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## No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's "Abusive" Standard

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**NO MORE ABUSE:  
THE DODD-FRANK AND  
CONSUMER FINANCIAL  
PROTECTION ACT'S  
“ABUSIVE”  
STANDARD**

**“[T]he addition of ‘abusive’ to the standard in the Consumer Financial Protection Bureau provisions is ‘the most egregious’ part of Dodd-Frank.”**

**— Richard Hunt, President of the Consumer Bankers Association.<sup>1</sup>**

## I. INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (“Dodd-Frank Act”) ushers in a new era of consumer protection and financial regulation. The Act spans 2,300-pages and regulates a panoply of consumer and commercial financial products.<sup>2</sup> Considering the wide range of business practices effected, what about the inclusion of a single word—*abusive*—has the Consumer Bankers Association so upset?

Title X of the Dodd-Frank Act, the Consumer Financial Protection Act (“CFPA”),<sup>3</sup> creates a new federal agency dedicated solely to consumer protection: the Bureau of Consumer Financial Protection (“the Bureau”).<sup>4</sup> This agency is expected to be juggernaut.<sup>5</sup> Its purpose is to act as a consumer watchdog and ensure “markets in consumer [financial products] are fair, transparent, and competitive.”<sup>6</sup> When the Bureau assumes its responsibilities on July 21, 2011, it will regulate virtually all consumer financial products, from loan products like mortgages to transactional products such as checking accounts,<sup>7</sup> affecting over \$14 trillion in consumer debt and services.<sup>8</sup>

The scope of the Bureau’s expansive power turns in part on the definition and application of a single word: *abusive*. Specifically, the Bureau is empowered to take any authorized action, including rulemaking, to prevent a credit or service provider “from committing or engaging in unfair, deceptive, or *abusive acts or practices*” in connection with a consumer financial product.<sup>9</sup> Prior to the Dodd-Frank Act, federal regulators (such as the Federal Trade Commission (“FTC”)) already had the authority to ban actions that were defined as unfair or deceptive under the Federal Trade Commission Act. But the CFPA adds the legal standard *abusive*, which expands the standard of misconduct.<sup>10</sup>

For two reasons, the term *abusive* will play a critical role in determining the scope of the Bureau’s power. First, though the CFPA provides several definitions, *abusive* has been used only in limited contexts, so its use as a legal standard has limited jurisprudential history.<sup>11</sup> Second, the *abusive* standard itself may be subject to abuse if the Bureau uses it to ban products or practices that would have been helpful to consumers.<sup>12</sup> As a result, the interpretative deficiency surrounding the term is fueling allegations that the CFPA drafters overstepped their powers by drafting such a broad standard.<sup>13</sup> Such suspicions have provided the Bureau’s influential critics with ammunition in their efforts to undercut the agency’s power.<sup>14</sup>

This article, however, contends Congress chose the word *abusive* consciously as a way to create additional powers that go beyond the previous powers of the FTC to control unfair and deceptive practices.<sup>15</sup> Although there has been criticism that the word *abusive* is unacceptably vague, the term actually has a history in other statutes that shows how the Bureau should begin applying the CFPA’s definition of the standard. Analogy to past application of the same term in other statutes and recent federal provisions against unethical consumer financial practices reveal that the standard applies to at least three practices: (1) extending high-risk credit without adequately assessing each consumer’s ability to repay; (2) using aggressive sales and marketing tactics to harass, oppress, or abuse consumers; and (3) steering consumers

who qualify for low-cost credit to higher-cost products. The development of regulations for these three practices will allow the term to be better understood and manageable.

Part II presents the purpose and policies behind the creation of the Bureau and the inclusion of *abusive* in the Act. It also contends that though the standard is broader than the unfair and deceptive standards, its inclusion in the CFPA is necessary to restore consumer confidence in our financial markets. Part III examines how the three above-mentioned practices fall under the *abusive* standard. It then fleshes out specific consumer financial contexts where the Bureau should take action, such as home mortgages, payday lending, and private student loans.

## II. THE RATIONALE FOR THE INCLUSION OF ABUSIVE

Congress included the term *abusive* in the CFPA to resolve consumer protection failures leading up to the subprime mortgage crisis.<sup>16</sup> Indeed, inadequacies of previous consumer protection statutes contributed to the severity of the crisis. As a legal standard, *abusive* is not as new or unfamiliar as some believe. While the addition of the *abusive* standard raises several policy considerations, the turmoil of the last few years indicates that a broader standard is necessary to restore financial stability and confidence in our financial markets.

