08 financial crisis were mortgage lenders “profiting ... on loans that set people up to fail because they could not repay.”<sup>36</sup> There are many ways in which lending without regard to ability to repay is abusive.

This discussion focuses directly on the abusive standard. But making loans without a reasonable expectation that the consumer will be able to repay the loan on its original terms, without reborrowing and while meeting other expenses, may also be found to be unfair, deceptive, or unconscionable.<sup>37</sup> Elements of those findings may also be relevant to a finding of abusiveness. Similarly, the numerous elements of federal law and guidances that emphasize the importance of

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<sup>32</sup> DFPI SoLo Funds Consent Order at 7.

<sup>33</sup> See NCLC, CRL, CFA & AFR, [Consumer Comments to the CFPB Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services](#) (May 2, 2022).

<sup>34</sup> CFPB, Advisory Opinion, Earned Wage Access Programs, 85 Fed. Reg. 79404 (Dec. 10, 2020).

<sup>35</sup> See [Letter From NCLC & CRL to Rohit Chopra Re: Concern about prior leadership’s finding that certain earned wage access products are not “credit” under TILA](#) (Oct. 12, 2021); [Letter from 96 consumer, labor, civil rights, legal services, faith, community and financial organizations and academics to Rohit Chopra](#) (Oct. 12, 2021).

<sup>36</sup> 88 Fed. Reg. at 21884; see id. at n. 6, 8, 10.

<sup>37</sup> See NCLC, Unfair and Deceptive Acts and Practices § 6.3 (10<sup>th</sup> ed. 2021) (improvident extensions of credit as a UDAP violation), updated at [library.nclc.org](#); NCLC, Consumer Credit Regulation § 2.4.8.5 (3d ed. 2020), updated at [library.nclc.org](#) (improvident lending as unconscionable), § 2.4.8.6 (terms other than interest rate as unconscionable).

ability to repay also support a finding that failure to sufficiently underwrite for ability to repay is abusive.<sup>38</sup>

Predatory lending will primarily fall under the second abusiveness prohibition: leveraging the consumer's circumstances to take unreasonable advantage. However, as discussed above, there may also be ways in which predatory lenders materially interfere with the consumer's ability to understand.

First, set-up-to-fail lending takes advantage of consumers' lack of understanding of the material risks and costs of the loan. The CFPB correctly states that a "person may lack understanding of risks, costs, or conditions, even if they have an awareness that it is in the realm of possibility that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product or service."<sup>39</sup>

Lenders that charge high interest rates have a much deeper understanding than borrowers of the likelihood that consumers will struggle to repay the loan and may ultimately default. They take advantage of consumers' lack of understanding by designing lending programs where the lender wins even if the borrower has difficulty repaying.<sup>40</sup> With higher rate loans, the consumer injury is greater, but the lender's incentive to make affordable loans is lower. High-cost lenders take advantage of vulnerable consumers, which is an element of abusiveness.

Because many high-cost lenders obtain authorization for automatic electronic repayment and often arrange for payments to be due on or near the borrower's payday, the lenders are often able to collect even if the borrower cannot afford to make the payment while covering other essential expenses, or if the payment triggers an overdraft and overdraft fee. Borrowers may manage to make payments for a while, but they often cannot sustain those payments for the life of the loan, or do so at the cost of being unable to pay for other expenses.

Similarly, auto title lenders take unreasonable advantage of consumers by using a powerful security mechanism that will coerce people to make unaffordable payments out of fear of losing their car. The lender may come out ahead even if the borrower defaults and the lender repossesses the car. The lenders take advantage of consumers' lack of understanding of the risks of these loans and their inability to protect their interests while struggling to make unaffordable payments.

A CFPB enforcement action involving debt settlement is also instructive about predatory lending. The debt settlement organization engaged in abusive practices by signing up and charging fees to vulnerable consumers whom the defendants knew had inadequate income to complete the debt relief programs.<sup>41</sup> As a result, consumers spent their last savings on fees for services from which

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<sup>38</sup> See NCLC, Federal ability-to-repay requirements for small dollar loans and other forms of non-mortgage lending (Nov. 2021), [https://www.nclc.org/wp-content/uploads/2022/08/IB\\_ability\\_to\\_pay.pdf](https://www.nclc.org/wp-content/uploads/2022/08/IB_ability_to_pay.pdf).

<sup>39</sup> 88 Fed. Reg. at 21887 & n.56.

<sup>40</sup> See generally, NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016), <https://www.nclc.org/issues/misaligned-incentives.html> (NCLC, *Misaligned Incentives*).

<sup>41</sup> Complaint, [Consumer Fin. Prot. Bureau v. Freedom Debt Relief, L.L.C.](#), No. 3:17-cv-06484 (N.D. Cal. Nov. 8, 2017), available at <https://files.consumerfinance.gov>; Complaint, [Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols., Inc.](#), No. 9:13-cv-80548 (S.D. Fla. May 30, 2013), available

they would not benefit. The CFPB's complaint alleged that the defendant's acts took unreasonable advantage of consumers' lack of understanding of how long it would take the defendant to settle their debts.

E. *High-cost lending takes unreasonable advantage of consumers' lack of understanding of how payments make little progress repaying principal and the difficulty in repaying the loan.*

Beyond the sheer unaffordability of payments for the full term of the loan, another way in which high-cost lending is abusive is the way interest rates and longer terms combine to create payments that go primarily to interest for many months and sometimes even years. Predatory lenders who take advantage of consumers' lack of understanding of how little progress their payments make towards repaying principal; how long it will take to make a significant dent in the principal and to pay the loan in full; and how difficult it will be to make those payments for the life of the loan.

High-cost installment loans and lines of credit frequently leave consumers shocked and in distress when they realize that hundreds or thousands of dollars of payments have done almost nothing to reduce the principal. There are many complaints that the CFPB and complaint websites have received against high-cost lenders including EasyPay Finance,<sup>42</sup> American First Finance,<sup>43</sup> Elevate Credit's Rise installment loan,<sup>44</sup> Opportunity Financial,<sup>45</sup> Personify,<sup>46</sup> LoanMart,<sup>47</sup> Check 'no Go's Xact,<sup>48</sup> Elevate's Elastic line of credit,<sup>49</sup> Enova's Net Credit<sup>50</sup> and others. These lenders take unreasonable advantage of consumers' lack of understanding of how they will be trapped in high-cost loans.

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at <https://files.consumerfinance.gov>. See also Stipulated Final Judgment & Order, [Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols., Inc.](#), No. 9:13-cv-80548 (S.D. Fla. June 7, 2013), available at <https://files.consumerfinance.gov>.

<sup>42</sup> See [Letter from NCLC et al. to FDIC Acting Chairman Martin Gruenberg re: Community Reinvestment Act examination of Transportation Alliance Bank](#) (June 30, 2022); Stop the Debt Trap, [Predatory Auto Repair Loans By TAB Bank and EasyPay Finance](#) (May 2022); Stop the Debt Trap, [Predatory Puppy Loans by TAB Bank and EasyPay Finance](#) (Feb. 2022).

<sup>43</sup> See [Letter from NCLC et al. to FDIC Chairman Martin Gruenberg re Community Reinvestment Act examination of FinWise Bank](#) (Mar. 14, 2023) (describing complaints against American First Finance, Elevate's Rise, and Opportunity Financial).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See [Letter from NCLC et al. to FDIC Chairman Martin Gruenberg re Community Reinvestment Act examination of First Electronic Bank](#) (Mar. 21, 2023) (describing complaints against Opportunity Financial and Personify).

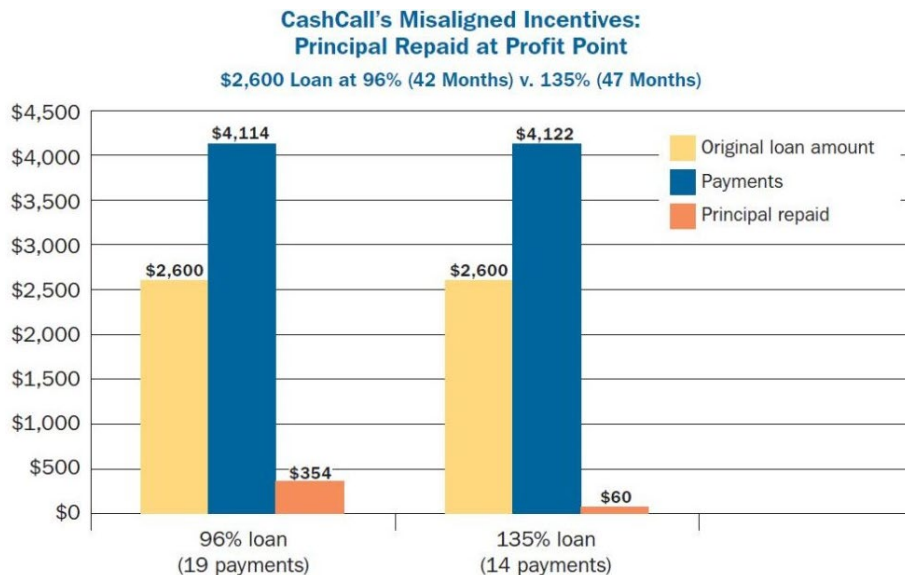
<sup>47</sup> See Letter from NCLC et al. to FDIC Chairman Martin Gruenberg re Community Reinvestment Act examination of Capital Community Bank (Mar. 30, 2023) (describing complaints against Wheels Financial dba LoanMart and Choice Cash, CNG Financial's Xact, and others).

<sup>48</sup> *Id.*

<sup>49</sup> Republic Bank CRA Letter, *supra*, at 12-14.

<sup>50</sup> Republic Bank CRA Letter, *supra*, at 9-12.

Skewed amortization schedules also contribute to set-up-to-fail lending where the lender can profit even if the consumer ultimately defaults. The lender need only collect enough interest payments to cover the principal and a profit. The follow chart compares shows how little principal borrowers had repaid on two CashCall loans at the point at which CashCall had recovered its principal plus a generous margin for expenses. CashCall was already offering an abusive 96% APR \$2,600 loan with a 42-month term. CashCall then increased the interest rate and the term in a way that allowed it to make a profit if the consumer made only 14 payments on a 47-month, 135% loan for \$2,600, despite only officially paying off \$60 of the loan at that point.<sup>51</sup> Many consumers ended up defaulting even while CashCall made a profit, as shown in this chart:<sup>52</sup>



These practices take unreasonable advantage of consumers' lack of understanding of the difficulty in repaying the loan and of consumers' inability to protect their interests once they are stuck in a loan. The CFPB should include this type of example in the Policy Statement.

F. *Conduct that induces reborrowing or refinancing of unaffordable loans is abusive.*

Predatory lenders often compound the abusiveness of their unaffordable loans by pushing consumers to reborrow or refinance their loans, thus extending their time in debt, inhibiting their ability to repay the initial loan, and greatly compounding the cost of the loan. These practices take unreasonable advantage of the consumers' lack of understanding of the impact of reborrowing or refinancing and also of their inability to protect their interests once caught in an unaffordable loan.

In an administrative consent order, the CFPB concluded that ACE Cash Express collectors created and leveraged an artificial sense of urgency to induce delinquent borrowers with a demonstrated

<sup>51</sup> NCLC, *Misaligned Incentives*, *supra*.

<sup>52</sup> NCLC, *Misaligned Incentives*, *supra*.

inability to repay their existing loans to take out a new ACE loan with accompanying fees.<sup>53</sup> The CFPB found that ACE Cash Express took unreasonable advantage of the consumers' inability to protect their interests and thus engaged in abusive practices.

A federal court has found that ITT, a for-profit school, engaged in such abusive conduct. It took unreasonable advantage of students in the school's lending practices by giving students little choice after enrollment but to take out new high-priced private loans with ITT. ITT's initial loans to those students (with much lower interest rates) had to be repaid before the course was completed even though ITT knew this would be impossible. The students were therefore left with the choice of taking out a new loan from the school or not completing the course, in which case the partial course credits would not be transferable to another school.<sup>54</sup>

Additional examples are discussed below in connection with the 2017 payday loan rule.

*G. The 2017 payday rule illustrates examples of abusive conduct.*

The 2017 rule on payday, auto title and similar loans has extensive discussion about how the practices of those lenders were abusive. The CFPB accurately noted that, even though the ability to repay rule itself was repealed in 2020, the repeal does not prevent the Bureau from the "appropriate exercise of supervision and enforcement tools" and "does not prevent the Bureau from exercising its judgment in light of factual, legal, and policy factors in particular circumstances as to whether an act or practice meets standards for abusiveness ...."<sup>55</sup>

We believe that the CFPB correctly analyzed abusiveness in the discussion of the 2017 rule. We briefly summarize here some of the elements of that analysis that shed light on what conduct is abusive.

The CFPB found that lenders were taking unreasonable advantage at two different stages of the loan process.

The lenders initially took unreasonable advantage by making loans to consumers without any idea as to whether they could repay the loan. The payday lenders were "out of step with traditional lender-borrower relationships in other loan markets, where the success of the lender is intertwined with the success of the borrower and determinations about loans that will be offered and accepted are preceded by underwriting assessments and determinations of this kind. Instead, the profitability of these lenders is built on, and depends upon, repeat re-borrowing by customers."<sup>56</sup>

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<sup>53</sup> Consent Order, *In re ACE Cash Express*, CFPB No. 2014-CFPB-0008 (July 8, 2014), available at [www.nclc.org/unreported](http://www.nclc.org/unreported).

<sup>54</sup> *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015). See also *Illinois v. Alta Colleges*, 2014 WL 4377579 (N.D. Ill. Sept. 4, 2014) (state attorney general action brought under CFPB's standard of abuse can proceed); Complaint, *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014), available at [www.nclc.org/unreported](http://www.nclc.org/unreported).

<sup>55</sup> 88 Fed. Reg. at 21887 n. 56 (quoting 85 Fed. Reg. 44382, 44414 n. 285 (July 22, 2020)).

<sup>56</sup> 82 Fed. Reg. at 54622.

While consumers certainly understand that they are taking out a loan that must be repaid by a certain date, and that there are consequences for non-payment, they do not understand how severe the impact of non-payment is or that non-payment is very likely for these loans. As the CFPB noted, “[m]any consumers who take out these loans appear not to understand, when they first take out the loan, how long they are likely to remain in debt and how costly and harmful that situation could be for them.”<sup>57</sup> This lack of understanding is caused in part by the extreme financial distress borrowers often face when taking out these loans. “[C]onsumers in extreme financial distress tend to focus on their immediate liquidity needs, rather than potential future costs, in a way that makes them highly susceptible to lender marketing.”<sup>58</sup>

Then, when the consumer cannot repay the loan at the time it is due, the lender provides the borrower with few or no repayment options other than full repayment at once or rolling over the loan into a new loan at the same high interest rates. Low-cost repayment or amortization options are not presented.<sup>59</sup> “Lenders have designed the term of the loan, its balloon-payment structure, and the common use of leveraged payment mechanisms, including vehicle security, so as to magnify the risks and harms to the borrower. The disparity between how these loans appear to function and how they actually function increases the difficulties that consumers experience with these loans.”<sup>60</sup>

In summary, the CFPB found that lenders take unreasonable advantage “when they develop lending practices that are atypical in the broader consumer financial marketplace, take advantage of particular consumer vulnerabilities, rely on a business model that is directly inconsistent with the manner in which the product is marketed to consumers, and eliminate or sharply limit feasible conditions on the offering of the product (such as underwriting and amortization, for example) that would reduce or mitigate harm.”<sup>61</sup>

The CFPB also explained consumers’ inability to protect their own interests with respect to payday, auto title, and similar loans. Consumer lack of understanding and inability to protect their own interests often go hand in hand. But consumers may also be unable to protect their own interests even when they understand the risks and costs.<sup>62</sup>

Borrowers may have an immediate need for credit and cannot identify alternatives. “Because they find themselves in such vulnerable circumstances when they are deciding whether to take out an initial covered short-term loan, they are unable, as a practical matter, to protect their interests.”<sup>63</sup>

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<sup>57</sup> 82 Fed. Reg. at 54615.

<sup>58</sup> 82 Fed. Reg. at 54616.

<sup>59</sup> 82 Fed. Reg. at 54622.

<sup>60</sup> 82 Fed. Reg. at 54623.

<sup>61</sup> 82 Fed. Reg. at 54623.

<sup>62</sup> 82 Fed. Reg. at 54619.

<sup>63</sup> 82 Fed. Reg. at 54619.

After they are unable to pay for the first loan, the borrower is in even more difficult circumstances. “An unaffordable first loan can thus ensnare consumers in a cycle of debt with no reasonable means to extricate themselves without incurring further harm, rendering them unable to protect their interests in selecting or using these kinds of loans.”<sup>64</sup>

A finding that consumers are unable to protect their own interests does not depend on there being no possible way for consumers to do so. The CFPB stated that this standard should be interpreted in a practical manner under the circumstances.<sup>65</sup> “[C]onsumers who take out a covered short-term loan in the circumstance of their urgent need for funds, lack of awareness or availability of better alternatives, and no time to shop for such alternatives, are unable to protect their interests in selecting and using such a loan.”<sup>66</sup>

The CFPB also noted that abusiveness based on inability to protect one’s own interests is not limited to inability caused by infirmity, ignorance, illiteracy, or inability to understand the language of an agreement.<sup>67</sup> The CFPB’s abusiveness standard has no such limitation.

H. *Lending that violates applicable state laws, including interest rate limits, is abusive.*

Another form of predatory lending involves attempts to evade applicable state laws in order to make high-cost loans that violate state interest rate limits.

One example of such lending is loans that purport to come from a Native American tribe. Whether or not the lender is actually an arm of the tribe, which is often questionable, tribal sovereign immunity does not exempt the lender from state law when the loan is made to a consumer off reservation. At most, it gives the tribal lender certain immunity from being sued directly, but the loan remains illegal.

Another example is rent-a-bank loans that claim to be protected by banks’ rate exportation powers when the true lender is actually a nonbank subject to state interest rate limits.

These loans are abusive because they take unreasonable advantage of the consumers’ lack of understanding that the loans are illegal. In addition, efforts to collect these loans are abusive because they exploit the lack of understanding that the interest, and in some states, the entire principal is void and uncollectable.

Thus, a federal court found that the CFPB adequately pled the abusive standard where it alleged that borrowers lacked an understanding of the law applicable to the loans in question and how those laws affected repayment obligations.<sup>68</sup> This was based on the fact that the loans were void

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<sup>64</sup> 82 Fed. Reg. at 54620.

<sup>65</sup> 82 Fed. Reg. at 54620.

<sup>66</sup> 82 Fed. Reg. at 54620.

<sup>67</sup> 82 Fed. Reg. at 54620.

<sup>68</sup> See *Consumer Fin. Prot. Bureau v. Think Fin., L.L.C.*, 2018 WL 3707911 (D. Mont. Aug. 3, 2018). See also Proposed Stipulated Final Judgment & Order, *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 1:15-cv-05211-CM (S.D.N.Y. Feb. 1, 2019), available at <https://files.consumerfinance.gov>; Complaint, *Consumer Fin. Prot. Bureau v. Golden Valley Lending, Inc.*, No. 1:17-cv-03155 (N.D. Ill. Apr. 27, 2017), available



under state law and that the creditor sought to collect on these loans, which the consumers did not understand that they did not owe. This was actionable even if the creditor did not interfere with the borrower's understanding and did not fail to disclose material loan terms. The creditor was taking advantage of the consumers' lack of understanding.

Similarly, the CFPB has accepted a consent order from a lead generator that sold leads to small loan lenders. According to the consent order, the company conveyed information to lenders where it knew that the loan product in the consumer's state of residence would be void in whole or in part. This took unreasonable advantage of the consumer's lack of understanding of material risks, costs, and conditions of a consumer financial product or service.<sup>69</sup>

I. *Other examples of abusive conduct by predatory lenders.*

The CFPB agreed to a consent order where a check casher took unreasonable advantage of the consumers' lack of understanding that it would withhold "some or all of the check proceeds to satisfy consumers' outstanding debt" from an unrelated transaction, such as a previous loan.<sup>70</sup> Although the check casher provided written disclosures of the set-off practice, it also had a policy of instructing its employees not to inform consumers that it would deduct any outstanding debts from the consumer's check proceeds and to keep checks out of the consumer's reach until the check-cashing transaction was complete.