### A. The Mortgage Crisis & Failed Consumer Protection

The subprime mortgage crisis was caused in part or at least exacerbated by a flawed system of consumer protection.<sup>17</sup> Essentially, bank and non-bank lenders extended exploitative loans, which should have never been approved and which borrowers simply could not afford.<sup>18</sup> Companies became increasingly debt averse by bypassing regulation using controversial (and ultimately unethical) practices such as loan flipping, prepayment penalties, complex product offerings to unsophisticated consumers, and so on.<sup>19</sup> This led to an economic meltdown, as millions of borrowers—unable to repay their mortgages—defaulted and walked away from their homes.<sup>20</sup> Put simply, the pre-crisis consumer protection system had too many gaps, allowing unscrupulous credit practices.

Prior to the enactment of the CFPA, consumer financial protection was fractured across seven federal agencies, such as the Office of the Comptroller of Currency and Office of Thrift Supervision.<sup>21</sup> In the wake of the crisis, Congress centralized consumer-protection authority with the Bureau. The new agency will operate as a fully independent agency, have access to a wealth of industry data, be well-funded, and have a powerful director.<sup>22</sup>

In addition to the structural problems, the CFPA also addressed statutory inadequacies of the consumer protection system. Statutorily, the federal agencies—particularly the FTC—did not have sufficient rulemaking authority to attack unethical practices that preceded the crisis.<sup>23</sup> Pre-crisis, the FTC was the primary consumer financial regulator, but its powers were limited in several ways. Under section 5 of the Federal Trade Commission Act (“FTCA”), the FTC may only prohibit acts that fall within the FTCA’s definitions of unfair and deceptive.<sup>24</sup> “Unfair” and “deceptive” acts and practices must each meet different three-part tests, which have high thresholds and are difficult to satisfy, thus

advances in consumer financial protection, through the FTC, have been limited.<sup>25</sup>

A practice is unfair where it “(1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition.”<sup>26</sup> Under the second element of the unfairness test “some courts have held that consumers can avoid injury by choosing another product or service. This makes the second element hard to prove.”<sup>27</sup>

Regarding the third unfairness element—essentially a cost-benefit analysis—lenders have successfully argued that “providing credit is a benefit even if questions can be raised about a borrower’s long term ability to repay it.”<sup>28</sup> For example, consider Borrower A who has a 30-year fixed home mortgage at a 15% interest rate.<sup>29</sup> A different lender convinces Borrower A to refinance their home with an adjustable-rate mortgage that has an initial two-year fixed interest rate at 7%, but after year two will jump to a fully indexed rate, mostly likely several percentage points above Borrower A’s original 15% interest rate. Further, the lender incorporated a \$7,000 penalty if Borrowers prepays the loans early, making the huge interest rate jump almost unavoidable.<sup>30</sup> Even though this new mortgage has a “built-in potential for payment shock”<sup>31</sup> at year two, some courts would hold that Borrower A has received a significant benefit because refinancing reduces the

loan’s original interest rate by more than half. Some courts decline to deem such practices as “unfair,” even though borrowers often fail to understand the risks associated with these types of loans, leading to an inevitable default.<sup>32</sup> Sheila Bair, Chairwoman of the Federal Deposit Insurance Corporation, testified that

these elements taken together mean that situations that cannot withstand the FTC’s statutory requirements are rare, and therefore, enforcement actions are equally rare despite the existence of many unethical practices.<sup>33</sup>

An act or practice is deemed “deceptive” when “a representation, omission, or practice misleads or is likely to mislead the consumer; a consumer’s interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and the misleading representation, omission, or practice is material.”<sup>34</sup> The deceptive test is also generally difficult to meet because consumers must have evidence that a consumer financial company made a false or unsupported statement.<sup>35</sup> This is a great challenge for consumers because almost all industry data is held by the offending companies themselves, making it very difficult to build a case.<sup>36</sup>

Because of the various factors discussed above, the FTC and other federal agencies became either unwilling or unable to implement necessary prohibitions to prevent unethical practices, despite their prevalence.<sup>37</sup>

### ***B. The Solution to Statutory Failures: Adding the “Abusive” Standard***

Congress recognized the statutory failings of the pre-crisis consumer-protection system. To resolve this, it intentionally included the abusive standard in section 1031 of the CFPA. The standard provides the flexibility to address the rapid changes

in the consumer financial industry.<sup>38</sup> It enables the Bureau to prevent any covered person or service provider from engaging in “unfair, deceptive, or *abusive acts or practices*” in connection with any transaction for a consumer financial product or service.<sup>39</sup> The definition of “covered person” includes bank and non-bank entities and is broadly defined as “any person that engages in offering or providing a consumer financial product or service.”<sup>40</sup>

There exists considerable interpretative history for what is “unfair” or “deceptive”, as such practices have been prohibited for some time.<sup>41</sup> By comparison, *abusive* is a newer term to the regulatory landscape,<sup>42</sup> thus the CFPA provides several definitions for the term:

(d) ABUSIVE—The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.<sup>43</sup>

The standard is considerably more expansive than prior consumer protection standards, because it places greater weight on subjective analysis when determining what practices should be considered illegal.<sup>44</sup> Its inclusion in the CFPA acknowledges the cost-benefit prong of the unfairness analysis, a factor that has been used in last thirty years, is not suitable to provide adequate consumer protection in all contexts.<sup>45</sup> Moving forward, under the abusive standard, even if a provider discloses all risks or provides a beneficial product—passing the unfair or deceptive tests—these circumstances would not absolve the providers from responsibility. The Bureau could still prohibit such conduct as abusive.<sup>46</sup>

Regulators and financial companies can look to the legislative origins of *abusive* for guidance on how the Bureau may apply it. Chairwoman Sheila Bair made one of the first suggestions for Congress to use the abusive standard and supported expansion of the unfair and deceptive standards.<sup>47</sup> In a 2007 congressional hearing on how to improve federal consumer protection, Chairman Bair proposed that Congress consider:

adding the term “abusive.” “Abusive” is a standard contained in HOEPA [Home Ownership and Equity Protection Act] that the Fed [Reserve] is looking at using in the context of mortgage lending . . .

“[A]busive” is a more flexible standard [than unfair or deceptive standards] to address some of the practices that make us all *uncomfortable*.<sup>48</sup>

A survey of federal legislation shows that the term abusive is not as new as some critics assert.<sup>49</sup> Some commentators suggest that the abusive standard is merely a repurposing of doctrine of unconscionability—a doctrine first introduced in the English courts of equity and later codified in the Uniform Commercial Code.<sup>50</sup> More frequently, commentators point to existing federal legislation that already use an abusive standard—some of which have been in place for more than thirty years—as evidence that the standard is not so unique.<sup>51</sup> At least three federal consumer-protection provisions give various federal agencies the power to prohibit certain acts or practices as *abusive*. These are the (1) Home Ownership and Equity Protection Act;<sup>52</sup> (2) Fair Debt Collection Practices Act;<sup>53</sup> and (3) Federal Telemarketing

## **Exactly how the Bureau will define, interpret, and limit the abusive standard will continue to be an issue of frenzied debate for years to come.**

Sales Rule. Regulators and financial institutions can also look to other federal provisions (such as Final Rules to Truth-in-Lending Act) that may not use the abusive standard, however, subsequent to the crisis, have banned practices that had evaded regulation under the unfair and deceptive tests. The Bureau can look to both types of provisions to interpret and apply the abusive standard.<sup>54</sup>

Despite a lengthy statutory definition and analogous provisions, great tension still exists regarding the scope of the abusive standard.<sup>55</sup> Is *abusive* a purely subjective standard examined only from the consumer's perspective, or does it reflect the idea that both the provider and consumer must take a certain level of responsibility in financial transactions? Unlike unfairness, *abusive* does not include a cost-benefit analysis.<sup>56</sup> Therefore, would the Bureau be able to ban non-traditional products that may be *abusive*, but which consumers would otherwise find very beneficial? Consider auto-title loans—short-term loans secured by the title of a consumer's car.<sup>57</sup> Could the Bureau limit the number of auto-title loans extended to a given consumer within a one-month period, even though many consumers find having multiple auto-title loans particularly attractive?<sup>58</sup>

Critics assail the standard as vague<sup>59</sup> and overly broad, because it is based in part on consumer perception.<sup>60</sup> Regulators and courts will be required to engage in subjective analysis of the consumer's mindset in a transaction, yet "it is unclear how a lender could guarantee a customer's understanding . . ."<sup>61</sup> Consider payday loans or cash advance loans, a product that has historically passed the unfair or deceptive tests<sup>62</sup> but may no longer be immune to regulation because of the greater emphasis on consumer understanding in the abusive standard.<sup>63</sup> The loan rollover—the ability for one to roll their loan balance from one term to the next for increasing fees—is an attractive feature of payday loans, but it can create a cycle of debt.<sup>64</sup> Many consumers systematically "overestimate their belief that they will pay off the loan at the end of the period and thus underestimate the likelihood that they might end up rolling over the loan."<sup>65</sup> By offering the rollover option with the knowledge that consumers are unlikely to repay, could the payday lender be abusive under section 1031(d)(2)(A), taking "unreasonable advantage of a lack of understanding on the part of the consumer?" These types of questions are propelling the consumer financial industry and legislators to demand more clarity around the standard or to strip the Bureau of such broad authority as this standard provides.