This practice is reminiscent of the actions by many payday lenders and other predatory lenders who orally disclaim the significance of the APR or other important terms in order to persuade them to take out a loan.

The CFPB should include this example, as well as the other examples of abusive predatory lending discussed above, in its Policy Statement.

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at <https://files.consumerfinance.gov>; Complaint, [Consumer Fin. Prot. Bureau v. NDG Fin. Corp.](#), No. 1:15-cv-05211-CM (S.D.N.Y. July 31, 2015), available at [www.nclc.org/unreported](http://www.nclc.org/unreported); Consent Order, [Consumer Protection Bureau v. Colfax Capital Corp.](#), CFPB No. 2014-CFPB-0009 (July 29, 2014), available at <https://files.consumerfinance.gov>; Complaint, [Consumer Fin. Prot. Bureau v. CashCall, Inc.](#), No. 1:13-cv-13167-GAO (D. Mass. Mar. 21, 2014), available at [www.nclc.org/unreported](http://www.nclc.org/unreported). Cf. [Consumer Fin. Prot. Bureau v. NDG Fin. Corp.](#), 2016 WL 7188792 (S.D.N.Y. Dec. 2, 2016) (finding that practice could be abusive because it materially interferes with consumers' ability to understand; court did not reach question of whether it takes unreasonable advantage of a consumer's ability to understand); [Consumer Fin. Prot. Bureau v. CashCall, Inc.](#), 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (finding practice deceptive, so not having to reach whether practice was also unfair or abusive).

<sup>69</sup> Consent Order, [In re Zero Parallel L.L.C.](#), CFPB No. 2017-CFPB-0017 (Sept. 6, 2017), available at <https://files.consumerfinance.gov>.

<sup>70</sup> Consent Order, [In re Cash Express, L.L.C.](#), CFPB No. 2018-CFPB-0007 (Oct. 24, 2018), available at <https://files.consumerfinance.gov>.

## II. Abusive Practices in Auto Financing

Over 91% of American households have access to at least one vehicle<sup>71</sup>, and auto purchase financing is now the third highest form of consumer debt, behind only houses and student loans. This debt has doubled in the past ten years and is now up to a staggering \$1.5 trillion.<sup>72</sup> Although the dollar amount of auto financing debt is less than the dollar amount of mortgage credit or student loan credit, the number of vehicle financings each year far exceeds the total number of both mortgage and student loans combined, and each origination is a potential opportunity for abuse by dealers and finance entities.<sup>73</sup>

The unique relationship between consumers and auto creditors embodies many of the concerns raised by the CFPB in its Policy Statement, both in the context of indirect auto financing and of buy-here-pay-here (BHPH) dealers. Many of the concerns that precipitated the mortgage crisis are becoming urgently present in the auto financing industry,<sup>74</sup> and the CFPB should take special care to continue to carefully evaluate these relationships for abusive conduct by the entities over which they have jurisdiction.

### *A. Traditional Auto Financing*

“Automobiles are the only regular major purchase that is financed primarily by the seller.”<sup>75</sup> Often referred to as “indirect” auto financing, these transactions occur when a consumer finances the purchase of a vehicle through the dealership. In this scenario, the consumer does not typically select the creditor to whom they ultimately make their monthly payments and who services the finance contract to completion. The consumer selects the dealer that obtains the consumer’s credit history and information. The dealer, typically after consulting with potential assignees, decides whether to offer to extend credit to the consumer. The dealer then assigns the retail installment sales contract (RISC) to a finance entity (creditor) of its choosing. The ultimate creditor purchases the RISC from the dealer and services that extension of credit for the life of the contract.

The consumer has no control or even knowledge of which assignees the dealer may select and is therefore not able to protect their own interests in selecting or using the indirect creditor. Importantly (and unbeknownst to the consumer), this decision is frequently influenced by the

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<sup>71</sup> Jonathan Lanning, Federal Reserve Bank of Chicago “The Importance of Cars and Car Loans for People with Low and Moderate Incomes” (July 15, 2022) available at <https://www.chicagofed.org/publications/blogs/cdps/2022/importance-cars-and-car-loans>.

<sup>72</sup> See Ryan Kelly et al., Consumer Fin. Prot. Bureau, *Rising prices means more auto loan debt* (Feb. 24, 2022), available at <https://www.consumerfinance.gov/about-us/blog/rising-car-prices-means-more-auto-loan-debt/>.

<sup>73</sup> See, National Consumer Law Center, *New Ways to Understand the Impact of Auto Finance on Low-Income Families* (May 2016), available at [http://www.nclc.org/images/pdf/car\\_sales/ibImportance\\_AutoFinanceFINAL53116.pdf](http://www.nclc.org/images/pdf/car_sales/ibImportance_AutoFinanceFINAL53116.pdf).

<sup>74</sup> David Straughan, *Negative Equity Surges: Millions of Americans Now Underwater on Auto Loans*, AUTOMOBLOG (June 14, 2023), <https://www.automoblog.net/negative-equity-surge-auto-loans/>.

<sup>75</sup> Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Geo. L.J. 1257, 1262 (2020), available at [https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin\\_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf](https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf)

financial incentives the assignee provides to the dealer for selling that contract. The assignee and dealer have an agreed-upon “buy rate,” which is the rate the creditor quotes to the dealer to purchase the RISC. The dealer may offer the consumer a rate that is higher than this secret buy rate, and the “difference” is split between the dealer and the assignee. This information is intentionally withheld from the consumer when they purchase the car. Dodd-Frank banned similar conduct called a “yield spread premium” in the mortgage context because of its widespread abuse during the mortgage crisis. Consumers do not know about these secret incentives that can dramatically affect the cost of their financing, and they have no ability to control these decision-making factors.

Creditors also have control over the pricing of certain add-on products and services, which are increasingly high due in part to increased visibility of and challenges to the interest rate markups described above – creditors need another way to compete for dealers’ business.<sup>76</sup> Consumers have no information about the prices or limits for add-ons set by creditors, or how the loan to value ratio of a particular transaction can be manipulated to include as many add-ons as possible. Inflated prices of valueless add-ons can make the transaction less affordable for a consumer, increasing the likelihood of default, repossession, and continued collections.

Although the auto dealer is the original lender for consumers who finance the purchase of their vehicles at the dealership, and dealers are bound by consumer financial protection laws to accurately advise consumers about their credit obligations, the CFPB is more limited in its ability to directly address the conduct of auto dealers due to the exemption language in 12 USC § 5519. This “behind the scenes” relationship of auto dealers and finance companies and its impact on consumers is an important factor that should guide the CFPB’s analysis of abusive conduct by auto creditors and whether they are taking unreasonable advantage of this relationship due to consumers’ inability to protect their interests in selecting and using the ultimate creditor and their reasonable reliance on the dealer.

An example comes from the CFPB’s recent Supervisory Highlights report regarding junk fees. It describes abusive auto creditor conduct which takes unreasonable advantage of consumers’ inability to protect their own interests by imposing certain junk fees.<sup>77</sup> The report discusses auto creditors imposing payment processing fees for payments made by a method other than ACH or mailed checks (i.e., only permitting free payments for those who can use a bank account). For the 90% of payments made by such other methods, the CFPB found that creditors imposed a processing fee that far exceeded the actual cost of processing the payment, and that this took unreasonable advantage of consumers’ inability to protect their own interests because the dealer selected the creditor that imposed these fees – not the consumer.

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<sup>76</sup> See John W. Van Alst, Carolyn Carter, Marina Levy, and Yael Shavit, National Consumer Law Center, *Auto Add-Ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary, and Discriminatory Pricing* (Oct. 2017), at 36-41, available at <https://www.nclc.org/issues/auto-Add-ons-add-up.html>

<sup>77</sup> Available at [https://files.consumerfinance.gov/f/documents/cfpb\\_supervisory-highlights-junk-fees-special-edition\\_2023-03.pdf](https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf).

The relationship between consumers and auto creditors is also dominated by an extreme power imbalance in favor of the creditor. Creditors have a secured interest in the vehicle, and, in the vast majority of instances, the ability to use self-help repossession, the threat of which provides them with enormous leverage over consumers. Creditors can use the threat of taking the consumer's vehicle as an incredibly effective tool to force payment. Vehicles provide access to work, healthcare, school, childcare and other necessities of living. The very real threat of losing that car may cause consumers to prioritize their auto payments higher than other bills or household expenses, putting lenders in a powerful position to take unreasonable advantage of this relationship.

Auto creditors may also exploit this power imbalance by utilizing powerful electronic repossession methods to take unreasonable advantage of consumers' inability to protect their interests. Electronic repossession involves the installation of electronic devices designed to pressure consumers into making payments or assist the creditor in the repossession process.<sup>78</sup> These devices can range from making annoying sounds that can only be deactivated by the creditor, to GPS devices which report the vehicle location to the creditor, or starter-interrupt devices which allow the creditor to remotely disable the vehicle until the consumer becomes current on their payments.<sup>79</sup>

The use of electronic repossession methods is more prevalent among finance entities who target subprime and deep subprime consumers. These consumers often believe that they have few options for credit. Dealers and finance entities capitalize on this insecurity by saddling consumers with higher interest rates, undisclosed inflated prices, and electronic repossession tactics. The creditor may be selected by the dealer as described above, or the lender and dealer may be one and the same, also known as a buy-here-pay-here (BHPH) dealer.

### *B. Buy-Here-Pay-Here Dealers*

BHPH dealers, in contrast to the finance companies described above, are not exempt from the CFPB because they maintain the financing "in-house" and do not routinely assign it to a third party. *See* 12 U.S.C. § 5519(b)(2). These dealers over which the CFPB maintains jurisdiction often specifically target consumers who believe they do not have access to traditional credit due to a thin or troubled credit history. This puts BHPH dealers in a prime position to take unreasonable advantage of consumers who need a vehicle (arguably low-income consumers rely more heavily on access to a vehicle) and may be more susceptible to dealer tactics that result in harmful outcomes because they are less likely or able to find other vehicle financing options. Consumers in this position are often less capable of protecting their own interests.

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<sup>78</sup> *See* generally, Chapter 6.6 "Electronic Repossessions" in *Repossessions*, National Consumer Law Center" (10<sup>th</sup> Ed. 2022).