### ***C. Responding to Criticism: the "Abusive" Standard Is Workable and Necessary Standard to Restore Consumer Confidence***

The uncertainty around the abusive standard has caused resistance from politicians and the consumer financial industry.<sup>66</sup> Critics argue the standard's vagueness and subjective nature will result in adverse policy consequences. Many predict the legal uncertainty, increased risk of litigation, and compliance costs will lead to a chilling effect on innovation and availability of credit.<sup>67</sup> This could have a significant impact on economic recovery in this country.<sup>68</sup> A reduced availability of credit products may harm the economically disadvantaged disproportionately, as they already have limited access to credit and further regulatory efforts could even further constrain available credit to the group.<sup>69</sup> While there may be some adverse consequences to the abusive standard, the high degree of concern is unwarranted because the standard is not unduly vague and it is necessary to ensure a similar financial crisis is not repeated.

From an administration standpoint, new legal standards are frequently drafted and enacted into law.<sup>70</sup> By analogy when Congress initially enacted the unfair or deceptive standards in the FTCA, they intentionally drafted the language broadly to allow regulators and courts to continue to refine its definition

and provide the flexibility to close regulatory gaps.<sup>71</sup> One can also compare the abusive standard to broad language in federal antitrust legislation. In the Sherman Act, Congress gave the FTC authority to deal with "unfair methods of competition,"<sup>72</sup> and declared illegal any "restraint of trade or commerce."<sup>73</sup> The language in the Sherman Act is "intentionally vague" to "allow each administration to interpret and enforce laws."<sup>74</sup> The broader language allowed flexibility for courts and regulators to adapt to changing conditions in the marketplace and to balance competing interests of private business and consumers.<sup>75</sup> Analogies to these acts demonstrate that the abusive standard as drafted is not unduly vague.

Millions have suffered as a result of the crisis, thus extensive change is needed to restore consumer confidence.<sup>76</sup> The crisis demonstrated the need to shift to a more paternalistic, government-led approach to consumer financial protection; otherwise, some companies will continue to evade regulations as they historically have done.<sup>77</sup> Pre-crisis consumer protection focused on disclosures and making consumer understand what they were getting into.<sup>78</sup> The CFPA shifts the emphasis from disclosure to one of fairness; companies must now ask themselves: "Are we being fair?"<sup>79</sup> John C. Dugan, the former Comptroller of the Currency during the crisis observed, "[T]here will be significantly more consumer protection regulation and enforcement over time, because that's clearly what Congress wanted."<sup>80</sup> As Senator Christopher Dodd, one of the co-authors of the Act said: "Financial reform [is] not about punishing the financial services industry. Rather it [is] about restoring order, stability, and, most of all, confidence to our financial system."<sup>81</sup> These comments demonstrate the need for greater statutory reform, which the *abusive* standard satisfies.

In summary, having a consumer watchdog with broad enough statutory reach to go after unethical practices is one of the first steps to restoring consumer confidence and economic stability. The abusive standard plays an integral part in achieving this goal. The standard is not as new or unduly vague as critics allege, and it is necessary to address the problems of failed consumer protection that played such a large part in the recent financial crisis.

### **III. DEFINING AND APPLYING THE ABUSIVE STANDARD**

Some fear when the Bureau assumes its responsibilities in July 2011, it will overwhelm the financial industry with new regulations.<sup>82</sup> To the contrary, any rulemaking or enforcement actions will likely not happen so quickly, because they take time to develop.<sup>83</sup> Also, the Obama Administration has yet to appoint or confirm a director for the Bureau.<sup>84</sup> Without a director, the Bureau cannot establish any new rules to protect consumers.<sup>85</sup> Nor can the Bureau exercise any authority over non-bank businesses that currently evade regulation.<sup>86</sup> Even once a director is nominated, the confirmation process will likely drag on for months.<sup>87</sup>

In light of this inevitable delay, exactly how the Bureau will define, interpret, and limit the abusive standard will continue to be an issue of frenzied debate for years to come.<sup>88</sup> To contribute to these discussions, this section suggests how the Bureau may apply the abusive standard by identifying several classes of practices the Bureau should prohibit. These practices should be foremost in the Bureau's mind as it utilizes its rulemaking and enforcement authority.