<sup>79</sup> Michael Corkery & Jessica Silver-Greenberg, "Miss a Payment? Good Luck Moving That Car." *New York Times* (Sep. 14, 2014), quoting a credit union lender who reported that he "disabled a car while I was shopping at Walmart," because "it gets their attention" available at [https://archive.nytimes.com/dealbook.nytimes.com/2014/09/24/miss-a-payment-good-luck-moving-that-car/?\\_r=0](https://archive.nytimes.com/dealbook.nytimes.com/2014/09/24/miss-a-payment-good-luck-moving-that-car/?_r=0)

As described above in the section on predatory lending, designed-to-fail lending is abusive and was a core reason the CFPB was enacted. In the BHPH context as well, dealer incentives may be less aligned with successful consumer outcomes, because defaults and repossessions may actually be more beneficial to BHPH dealers than a consumer's successful completion of making financing payments.<sup>80</sup>

The backwards incentives of BHPH dealers are evidenced by their inventory, which is often made up of vehicles that have previously been sold to other consumers and repossessed. The New Jersey Attorney General's 2019 case against two BHPH dealers alleged that the dealers repossessed and resold multiple vehicles ("churning") five to eight times each.<sup>81</sup> BHPH transactions also often involve sizable down payments for lower cost cars that often represent an immediate breakeven if not an outright profit for dealers.<sup>82</sup> These down payments combined with aggressive churning conduct mean that BHPH dealers can make more money from multiple repossessions and sales of the same vehicle than they would from the successful completion of a single financing of a single vehicle over the same period of time. These "misaligned incentives" of many BHPH dealers are a prime example of how they are in a position to take unreasonable advantage of consumers who cannot protect their own interests.<sup>83</sup>

In addition, BHPH dealers may be in a position to materially interfere with consumers' ability to review the terms and conditions of the contracts they sign.<sup>84</sup> The use of the electronic signature process may be abused to the point where BHPH dealers are not providing each of the documents to consumers for review, speeding through the e-signature process, or failing to provide consumers with copies of their electronically signed paperwork. These practices are similar to those described above in the section on "Predatory lenders operating in retail or mobile settings may materially interfere with consumers' ability to understand disclosures and agreements entered into electronically."

BHPH dealers can abuse this process to hide fees, add-ons, or permissions to utilize GPS trackers or other methods of electronic repossession. Some BHPH dealers do not advise consumers at all that the vehicles they have purchased are equipped with electronic repossession tools, such as a

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<sup>80</sup> Ken Bensinger "A Vicious Cycle in the Used Car Business," L.A. Times (Oct. 30 – Nov. 2, 2011, available at <https://www.latimes.com/projects/la-fi-buyhere-payhere/> .

<sup>81</sup> *Gurbir Grewal, Attorney General of New Jersey v. Nu 2 U Auto World, LLC et al.* Complaint, Case No. C18-19 (March 5, 2019), at para. 38, , available at [https://www.nj.gov/oag/newsreleases19/NU-2-U\\_Filed-Complaint.pdf](https://www.nj.gov/oag/newsreleases19/NU-2-U_Filed-Complaint.pdf)

<sup>82</sup> *Id.* at Para. 29, describing how two BHPH dealers required excessively high up-front payments for vehicles with inflated prices.

<sup>83</sup> This is similar to the abusive conduct alleged by the CFPB in its enforcement action against the predatory auto finance company, Credit Acceptance Corporation (CAC), where it alleges that CAC's business model accurately created and predicted a high rate of defaults and was indifferent to the devastating consequences for consumers as a result. *See* Complaint, available at [https://files.consumerfinance.gov/f/documents/cfpb\\_credit-acceptance-corporation\\_complaint\\_2023-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_credit-acceptance-corporation_complaint_2023-01.pdf)

<sup>84</sup> This conduct is not limited to BHPH dealers and likely occurs at other dealerships as well. To the extent that the assignee/creditor requires or incentivizes this conduct by the dealer, it may be liable for this abusive conduct as well.

GPS tracker.<sup>85</sup> This omission of information amounts to abusive material interference with the consumer’s ability to understand material terms and conditions of the contract.

### III. The Inability of Consumers to Protect their Interests – Prison Financial Services Leave Consumers With No Choice But To Enter Into a Relationship With a Service Provider.

One context in which consumers often have no choice but to enter into a relationship is in the carceral system. In its Policy Statement, the CFPB notes that consumers may be unable to protect their interests if they “lack the practical ability to switch providers, seek more favorable terms, or make other decisions to protect their interests.”<sup>86</sup> All of these features characterize the financial products and services forced upon incarcerated people and their families. Two financial products and services stand out as particularly problematic due to the abusive conduct that frequently accompanies them: (1) release cards and (2) money-transfer services.

#### *A. Release Cards*

When people leave prison or jail, so does their money. Upon leaving custody, people often have money left in their inmate trust account<sup>87</sup>—whether from accumulated earnings; support from family; or, in the case of a short-term jail stay, a return of whatever cash they had in their possession when arrested.

In the past, people received their money in the form of cash or a check. But, working in concert with private-equity backed financial services firms, correctional facilities have increasingly given released people their money in the form of a prepaid debit card, known in correctional circles as a “release card.”<sup>88</sup> Oftentimes, people have no choice but to receive their money from a release-card company that has an exclusive contract with the correctional facility from which they are being released. Many companies take unreasonable advantage of consumers’ absence of choice to force them to pay outrageous fees to access their own money. Indeed, the CFPB cites the conduct of one release-card company, JPay, as an example of this type of abusive practice.<sup>89</sup>

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<sup>85</sup> See *United States et al. v. Auto Fare, Inc., et al.*, (D. N.C.) Complaint (Jan 1. 2014), Para. 22, available at <https://www.justice.gov/sites/default/files/crt/legacy/2014/01/14/autofarecomp.pdf>.

<sup>86</sup> CFPB, Policy Statement on Abusiveness, 7; see also *id.* at 15 (“In these circumstances, people cannot protect their interests by choosing an alternative provider either upfront (i.e., they have no ability to select the provider to begin with) or during the course of the customer relationship (i.e., they have no competitive recourse if they encounter difficulty with the entity while using the product or service).”).

<sup>87</sup> “Trust account” is a term of art in the correctional sector, referring to a pooled bank account that holds funds for incarcerated people whose individual balances are sometimes treated as subaccounts. The term “trust” is used because the correctional facility typically holds the account as trustee, for the benefit of the individual beneficiaries (or subaccount holders). See, e.g., Wanda Bertram, *The CFPB’s Enforcement Order Against Prison Profiteer JPay, Explained*, Prison Policy Initiative, n.l (Oct. 28, 2021), available at <https://www.prisonpolicy.org/blog/2021/10/28/cfpb-jpay/#lf-fnref:1>.

<sup>88</sup> Stephen Raheer, *Insufficient Funds: How Prison and Jail “Release Cards” Perpetuate the Cycle of Poverty*, Prison Policy Initiative (May 3, 2022), available at <https://www.prisonpolicy.org/blog/2022/05/03/releasecards/>; see also Worth Rises, *The Prison Industry: How It Started. How It Works. How It Harms* 59, 62–63, available at <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/621682209bb0457a2d6d5cfa/1645642294912/The+Prison+Industry+How+It+Started+How+It+Works+and+How+It+Harms+December+2020.pdf>.

<sup>89</sup> CFPB, Policy Statement on Abusiveness, n.42 & n.68.

We applaud the CFPB’s action against JPay, which exemplifies the importance of this Policy Statement for protecting consumers against abusive conduct in this area. Unfortunately, JPay is far from the only release-card company engaged in abusive practices. The Prison Policy Initiative (PPI), a non-profit, non-partisan organization, conducted a survey of 48 active release cards issued by five different financial institutions, using the CFPB’s prepaid product agreements database.<sup>90</sup> PPI’s survey revealed widespread abusive conduct, with companies taking unreasonable advantage of consumers’ lack of choice to charge them for things like having an account (“periodic maintenance fees”), using their account (“purchase fees”), not using their account (“account closure fees”), and declined purchases. These fees stand out as particularly abusive because they do not appear to compensate card issuers for real costs. These problematic charges are described in more detail in recent comments to the CFPB<sup>91</sup> and FTC.<sup>92</sup>

### *B. Money Transfer Services*

Money-transfer services are also frequently accompanied by abusive practices. Correctional facilities are supposed to provide a basic level of subsistence to people who are incarcerated. But unfortunately, incarcerated people’s loved ones must often pick up the slack by sending in money for basic necessities like hygiene products, food, and paper from the commissary.<sup>93</sup>

Sending money to someone in prison or jail typically requires dealing with a private company that handles money transfers.<sup>94</sup> As with release-card companies, these companies are often awarded an exclusive contract with a particular correctional facility, and they often take unreasonable advantage of their status as consumers’ only option to extract outrageous fees.

PPI recently reviewed the money-transfer setups in all state prisons and found that these fees are alarmingly high. The average is around 20 percent of the principal amount in 26 states that issue monopoly contracts; the highest fees observed were 37 percent.<sup>95</sup> By comparison, services like Venmo, CashApp, Paypal, and Zelle provide *free* automated clearing house (“ACH”) transfers

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<sup>90</sup> See Prison Policy Initiative, Comment Letter in Docket No. CFPB-2022-0003 (Apr. 11, 2022), available at <https://www.regulations.gov/comment/CFPB-2022-0003-2517>, at Ex. 2.

<sup>91</sup> Prison Policy Initiative, Comment Letter in Docket No. CFPB-2022-0003, pp. 7–11 (Apr. 11, 2022), available at <https://www.regulations.gov/comment/CFPB-2022-0003-2517>.

<sup>92</sup> NCLC, et al., Comment Letter in Docket No. FTC-2022-0069-0001, pp. 7–9 (Feb. 16, 2023), available at <https://www.regulations.gov/comment/FTC-2022-0069-6091>.

<sup>93</sup> Incarcerated people obtain many necessities of life at the commissary, a retail outlet that is often operated by a for-profit contractor. Commissary is where people can buy necessary hygiene products and over-the-counter medications; purchase basic supplies like paper, batteries, and small appliances; and supplement the low-quality, too-small, and possibly spoiled or rotten food served in the cafeteria. Ariel Nelson & Stephen Raheer, *Captive Consumers: How government agencies and private companies trap and profit off incarcerated people and their loved ones*, *Inquest* (Mar. 19, 2022), available at <https://inquest.org/captive-consumers/>.

<sup>94</sup> See Worth Rises, *The Prison Industry: How It Started. How It Works. How It Harms* 61–62, available at <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/621682209bb0457a2d6d5cfa/1645642294912/The+Prison+Industry+How+It+Started+How+It+Works+and+How+It+Harms+December+2020.pdf>.

<sup>95</sup> Stephen Raheer & Tiana Herring, *Show Me the Money: Tracking the Companies that Have a Lock on Sending Funds to Incarcerated People*, Prison Policy Initiative (Nov. 9, 2021), available at <https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers/>.

from bank accounts (correctional money-transfer companies do not offer an ACH option), and they offer transfers from a credit or debit card either for free or for a typical fee of 3 percent or less.<sup>96</sup>

The massive disparity between fees for money-transfer services inside versus outside of the correctional sector becomes even more difficult to justify when one considers that correctional money-transfer companies seem to have an *easier* job than their free-world counterparts. Whereas a service like Venmo must facilitate transfers between two large groups of customers (senders and recipients) and manage the resulting complexities that can arise in either group (from errors or disputes), a correctional money-transfer service has only one recipient to deal with under any given contract: the correctional agency that awarded the contract.

In its Policy Statement, the CFPB instructs that “[o]ne may . . . assess whether entities are obtaining an unreasonable advantage by considering whether they are reaping more benefits as a consequence of the statutorily identified circumstances [e.g., unequal bargaining power], or whether the benefit to the entity would have existed if the circumstance did not exist.”<sup>97</sup> The above evidence—namely, the massive disparity in fees charged by correctional money-transfer companies versus their free-world counterparts, despite the fact that the former have an easier task to perform—makes clear that providers of money-transfer services in correctional facilities are taking unreasonable advantage of consumers.

Abusive conduct in the corrections context raises especially grave consumer-protection concerns for at least two reasons. First, incarcerated people have especially limited financial resources: the median income among people entering prison is 41 percent less than the national average,<sup>98</sup> and people have virtually no ability to earn meaningful wages while they are incarcerated.<sup>99</sup> Second, the financial cost of supporting incarcerated family members tends to fall disproportionately on people of color, and Black women in particular, raising important equity considerations.<sup>100</sup> For all of these reasons, the CFPB’s Policy Statement is particularly welcome and important for curbing the widespread abuses in this space, especially in the release card and money-transfer industries.

### *C. Unreasonable advantage due to market share*

The CFPB observes that consumers are often unable to protect their interests if companies have outsized market power. In the markets for financial products and services in correctional facilities,

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<sup>96</sup> *Id.*

<sup>97</sup> CFPB, Policy Statement on Abusiveness, 10.

<sup>98</sup> Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned (2015), available at <https://www.prisonpolicy.org/reports/income.html> (“We found that, in 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than nonincarcerated people of similar ages.”).

<sup>99</sup> Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, Prison Policy Initiative (Apr. 10, 2017), available at <https://www.prisonpolicy.org/blog/2017/04/10/wages/> (showing average hourly wages of 14¢ to 63¢ for typical prison jobs).

<sup>100</sup> Saneta deVuono-powell, et al., Ella Baker Center for Human Rights, Who Pays? The True Cost of Incarceration on Families 9 (2015), available at <https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/>.



companies often have outsized power for two reasons. First, companies commonly possess a monopoly for a particular product or service within a particular correctional facility. Second, oligopolistic dynamics characterize the corrections market more broadly, with two corporations dominating. Both market dynamics grossly distort the proper functioning of the market and help facilitate widespread abusive conduct that causes severe harm to vulnerable consumers.

The prevalence of monopolies for goods and services in correctional facilities—and the harm to consumers caused by them—are well-known to the CFPB. As the CFPB explained in a January 2022 report, fairness and competition “seldom appear in the markets for products and services that capitalize off the criminal justice system, where firms may enter into exclusive relationships with government actors, rather than competing on the basis of consumer choices.”<sup>101</sup> And in its Policy Statement, the CFPB cites the actions of JPay, a prison financial services company, as an example of abusive conduct enabled by JPay’s monopoly status.<sup>102</sup>

Private companies like JPay are often able to secure these exclusive relationships with correctional facilities by paying them large kickbacks, called “site commissions.” More specifically, private companies compete with one another for a contract to provide services in a given correctional facility by offering to make kickback payments. The higher the kickback payment, the more attractive the company’s offer is to the correctional facility. In exchange for these payments, the company requires the correctional facility to make it the exclusive provider of the contracted service. This secures for the company what is, in many cases, a literally “captive market.” Companies pass on the costs of these kickback payments directly to consumers—here, incarcerated people and their loved ones. They do so by aggressively inflating prices and charging excessive fees, which the exclusive terms of their contracts allow them to do without fear of competition. Excessive fees both pad the company’s profits and help finance the large kickback payments to the corrections agency. But they cause substantial, unavoidable harm to consumers least able to afford these high costs.

As noted above, oligopolistic dynamics characterize the corrections market more broadly, further fostering abusive practices. Two companies dominate the correctional phone market—Securus and ViaPath (formerly called Global Tel\*Link, or GTL).<sup>103</sup> These two companies have in turn acquired numerous competitors that sell products and services like release cards and money transfer platforms (discussed above).<sup>104</sup>

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<sup>101</sup> CFPB, Justice-Involved Individuals and the Consumer Financial Marketplace 3 (2022), available at <https://www.consumerfinance.gov/data-research/research-reports/justice-involved-individuals-consumer-financial-marketplace/>.

<sup>102</sup> CFPB, Policy Statement on Abusiveness, n.72 (explaining that JPay “took unreasonable advantage of the market structure which allowed it, as a single-source government contractor for prepaid cards, to charge fees even if consumers did not want to do business with the company because consumers were denied a choice on how their money would be given to them upon release from incarceration”).

<sup>103</sup> ViaPath Technologies has a 30.4% market share (i.e. provides phone service to facilities holding approximately 30.4% of all incarcerated people). Securus has a 29.5% market share. These two companies’ market dominance is the result of their years of buying up competitors. Peter Wagner & Wanda Bertram, Prison Policy Initiative, State of Phone Justice 2022: The Problem, the Progress, and What’s Next, n.20 (2022), available at [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice\\_2022.html](https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html).

<sup>104</sup> Aventiv Technologies, the corporate parent of Securus, explains on its website that Securus is “continuing [its] transformation from a traditional corrections telecommunications service provider to a diversified technology

Accordingly, Securus and ViaPath can now offer correctional facilities packages of unrelated services in one huge “bundled contract,” which give a company exclusive rights to offer incarcerated people multiple services, all covered by a single contract. Bundling is now the norm, present in the overwhelming majority of phone contracts.<sup>105</sup> Bundling allows private companies to obscure the actual cost of providing their various services—hiding cost information from both end users and the contracting correctional facility. The oligopolistic nature of the corrections macroeconomy also means that correctional facilities have little choice in deciding which company to award contracts to. This lack of competition prevents companies from having to compete with one another by offering lower costs, thereby distorting the proper functioning of the market, to consumers’ detriment.

#### IV. Forcing Consumers into Arbitration Is Abusive

All forms of forced arbitration are abusive. Just as over 100 consumer, civil rights, and labor groups emphasized in a letter to the CFPB,<sup>106</sup> we urge the Bureau to act now to rein in forced arbitration in financial services through a rulemaking. In the interim, we want to point out why forced arbitration necessitates imminent action based on a number of factors, including its inherent and explicit abusive nature.

Forced arbitration is abusive because it is one-sided, allows the corporation to handpick the forced arbitration provider, and is offered as a pre-condition to obtain most financial products or services. And routinely, confidentiality provisions are a hallmark of forced arbitration proceedings such that how companies treat consumers within forced arbitration, and any wrongdoing that the company committed, are entirely hidden from public view. Consumers are forced to give up their fundamental rights to seek accountability and be at the mercy of a system in which they have virtually no power to obtain a fair process.

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company” that provides products and services “across multiple sectors.” Aventiv is now the corporate parent of Securus, JPay, and AllPaid, whose combined correctional products and services span communications, security, entertainment, education, money transfers, release cards, parole and probation payments, tablets, and more. Aventiv, “Securus Technologies Realigns Business Units, Diversifies Product Offerings Under New Corporate Parent: Aventiv Technologies” (Oct. 10, 2019), available at <https://www.aventiv.com/securus-technologies-realigns-business-units-diversifies-product-offerings-under-new-corporate-parent-aventiv-technologies/>.

<sup>105</sup> Peter Wagner & Wanda Bertram, Prison Policy Initiative, State of Phone Justice 2022: The Problem, the Progress, and What’s Next, n.20 (2022), available at [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice\\_2022.html](https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html). To incentivize a bundled contract, the companies typically offer a higher commission payment, and dangle the prospect of getting more services for less negotiation and paperwork. But in exchange, the facilities give up the leverage to retain *only* the quality services they want at a price they consider fair.

<sup>106</sup> Press Release, National Consumer Law Center, More than 100 Consumer, Labor and Civil Rights Groups Call on CFPB to Take Action on Banking Fraud and Forced Arbitration (Sept. 14, 2022), <https://www.nclc.org/more-than-100-consumer-labor-and-civil-rights-groups-call-on-cfpb-to-take-action-on-banking-fraud-and-forced-arbitration/>.

*A. Forced arbitration clauses are often found in the fine print.*

Forced arbitration clauses are often tucked away in the fine print of terms and conditions. Credit card terms of service agreements are lengthy<sup>107</sup>, presented in small and difficult to read font<sup>108</sup>, separated into confusing sections, and are written in inaccessible legalese.<sup>109</sup> A 2016 study of more than 2000 credit card contracts found that typical credit card contract language exceeds the reading level of most Americans.<sup>110</sup> The study also found that the average credit card contract contained 4,900 words. Most consumers don't take the time to review all of the terms and conditions they are presented with – because it is literally not feasible to do so. A study found that just reading all of the digital contracts or privacy policies covering the affairs of an average American would take anywhere from 250 hours or 76 full workdays per year.<sup>111</sup> In another study, only one in four college students attempted to read the fine print of the terms and conditions for a fictitious online social network.<sup>112</sup>

*B. Forced arbitration providers are captive to the companies that choose them and take unreasonable advantage of a consumer's inability to protect their interests.*

As consumer protection organizations have warned, the business relationship between companies and forced arbitration providers gives rise to inherent conflicts of interest that are inherently abusive. Indeed, unlike courts, companies, or defense firms representing companies, choose forced arbitration providers, designate them in millions of consumer terms and conditions, and then become “repeat players” that provide all or most of the business for the forced arbitration providers. Forced arbitration providers, interested in keeping an industry's business, are inherently biased in favor of the only side that has the power to choose them repeatedly.