In first applying the abusive standard, the Bureau must address the concerns of consumers and legislators, yet not alienate the financial industry—or otherwise risk the wrath from these groups.<sup>89</sup> It is a very fine line. Many of the most blatantly abusive practices, such as hidden balloon payments, bait and switch tactics, etc., have already been prohibited through the CFPA or recent



regulatory action.<sup>90</sup> In order to build credibility and cooperation with consumers and financial companies, initially, the Bureau should use the abusive standard to prohibit unethical practices that have been banned in other consumer contexts by existing federal legislation. Using other federal legislation as support for its actions, the Bureau can establish credibility and avoid the perception of being arbitrary. If a practice is banned in one consumer financial context, it should not be tolerated in another. The three classes of practices that the Bureau should deem abusive are: (1) extending credit without regard to borrower's ability to repay; (2) using overly aggressive sales and marketing tactics in consumer transactions; and (3) steering borrowers to certain products for the purpose of increasing lender compensation without meaningful benefit to the borrower.

This Part analyzes each practice with a focus on three key factors: (1) what conduct constitutes the abusive practice, (2) why the practice falls under the CFPA's definition of abusive and what existing legislation the Bureau can leverage to justify this prohibition, and (3) how the Bureau may apply this prohibition in different consumer financial contexts. By using this analytical framework, the contours of *abusive* can be more firmly established.

### ***A. Extending Credit Without Regard for the Ability to Repay***

Under its authority to prohibit abusive practices, the Bureau should prohibit the extension of credit to a borrower without adequate regard to a borrower's reasonable ability to repay.

#### **1. Conduct Constituting the Extension of Credit Without Regard to a Borrower's Reasonable Ability to Repay**

Extending credit without regard to a borrower's ability to repay occurs when a lender: (1) fails to adequately verify a borrower's credit, income, and financial obligations to determine a borrower's reasonable ability to repay the loan or (2) inflates a borrower's income in order to obtain a loan larger than the borrower can reasonably repay.<sup>91</sup>

For a secured loan, rather than relying on a borrower's ability to make scheduled payments, lenders extend credit based on the liquidation value of the borrower's collateral, such as a home or car. Put simply, lenders rely on the ability to seize a borrower's equity in the asset to satisfy any outstanding obligation.<sup>92</sup> This is commonly referred to as asset-based lending.<sup>93</sup> For an unsecured loan, lenders rely on the recovery of high fees in the event of missed payments, rather than on the borrower's ability to repay.<sup>94</sup>

These practices are particularly prevalent in the area of subprime or high-risk lending.<sup>95</sup> Subprime and high-risk loans are "loan[s] with more burdensome terms than those of a 'prime loan' and is designed for a borrower who lacks the income or credit score to qualify for a prime loan."<sup>96</sup> High-risk products include payday loans, auto-title loans, and student credit products.<sup>97</sup>

#### **2. Why is Failing to Perform an Adequate Assessment on a Borrower's Repayment Ability "Abusive?"**

##### ***a. Falling Under the Statutory Definition of Abusive***

The Office of the Comptroller observed that extending credit absent a determination of a borrower's reasonable repayment ability is "not consistent with established lending standards"<sup>98</sup> and "generally forms the basis of abusive lending."<sup>99</sup> In light of these comments and as discussed below, the Bureau should find extending credit without adequate regard to a borrower's ability to repay an abusive practice under section 1031(d)(2)(A) of the CFPA.<sup>100</sup>

First, extending credit without regard to a borrower's ability to repay should be defined as abusive because under section 1031(d)(2)(A) of the CFPA, such practice takes "unreasonable

advantage of . . . a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service . . . ."<sup>101</sup> Consumers often fail to fully understand common financial products because of their complexity and prolix agreements.<sup>102</sup> In the prime market, lenders are less able to exploit consumers' lack of understanding because competition drives out bad products.<sup>103</sup> Borrower exploitation is much more common in subprime markets where consumers are financially unsophisticated and more vulnerable to opportunistic lenders.<sup>104</sup> Because of limited financial literacy, consumers do not comprehend key terms of a financial product, such as variable interest rates, annual percentage rates, and prepayment fees.<sup>105</sup> Therefore, consumers fail to grasp the total cost of a loan, which leads to a poor understanding of their ability to make timely payments to lenders.<sup>106</sup> Consequently, many consumers simply do not comprehend the *material risks and costs* associated with financial products such as mortgages, payday loans, and overdraft fees.

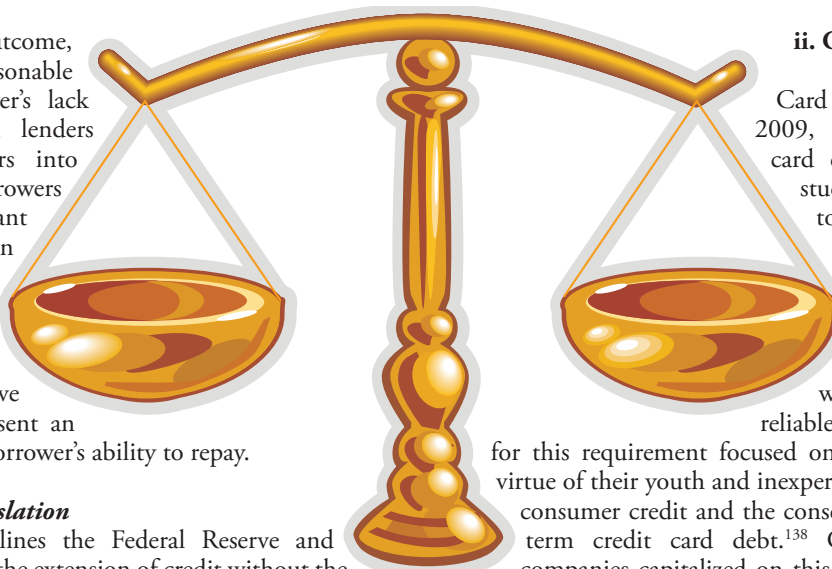
Many subprime lenders, knowing or likely knowing of the consumers' lack of understanding,<sup>107</sup> nevertheless fail to adequately verify each borrower's repayment ability, opting instead to extend loans relying on borrowers' collateral or high fees. As the FTC has observed, such loans are intentionally structured to fail.<sup>108</sup>

Though the Bureau has yet to define what constitutes "unreasonable advantage," the language could be construed to establish a quasi-duty of care owed by lenders to borrowers, limiting the amount that a lender could profit when one of the three prohibited conditions<sup>109</sup> described in section 1031 exist.<sup>110</sup> Also, if an "unreasonable advantage" is likely to be reviewed from the perspective of a reasonable consumer in the specific circumstance, the analysis could account for individual characters and attributes, such as financial literacy.<sup>111</sup> Against this backdrop, it is highly plausible that the Bureau would consider a lender to have taken "unreasonable advantage" of a borrower by extending a loan that the lender knows or should know is likely to fail. For example, in payday lending, it is estimated that over 90 percent of lender profitability is generated from high fees and penalties collected from borrowers who decline to pay or default on the initial loans and rollover their loans back-to-back over five or more successive payment periods.<sup>112</sup> By offering such products, which lenders know or likely know the borrower is unlikely to repay, the lenders are taking unreasonable advantage of the borrower.<sup>113</sup> Although one or two rollovers may actually assist the borrower, repeated rollovers with high fees serves only to place the consumer in a far worse financial position.<sup>114</sup>

The risk inequity between payday borrowers and lenders demonstrates why such loans are unreasonable. When lenders provide loans that borrowers are unlikely to repay, the consequences are significantly worse for borrowers than lenders. Consumer advocates claim that by failing to adequately verify a borrower's repayment ability, lenders "trap borrowers into collateral-based loans they clearly cannot repay."<sup>115</sup> Borrowers may lose important assets, such as their home or cars; be forced to perpetual, high-cost refinancing; or be forced to declare bankruptcy.<sup>116</sup> On the other hand, lenders profit handsomely, whether or not scheduled payments are made. This is done through their ability to seize the borrower's collateral to satisfy the outstanding loan, profit from forced refinancing, or collect high fees associated with default.<sup>117</sup>

Lending without an adequate assessment of a borrower's repayment ability is even more unreasonable, because it departs from customary underwriting principles.<sup>118</sup> The Office of the Comptroller observed that a basic principle of loan underwriting requires a proper assessment of the "borrower's capacity to make scheduled payments."<sup>119</sup> Ignoring basic loan underwriting lies at the heart of abusive, or as they are also commonly called, predatory

practices.<sup>120</sup> Given this outcome, lenders take unreasonable advantage of the borrower's lack of understanding. When lenders knowingly lead borrowers into loans that will fail, borrowers are subject to significant harm from defaulting on failed loans, and despite the harm to borrowers, lenders receive a windfall. Therefore, the Bureau should prohibit as abusive the extension of loans absent an adequate assessment of a borrower's ability to repay.