Also, forced arbitration providers maintain the discretion to change their rules without notice or input from consumers. There are no enforceable civil procedure standards or applicable rules of evidence that apply in a forced arbitration proceeding. Companies use this power to exploit the forced arbitration provider's rules in ways that are not transparent and heavily tilt the process in their favor. These practices fall under the second form of “abusiveness” as defined by the CFPA by taking “unreasonable advantage...of particular circumstances” including “circumstances where

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<sup>107</sup> See, Perez-Pedemonti, *Regaining the Right to Reject – Forced Arbitration Clauses in Credit Card Contracts*, CITIZEN.ORG (May 2023), available at, <https://www.citizen.org/article/regaining-the-right-to-reject-forced-arbitration-clauses-in-credit-card-contracts/>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> CreditCards.com Staff, *Study: Credit Card Agreements Unreadable to Most Americans*, CREDITCARDS.COM (2016), available at <https://web.archive.org/web/20161008141315/http://www.creditcards.com/credit-card-news/unreadable-card-agreements-study.php>.

<sup>111</sup> Alex C. Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, THEATLANTIC.COM (Mar. 1, 2012).

<sup>112</sup> In that study, the students agreed to give a fictitious social media company their first-born children. David Berreby, *Click to Agree With What? No One Reads Terms of Service, Studies Confirm*, THEGUARDIAN.COM (Mar. 3, 2017).

people lack sufficient bargaining power to protect their interests. Furthermore, “people also have interests in limiting the amount of time or effort necessary to obtain consumer financial products or services or remedy problems related to those products or services.”<sup>113</sup>

- Wells Fargo reportedly continued to try to avoid accountability through procedural tactics within the forced arbitration system, despite being ordered to pay more than \$3 billion in redress and civil penalties for blatantly illegal conduct costing billions of dollars.<sup>114</sup> Initially, Wells Fargo’s forced arbitration clause included a class action waiver and also required customers to file forced arbitrations only on an individual basis. The bank promised to pay forced arbitration fees so long as customers paid their initial filing fees. However, when 3,000 customers who had been illegally charged surprise overdraft fees tried to proceed in forced arbitration by paying those initial filing fees to begin the process, Wells Fargo *then* demanded that their preferred forced arbitration provider, AAA, adopt de facto class procedures to handle consumer cases.

The bank proceeded to convince arbitrators to adopt a corporate wish list of procedural requirements frequently requested in court such as heightened pleading requirements, multiple dispositive motions, or drawn-out discovery disputes, without any of the benefits that their customers would have gotten in the court system, such as the ability to group cases together, or seek discovery into widespread corporate policies and practices.

Wells Fargo effectively halted all current and future cases by successfully imposing the new heightened pleading standard. Customers would now have to provide evidentiary proof before being allowed to proceed, while at the same time, Wells Fargo was allowed to withhold the information customers needed to satisfy the new heightened pleading standard.<sup>115</sup> This “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>116</sup>

Not only can companies choose forced arbitration providers, but some companies have also begun trying to switch forced arbitration providers mid-dispute, to further insulate themselves against all possibility of ever being held accountable.<sup>117</sup>

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<sup>113</sup> 28 Fed. Reg. 21888 (Apr. 12, 2023).

<sup>114</sup> CFPB Orders Wells Fargo to Pay \$3.7 Billion for Widespread Mismanagement of Auto Loans, Mortgages, and Deposit Accounts, CFPB (Dec. 20, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-wells-fargo-to-pay-37-billion-for-widespread-mismanagement-of-auto-loans-mortgages-and-deposit-accounts/>.

<sup>115</sup> See Memorandum of Points and Authorities In Support of Plaintiffs’ Opposition to Defendant’s Motion to Compel Arbitration, *Mosley et al. v. Wells Fargo & Co. et al.*, No. 3:22-cv-01976-DMS-AGS (S.D.Cal. Mar. 3, 2023).

<sup>116</sup> See *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

<sup>117</sup> Examples of non-CFPB regulated entities such as Ticketmaster are highlighted to add context around trending corporate practices that should be seen as illustrative of the industry.

- Recently, while a judge was considering whether to compel arbitration in the middle of a separate antitrust lawsuit,<sup>118</sup> Ticketmaster unilaterally changed forced arbitration providers mid-conflict, switching from JAMS arbitrators to a new start-up forum, New Era ADR.<sup>119</sup>

According to their own terms and conditions, New Era’s provisions are incredibly one-sided, allowing retailers such as Live Nation and Ticketmaster to pay a single subscription fee, while consumers must each pay a \$300 fee per filing. The forced arbitration agreement also bars class or representative proceedings for consumers, while New Era is allowed to unilaterally group cases for any reason it deems appropriate. New Era can then decide which arbitrator presides over these groups, including for bellwether cases that determine the outcome for all consumers, even those who have yet to file claims. These terms make it exceptionally difficult for consumers to prevail.<sup>120</sup>

New Era’s procedures are designed to create as many inefficiencies for consumers as possible. Consumers pay 100% of the marginal cost and must prove their case in the face of absurd limitations on documents that can be submitted (10 total), briefing page lengths (5), witnesses (2-3), and discovery (none). All cases are consolidated before one arbitrator who can reject all cases based on dispositive issues at once (with no discovery, 10 documents, and one 5-page brief). If the consumers survive on dispositive issues, then Ticketmaster can litigate individual issues seriatim, virtually indefinitely, producing a controlled drip of final decisions to reduce the pressure on Ticketmaster.<sup>121</sup>

If a consumer successfully wins injunctive relief, Ticketmaster still retains a one-sided right to appeal to a different forced arbitration forum, (while denials of a consumer’s request for injunctive relief is unreviewable).<sup>122</sup> In short, Ticketmaster can win efficiently, but can only lose after consumers incur massive inefficiencies. The notion that a company facing litigation can not only change the rules of the game midstream, but also pick the umpire, is inimical to a fair dispute resolution system.

Finally, in response to this litigation, a complaint recently filed alleges how New Era sought to have records of its improper communications with Ticketmaster’s counsel and its founder’s deposition sealed. However, its founder, a former corporate attorney, filed an unapproved declaration in which he attempted to “interpret” New Era’s own rules, apparently in ways inconsistent with his prior testimony. Those records are all sealed, making it impossible for consumers<sup>123</sup>

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<sup>118</sup> *Skot Heckman et al. v. Live Nation Entertainment, Inc. et al.*, No. 2:22-cv-00047 (C.D. Cal. Jan. 4, 2022).

<sup>119</sup> See Alexandra Ong, *The Eras vs New Era: How Bulletproof is Ticketmaster’s Arbitration Provision?*, THE RACE TO THE BOTTOM, March 1, 2023, <https://www.theracetothetbottom.org/rttb/2023/3/1/the-eras-vs-new-era-how-bulletproof-is-ticketmasters-arbitration-provision>.

<sup>120</sup> New Era ADR Rules and Procedures are available at <https://www.neweraadr.com/rules-and-procedures/>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Plaintiffs’ Brief in Response to the Williams Declaration, *Skot Heckman et al. v. Live Nation Entertainment, Inc. et al.*, No. 2:22-cv-00047--GW-GJS (C.D. Cal. June 19, 2023).

- Recent reports revealed that when cryptocurrency exchange and lender Gemini learned that it had entrusted \$900 million worth of customer funds to an investment fund that was likely to lose nearly all of the customer funds, it began to repeatedly update its dispute resolution provisions, adding nearly 2,000 words, changing arbitration administrators and imposing extensive administrative exhaustion requirements and complex consolidation procedures as conditions to initiate a forced arbitration.<sup>124</sup> Companies like Gemini can simply rewrite the rules as they see fit at any point in time, to the detriment of consumers, making it nearly impossible for consumers to hold them accountable when they are harmed.
- DoorDash also recently attempted to change forced arbitration providers away from AAA to a new forced arbitration provider CPR<sup>125</sup> that proceeded to allow DoorDash’s attorneys to draft rules for handling mass employment claims *in the middle of an ongoing lawsuit*. The company attempted to abandon its use of AAA due to its fee structure, which was only uncovered after Judge Alsup, presiding over the case, ordered the unsealing of emails and other documents detailing DoorDash’s efforts to abandon AAA and rewrite the rules on mass forced arbitration. Though CPR attempted to keep communications around the mass claims protocol confidential, Judge Alsup unsealed them as they “would be useful to the public in evaluating the true extent” of CPR’s “impartiality.” These previously sealed documents revealed that the law firm representing Door Dash, Gibson Dunn, as well as DoorDash’s in-house counsel, had traded drafted versions of the mass forced arbitration protocol before coordinating efforts to make the new claims process public. Not only were DoorDash drivers stopped from proceeding in court through forced arbitration, the 5,000 “dashers” (delivery drivers) had to spend additional time and resources fighting for the right just to use AAA as the forced arbitration provider – the firm originally designated and selected by DoorDash, which the company attempted to switch to after it didn’t get its way.<sup>126</sup>

C. *Corporate tactics evolving from the use of forced arbitration are abusive.*

In an attempt to immunize themselves against all possibilities that they will ever be held accountable, corporations are also now resorting to some or all of the below-outlined practices related to the use of forced arbitration. These abusive tactics are possible because consumers are stripped of the right to file a public case in court by forced arbitration clauses. Such abusive tactics include using contractual clauses that allow companies to unfairly and unilaterally modify terms and conditions, even mid-dispute; imposing various procedural hurdles and pre-filing requirements that essentially work to further decrease the already miniscule chances that any consumer will ever even attempt to seek justice through forced arbitration; and using so-called “bellwether” or “batching” consumer limitations that so severely delay a consumer’s ability to seek justice that the consumer is forced to give up.

<sup>124</sup> See Complaint, *Picha et al. v. Gemini Trust Company, LLC et al.*, No. 1:22-cv-10922-NRB (S.D.N.Y. Mar. 17, 2023). See also *Nguyen v. OKCoin USA Inc.*, No. 22-cv-06022-KAW, 2023 WL 2095926 (N.D. Cal. Feb 17, 2023) (granting the cryptocurrency company’s motion to compel arbitration although it adopted revised forced arbitration clause two months after collapse of a company in which customers were invested).

<sup>125</sup> International Institute for Conflict Prevention & Resolution, or CPR for short.

<sup>126</sup> Vin Gurreri, *Gibson Dunn Helped Craft Arbitration Provider’s Rules*, LAW 360 (Feb. 28, 2020).

Being able to unfairly and unilaterally modify terms and conditions is particularly egregious for anticipated claims arising from facts that are only known to companies, and not equally known to consumers<sup>127</sup> Some financial services companies have even held a consumer's funds hostage to a requirement that the consumer accede to the new terms before they can access their account.<sup>128</sup>

*1. The rise of pre-dispute dispute resolution clauses ("PDDR" clauses) are an abusive practice that further takes "unreasonable advantage" of consumers.*

Companies are creating insurmountable procedural hurdles, including forcing individuals to slog through a series of abusive company-imposed consumer limitations (pre-dispute dispute resolution, or "PDDR" clauses), and pre-filing requirements, *before* an individual is even formally allowed to try and initiate a forced arbitration. These clauses are so difficult to navigate successfully and create so many additional procedural and substantive hurdles for consumers, that many PDDR clauses are also inconsistent with state and federal consumer protection laws,<sup>129</sup> which provide substantive rights for consumers or spell out procedures that consumers may use to dispute transactions.<sup>130</sup>

These clauses use lopsided language to give businesses certain procedural rights if their unilaterally imposed requirements aren't met. They also unfairly allow companies to retain the advantage of limiting group actions by sending group actions that could otherwise be filed as class action suits into individual forced arbitrations. Simultaneously, it is almost impossible for consumers to bring forced arbitrations at any meaningful scale to deter widespread repeat misconduct.

For individuals who have no legal training and no understanding of the legal process, the pre-filing, PDDR process may appear informal, as companies promote it as an easy, cost-saving way to resolve conflicts. But in reality, PDDR is a complex legal process with real and permanent consequences which severely further impact consumer rights and within forced arbitrations. Some of the clauses include requirements that consumers provide a preview of their case to corporate counsel, or personally attend a settlement discussion with corporate counsel or representatives, enabling corporate counsel to inappropriately engage with consumers directly.<sup>131</sup> PDDR clauses

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<sup>127</sup> See Comments of Ten Consumer Organizations on Docket No. CFPB-2023- 0002; RIN 3170-AB14; Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, Apr. 3, 2023 at 10-11 ("Comment Letter").

<sup>128</sup> *Id.*

<sup>129</sup> See Comments of Ten Consumer Organizations on Docket No. CFPB-2023- 0002; RIN 3170-AB14; Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, Apr. 3, 2023 at 19-21 ("Comment Letter").

<sup>130</sup> While some state unfair and deceptive practice statutes require consumers to provide notice before filing suits to enforce statutes, these requirements are not as burdensome as those typically imposed in PDDR clauses, and would also have reciprocal obligations for companies. For example, California's Consumer Legal Remedies Act requires companies to offer consumers an opportunity to make reasonable corrections within 30 days of receiving the consumer's statutory notice letter. See Cal. Civ. Code § 1782 (West).

<sup>131</sup> See, e.g., AT&T Consumer Service Agreement, <https://www.att.com/consumerserviceagreement> ("During that period [after receipt of a Notice of Dispute], either you or AT&T may request an individualized discussion (by phone call or videoconference regarding settlement .... [A]n AT&T representative must personally participate .... Your and

violate the CFPA’s “abusiveness” prohibitions as they take “unreasonable advantage” of “the inability of the consumer to protect the interests of the consumer,”<sup>132</sup> including “interests in limiting the amount of time or effort necessary to...remedy problems related to those products or services.”<sup>133</sup>

- It has been reported that Coinbase’s onerous PDDR provisions (rolled into its forced arbitration provision)<sup>134</sup> have made it difficult and expensive for customers such as Abraham Bielski to hold the cryptocurrency platform accountable for its failure to follow federal banking laws. In 2021, it was alleged that as a result of unauthorized transactions on the Coinbase platform, consumers such as Mr. Abraham Bielski had \$31,000 stolen from his Coinbase account. Coinbase first relied on the PDDR provision, and then on its forced arbitration clause, to avoid accountability for failing to follow federal banking laws by taking the appropriate precautionary protections for customers.<sup>135</sup>

Coinbase’s Terms and Conditions state that even *before* any forced arbitration may proceed, customers are mandated to follow a two-step PDDR process: first, they must contact Coinbase’s support page to “resolve any such dispute amicably” (a highly subjective standard) and second, they must complete a complaint form that will be evaluated by a Coinbase employee. If these steps aren’t fulfilled to *Coinbase’s* satisfaction, the consumer’s “claim or action must be dismissed from arbitration or small claims court.”<sup>136</sup> This extreme language seems to allow a company, with no oversight, to throw out all consumer claims.

In a “fox guarding the hen house” dynamic, it seems counterproductive to force consumers to submit disputes related to a company’s systemic noncompliance with federal laws to the company itself, before the dispute is forced into arbitration. Coinbase customers, such as Mr. Bielski, have had to spend additional time and resources fighting the forced arbitration provision just to have a judge, and not an arbitrator, decide on the unconscionability of the PDDR clause.<sup>137</sup>

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AT&T’s lawyers (if any) also can participate.”); Intuit Terms of Service, <https://www.mint.intuit.com/terms> (“[B]efore either you or Intuit commence arbitration ..., we will personally meet, via telephone or videoconference, in a good-faith effort to confer with each other and try to resolve informally any Claim ....”).

<sup>132</sup> CFPA section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B).

<sup>133</sup> 88 Fed. Reg. 21888 (Apr. 12, 2023).

<sup>134</sup> 88 Fed. Reg. 6909, 6933 (Feb. 1, 2023).

<sup>135</sup> *Bielski v. Coinbase, Inc.*, No. C 21-07478 WHA, 2022 WL 1062049 (N.D. Cal. Apr. 8, 2022), *stay denied*, No. 22-15566 (9th Cir. July 11, 2022), *cert. granted*, No. 22-105 (U.S. argued Mar. 21, 2023), No. 22-105, 2023 WL 4138983 (U.S. June 23, 2023).

<sup>136</sup> See Coinbase user agreement, Provision 7, “Customer Feedback, Queries, Complaints, and Dispute Resolution,” available at [https://www.coinbase.com/legal/user\\_agreement/united\\_states#appendix-5-arbitration-agreement](https://www.coinbase.com/legal/user_agreement/united_states#appendix-5-arbitration-agreement) (last accessed on Feb. 15, 2023).

<sup>137</sup> *Bielski v. Coinbase, Inc.*, No. C 21-07478 WHA, 2022 WL 1062049 (N.D. Cal. Apr. 8, 2022), *stay denied*, No. 22-15566 (9th Cir. July 11, 2022), *cert. granted*, No. 22-105 (U.S. argued Mar. 21, 2023), No. 22-105, 2023 WL 4138983 (U.S. June 23, 2023). See also Brief for American Association for Justice as Amicus Curiae in Support of Respondents,



- Reports similarly indicate Klarna’s vaguely worded and subjective requirements could stop individuals even from initiating any sort of dispute resolution process. For example, Klarna’s terms and conditions include an Initial Dispute Resolution provision that requires customers to “try, for 60 days, to resolve any Dispute informally.” This is a “material term” of the Agreement, and “a requirement that must be fulfilled before commencing any arbitration.”<sup>138</sup> Such vague language may fuel additional litigation and delay resolution for individuals by allowing companies to argue that the facts and relief stated weren’t sufficient, subjective standards that would be decided by potentially biased arbitrators in secret proceedings. Klarna and other corporate defendants who use these types of provisions also get an unfair extra opportunity, a “free peek,” to see what they anticipate is going to be filed against them. This “informal” and yet “material” dispute process does not come with the protections and oversight of a neutral third party.

2. *Forcing individuals into arbitration unexpectedly through third-party credit contracts meets both abusiveness provisions under the CFPA.*

Credit reporting agencies such as Experian are now forcing consumers into arbitration for disputed reporting errors by relying upon forced arbitration clauses in the fine print of *third-party* credit monitoring services, such as Credit Works.<sup>139</sup> This is an abusive practice that “takes unreasonable advantage” and “materially interfere[s] with the ability of a consumer to understand a term or conditions” and “takes unreasonable advantage” under the CFPA. Instead of quickly resolving inaccurate credit reports and updating the technology behind Experian’s problematic dispute resolution system, Experian has argued that consumers agree to such clauses when they agree to terms and conditions with affiliated companies, such as when a consumer signs up for free or paid credit monitoring programs.<sup>140</sup> Such practices meet both CFPA abusiveness prohibitions as consumers typically have no idea that signing up for one service forces them into arbitration related to a credit report. There is no “meaningful choice in the selection or use of any particular entity as a provider” and further takes “unreasonable advantage” of a consumer’s understanding of the “material risks, costs, or conditions of the entity’s product or service.”<sup>141</sup>

Experian’s latest terms and conditions, updated in April, are now redrafted to cover both entities even more clearly.<sup>142</sup> With no real ability to resolve reporting errors and hold credit reporting

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*Coinbase Inc., v. Bielski*, No. 22-105 (U.S. Feb. 28, 2023), <https://www.justice.org/resources/research/coinbase-v-bielski>.

<sup>138</sup> See Terms for Klarna Shopping Service, Initial Dispute Resolution, Provision 6, (last accessed on July 1, 2023), [https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en\\_us/user#mandatory-disputes](https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/user#mandatory-disputes).

<sup>139</sup> *Soriano v. Experian Info. Sols., Inc.*, No. 2:22-CV-197-SPC-KCD, 2022 WL 6734860 (M.D. Fla. Oct. 11, 2022), objections overruled, No. 2:22-CV-197-SPC-KCD, 2022 WL 17551786 (M.D. Fla. Dec. 9, 2022).

<sup>140</sup> *Id* at 1.

<sup>141</sup> 88 Fed. Reg. 21889 (Apr. 12, 2023).