### b. Analogous Federal Legislation

This section outlines the Federal Reserve and Congress' decisions to ban the extension of credit without the regard for a borrower's ability to repay for home mortgages and student credit-cards.<sup>121</sup> Congress and the Federal Reserve took action because such practices took advantage of a borrower's lack of understanding or misplaced reliance on lenders.<sup>122</sup> Due to the similarities between these and other consumer financial sectors, the Bureau should prohibit such lending in other contexts.<sup>123</sup>

### i. Home Ownership and Equity Protection Act

In 1994, Congress gave the Federal Reserve authority, through HOEPA, to prohibit acts or practices related to any mortgages that the Federal Reserve determined were "unfair, deceptive . . . or associated with *abusive lending*."<sup>124</sup> Congress focused on preventing practices designed to "take advantage of unsophisticated borrowers."<sup>125</sup> In 2008, the Federal Reserve Board finalized rules prohibiting asset-based lending for high-priced mortgage loans,<sup>126</sup> as part of its mandate under HOEPA to prevent those activities "associated with abusive lending."<sup>127</sup> In mortgage lending, brokers receive a commission on each loan closed. They are incentivized to close as many and as large loans as possible, rather than looking out for the long-term interests of the borrowers.<sup>128</sup> As a result of these misaligned incentives, lenders inflated borrowers' stated incomes to gain approval for larger-than-needed loans, understated borrower obligations, or failed to verify borrowers' ability to repay.<sup>129</sup>

Inevitably, borrowers mistakenly relied on lenders to determine their ability to repay, unaware of high risks and unable to comprehend the complexities of a high-priced mortgage loan lenders sold to them.<sup>130</sup> Accordingly, they became exposed to tremendous foreclosure risk.<sup>131</sup> Such circumstances created a windfall for lenders. They profited regardless of whether or not borrowers met their loan payments.<sup>132</sup> If borrowers met payments, lenders would profit from high-interest charged.<sup>133</sup> If borrowers did not meet their payments but were able to refinance, lenders profited from the high fees and pre-payment penalties associated with refinancing. In the event of a borrower default, lenders usually recovered money owed in part from the foreclosure of the borrower's homes.<sup>134</sup> Each result heavily favored lenders to the severe detriment of borrowers.

Several states, including New York, followed the Federal Reserve and enacted requirements for lenders to assess consumers' ability to repay.<sup>135</sup> Congress later expanded the prohibitions against asset-based lending across all consumer mortgages, in Title XIV of the CFPA.<sup>136</sup> Given the strong measures taken against this practice in home mortgages, the Bureau should follow suit for similar practices in other contexts.

### ii. Credit Card Reform Act

As part of the Credit Card Reform Act, enacted in 2009, Congress required credit card companies to first assess students' reasonable ability to repay before approving them for a credit card.<sup>137</sup>

The Act specifically prohibited the issuance of credit cards to students, unless they were employed or had a reliable cosigner. The rationale

for this requirement focused on how most students—by virtue of their youth and inexperience—do not understand consumer credit and the consequences of creating long-term credit card debt.<sup>138</sup> Consequently, credit-card companies capitalized on this lack of understanding by

offering easy credit and encouraging students to use credit cards without first verifying students' repayment ability.<sup>139</sup> This is in stark contrast to an adult's application for a credit card, which generally requires verification of a consumer's ability to repay based on a consumer's income, household income, work and credit history, and so forth.<sup>140</sup>

Although, the average student credit card limit is only \$500, these products are highly profitable for the companies issuing them.<sup>141</sup> Credit card companies profit when students use and pay the credit debt on time, but also profit if the students default, thanks to the ability to charge the highest interest rate on unpaid balances and students' reliance on their families to cover the outstanding debt.<sup>142</sup> Disturbed by the vulnerability of unsophisticated students—and windfalls received by credit card companies—Congress prohibited the extension of credit cards to students without regard to their ability to repay.<sup>143</sup>

### 3. How the Bureau May Implement This Prohibition

Congress' decision to require lenders to perform an adequate assessment of a student borrower's repayment ability indicates a failure to do so is unreasonable not only for secured, larger-sized loans (like mortgages) but also for unsecured, small-sized loans.<sup>144</sup> The Bureau may use this reasoning to prohibit the extension of payday loans without a determination that the borrower has a reasonable ability to repay.

Payday loans are a type of subprime loan that have come under considerable public pressure and media scrutiny.<sup>145</sup> Payday loans are intended as short-term cash advances provided for a fee, secured by a borrower's post-dated check. Ideally, these loans are only intended to cover short-term emergencies.<sup>146</sup> Most typically, a lender extends a \$300 loan with a \$50 fee to be repaid in two weeks.<sup>147</sup> This loan equates to a high annual-percentage rate of 435 percent.<sup>148</sup> Payday lending is a \$35 billion industry and growing; loans are provided online and at over 22,000 locations nationwide.<sup>149</sup> Despite state efforts to regulate the industry, lenders have frequently found creative ways to avoid state-level regulation and judicial action, necessitating the creation of a federal regulatory approach.<sup>150</sup>