<sup>142</sup> See Experian “Terms of Use Agreement”, revised April 3, 2023 (“For purposes of this Arbitration Agreement, the term “Information” means any credit, personal, financial or other information delivered to you as part of...enrollment and use of free Services (such as EXPERIAN CREDITWORKS Basic), and/or enrollment, purchase and use of

agencies accountable for ongoing errors, these forced arbitration clauses have undermined the very consumer protections intended by the Fair Credit Reporting Act (FCRA). Consumers with life-impacting credit reporting errors have been shocked to find out that credit monitoring services they may have signed up for after a data breach have now pushed them into arbitration for unrelated FCRA claims. Moreover, consumers are now penalized for retaining the same counsel to represent them in their claims. They are required to wait for a “batch” of 250 claims to be heard by the same arbitrator before their claim can get a hearing.<sup>143</sup> Given that there are few consumer advocates who regularly represent individual consumers in FCRA claims, Experian’s practices threaten to prevent consumers from effectively vindicating their FCRA rights by penalizing them for retaining experienced counsel.

3. *Seeking to use “forced arbitration” clauses to channel claims into small claims courts that do not have jurisdiction is an abusive practice.*

Companies attempting to avoid mass forced arbitration are inappropriately trying to force cases into small claims court, even when small claims courts clearly do not have jurisdiction over cases. This requires the small claims court to first decide whether it has jurisdiction over each case, a practice that further delays case resolutions, avoids legal accountability, and threatens to flood small claims courts with thousands of individual disputes that are outside of their jurisdiction. Compounding the problem, unwary consumers likely may not understand the nuances of small claims court versus forced arbitration. Once again, this abusive practice renders consumers “unable to protect their interests, including an interest “limiting the amount of time or effort necessary...to remedy problems related to those products or services.”<sup>144</sup>

- Intuit attempted to back out of paying forced arbitration fees per its own terms and conditions by pushing consumer cases into small claims court.<sup>145</sup> In 2021, 40,000 customers who were wrongfully charged for tax software found themselves forced into arbitration by Intuit.<sup>146</sup> But when these customers proceeded with forced arbitrations, Intuit realized they owed \$3,200 in arbitration fees for each customer and filed for a preliminary injunction in state court to halt these forced arbitrations and push them into small claims court. The state trial and appeals courts ultimately denied Intuit’s motion for an injunction of the arbitration claims.

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membership based Services (such as EXPERIAN CREDITWORKS Premium, Experian IdentityWorks, or Experian Credit Tracker), <https://www.experian.com/help/terms-and-conditions.html> (last accessed July 1, 2023).

<sup>143</sup> See Experian Terms and Conditions, “Dispute Resolution By Binding Arbitration,” (last accessed July 1, 2023), <https://www.experian.com/help/terms-and-conditions.html>.

<sup>144</sup> 88 Fed. Reg. 21888 (Apr. 12, 2023).

<sup>145</sup> *Intuit Inc. v. 9,933 Individuals*, No. B308417, 2021 WL 3204816, at \*8 (Cal. Ct. App. July 29, 2021).

<sup>146</sup> AAA’s self-reported data reveal that Intuit was a defendant in the greatest number of arbitrations against financial services companies over a five-year period from 2017-2021. See FORCED ARBITRATION AND BIG BANKS: WHEN CONSUMERS PAY TO BE RIPPED OFF, AM. ASS’N. FOR JUST. (2022), accessible at <https://www.justice.org/resources/research/forced-arbitration-big-banks>.

When reading the small claims provision, the appeals court found the terms only empowered *consumers* and not Intuit to elect whether to move arbitration to small claims court.<sup>147</sup> The court noted that “Intuit is now seeking to push the claims out of arbitration and into oblivion.”<sup>148</sup> That the FAA prohibits arbitration agreements that “effectively eliminate a party’s substantive statutory rights.” The court further observed that parties like Intuit “have not just been forum shopping; they have been on a veritable shopping spree.”<sup>149</sup>

- When several dozen consumers tried to file forced arbitrations against Match Group, a company that owns numerous online dating platforms, for collecting their biometric data in violation of the Illinois Biometric Information Privacy Act (“BIPA”), Match Group decided that it did not want to arbitrate the claims and chose to have the forced arbitration administrator, JAMS, dismiss them in favor of small claims court.<sup>150</sup> This does not even begin to address the practical and policy implications of requiring consumers to flood Illinois small claims courts with identical disputes over jurisdiction. Further, even if consumers could obtain this pro forma ruling from the small claims court, Match still reserves the right to arbitrate those claims.

4. *Limiting provisions, including “batch arbitration” and “bellwether” provisions render consumers unable to protect their interests.*

In contrast to outright waivers limiting all collective actions, class actions, and class forced arbitrations, companies are drafting terms and conditions that provide for consolidation of group claims, including “batch arbitration” and “bellwether” provisions. These provisions typically either limit the number of forced arbitrations that may proceed at once or cap the number of individuals who may be represented in forced arbitration by the same attorneys at any given time, delaying a consumer’s ability to file their case sometimes indefinitely. Consumer advocates report that limits on “batch” or “mass” forced arbitration in contract provisions are proliferating, and have the potential to greatly hinder cases.<sup>151</sup> These clauses render consumers unable to protect their interest in “limiting the amount of time or effort necessary to...remedy problems to...products or services” including “when the steps a person would need to take to protect their interests are unknown to the person or are especially onerous.”<sup>152</sup>

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<sup>147</sup> AAA’s Rule 9(b), “Small Claims Option for the Parties” is also serving as a loophole that allows companies to funnel cases into small claims court before an arbitrator is assigned. There have been instances of this rule being invoked against consumers, who preferred arbitration, but were forced into small claims court against their will, possibly in an attempt to make these cases disappear (as Intuit attempted to do).

<sup>148</sup> *Intuit Inc. v. 9,933 Individuals*, No. B308417, 2021 WL 3204816, at \*8 (Cal. Ct. App. July 29, 2021).

<sup>149</sup> *Id.* at 1.

<sup>150</sup> See Defendant’s Memorandum of Their Motion to Dismiss, *Baker v. Match Group, Inc. et al*, No. 2022-cv-6924, (N.D. Ill. Jan. 13, 2023).

<sup>151</sup> See Comments of Ten Consumer Organizations on Docket No. CFPB-2023- 0002; RIN 3170-AB14; Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, Apr. 3, 2023 (“Comment Letter”).

<sup>152</sup> 28 Fed. Reg. 21888 (Apr. 12, 2023).

- A recent case brought to light the situation in which limiting provisions jeopardized Verizon customer cases, individually and seeking public injunctive relief, when they were forced to choose between denial of their counsel of choice or a delay of their ability to file forced arbitration proceedings with no tolling of the statute of limitations.<sup>153</sup> Verizon had reportedly falsely advertised its “Administrative Charge” for wireless services, misrepresenting it as a tax or government regulation, when it was simply another Verizon fee. Verizon’s forced arbitration clause prevented consumers represented by the same or coordinated counsel from even filing more than 10 arbitrations until the previous “batch” of 10 forced arbitrations was completed. Two courts have now denied Verizon’s motion to compel forced arbitration, citing in part that limiting forced arbitrations to 10 at a time is substantively unconscionable, as it would have forced just the 2,537 consumers represented by one law firm to wait for over 150 years before being able to proceed with their counsel of choice, and could even have the effect of barring the claims based on statutes of limitations. Indeed, AAA, Verizon’s forced arbitration provider, refused to implement the bellwether procedure for that same reason. However, Verizon continues to impose that procedure on consumers, making minor tweaks to the provision each time a court finds it unenforceable.<sup>154</sup>

In *AT&T v. Concepcion*,<sup>155</sup> state attorneys general filed an amicus brief warning that a decision in AT&T’s favor would lead to more litigation, while preempting state laws that protect consumers from unfair practices, which critically enable private enforcement of consumer laws.<sup>156</sup> These warnings have come to pass, and the corporate practices outlined above have deprived consumers of any process to seek accountability when they are hurt or defrauded by financial services providers, banks, and other entities regulated by the CFPB. Companies have used these abusive tactics to essentially take away consumer rights to enforce state and federal laws that have authorized private remedies where *companies* have decided they have been exercised by too many people at once.

As these examples demonstrate, forced arbitration is an abusive practice, necessitates imminent action, and must be reined in through a rulemaking.

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<sup>153</sup> *MacClelland et al. v. Cellco P’ship et al.*, No. 21-CV-08592-EMC, 2022 WL 2390997 (N.D. Cal. July 1, 2022), *appeal filed*, No. 22-16020 (9th Cir. July 13, 2022). See also Brief for American Association for Justice as Amicus Curiae in Support of Plaintiffs-Appellees, *MacClelland, et al. v. Cellco P’ship, et al.*, No. 22-16020 (9th Cir. Mar. 24, 2023).

<sup>154</sup> In *MacClelland*, Verizon’s arbitration clause did not include a provision tolling the statute of limitations for consumers who filed claims but had to wait for other consumers to have their arbitration heard. Verizon included this provision in a new version of the clause, introduced mid-dispute. However, a different court still determined that this provision was unenforceable, finding that it was expressly given the authority to make that decision because Verizon carved the dispute over the bellwether provision out of its delegation clause. Verizon then changed the arbitration clause *again* to remove the delegation carveout and is now arguing before a *third* court that it does not have the authority to hear the dispute.

<sup>155</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1743, 179 L. Ed. 2d 742 (2011).

<sup>156</sup> See *AT&T v. Concepcion*, Brief for the States of Illinois, Maryland, Minnesota, Montana, New Mexico, Tennessee, and Vermont and The District of Columbia as Amici Curiae in Support of Respondents, 09-893 (U.S. 2010).

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We applaud the CFPB for this updated framework and Policy Statement as it shows the agency's steadfast commitment to protecting consumers from ongoing abusive practices as well as emerging threats to the financial wellbeing of Americans. We appreciate the Bureau's comprehensive list of practices but hope that additional examples are included in the final Policy Statement so as to better guide regulators in safeguarding the financial health of consumers.

Thank you for taking these recommendations into consideration. We look forward to supporting the Bureau's efforts. Please do not hesitate to reach out to Martha Perez-Peredonti at [mperezpedemonti@citizen.org](mailto:mperezpedemonti@citizen.org) with any questions or concerns.

Sincerely,

American Association for Justice  
Consumer Federation of America  
National Consumer Law Center (on behalf of its low-income clients)  
Prison Policy Initiative  
Public Citizen