Payday lenders do not provide an adequate assessment of a borrower's ability to repay, thus the Bureau should deem the failure to do so as *abusive* given the disproportionate impact this practice has on borrowers compared to the lenders. Similar to consumers who receive high-priced mortgages or student credit cards, consumers who take out payday loans are usually financially unsophisticated.<sup>151</sup> Though borrowers may be aware of the finance charges associated with the loan, they still lack an

understanding of other *material risks, costs, and conditions*. These aspects include a high annual percentage rate, which limits a borrower's ability to effectively compare alternative products;<sup>152</sup> a systematic overestimation by borrowers of their ability to repay the loan; and a lack of understanding of the actual cost of the loan upon multiple renewals.<sup>153</sup> Moreover, many borrowers do not realize that lenders have no obligation to conduct accurate assessments of borrowers' abilities to repay.<sup>154</sup>

Payday lenders capitalize this lack of understanding. They typically perform limited verification on borrowers. Lenders require only proof the borrower receives a regular paycheck, has a bank account, or receives public benefits.<sup>155</sup> Lenders do not possess an adequate view of the borrower's true financial position.<sup>156</sup> As such, lenders provide loans designed to fail.<sup>157</sup>

What makes the failure to properly verify borrower repayment ability so unreasonable is outlined by analyzing loan rollovers. Only 25 percent of payday loans are paid off on time.<sup>158</sup> An estimated 76 percent of payday loans are made to repay a previous payday loan.<sup>159</sup> As discussed in Part III.A.2.a., borrowers

are consequently forced to rollover the first loan into a new loan in order to pay off the first at high additional costs, leading to a perpetual cycle of debt.<sup>160</sup> Professor Elizabeth Warren—the Special Advisor to the Obama Administration responsible for laying the groundwork for the Bureau—

## **Another practice the Bureau should prohibit is overly aggressive sales and marketing tactics that are used to coerce or intimidate borrowers into entering a credit transaction.**

observed that rollovers are the *most dangerous feature* of payday lending.<sup>161</sup> On average, borrowers will rollover the same loan nine times before repayment, usually in back-to-back succession.<sup>162</sup> This doubles the ultimate repayment amount.<sup>163</sup> For example, if a borrower rolls over their \$300 loan, eight times, borrower will pay \$705 in principal, interests, and fees.<sup>164</sup>

What is even more concerning is that 90 percent of the payday lenders' profitability derives from borrowers who are unable to repay and must rollover their loans. Thus, payday lenders are not incentivized to perform in-depth checks of a borrower's ability to repay. The more people use the loans as they are intended and repay on-time, the less profitable payday lenders will be. This strengthens the assertion that payday lenders, who fail to adequately verify a borrower's repayment ability, are taking unreasonable advantage of borrowers' lack of understanding of risks by purposefully ignoring the fact that they are leading borrowers into loans they cannot repay.<sup>165</sup> A Department of Defense report—which led to heavy federal regulation of payday loans for the military—explains the exploitative nature of this industry: "It is clear that the payday lending business model *is based on the repeat high loan fees from one borrower in successive transactions, without the extension of new principle.*"<sup>166</sup>

Small-dollar loans, like payday loans, are useful to American families as they provide a source for fast, short-term cash, thus the Bureau's intent is not to eliminate them.<sup>167</sup> Nor is the Bureau able to impose usury caps.<sup>168</sup> To facilitate the speed of the transaction, requiring an extensive verification of ability to repay is somewhat problematic. Yet, with its existing data, payday lenders could analyze and generate profiles of those borrowers who are most likely to default, use the profile to screen new and existing

consumers, and at least perform selective assessments.<sup>169</sup> To fail to conduct a more reasonable verification would be to perpetuate predatory loans.<sup>170</sup> As Professor Elizabeth Warren commented about payday loans, "it is important from a regulatory standpoint that people are not at the mercy of lenders who build business models around fooling people. There's a real problem . . . [and] I anticipate a lot of change in this [payday loan] area."<sup>171</sup>

Accordingly, as illustrated by the analogies to high-priced mortgage loans and students credit cards, the Bureau can justify prohibiting as abusive any extension of credit without adequate regard to a borrowers' abilities to repay—especially given the windfall to lenders at the expense of naïve borrowers.

### **B. Overly Aggressive Sales and Marketing Tactics**

Another practice the Bureau should prohibit is overly aggressive sales and marketing tactics that are used to coerce or intimidate borrowers into entering a credit transaction.<sup>172</sup>

#### **1. What Constitutes Overly Aggressive Sales & Marketing Tactics?**

To determine what conduct constitutes abusive sales and marketing tactics, the Bureau can find authority in the Fair Debt Collection Practices Act and Federal Telemarketing Sales Rule.<sup>173</sup> Obviously, some "hard-sell" sales tactics will exist in the marketplace. Overly aggressive sales and marketing tactics, however, should be viewed as any conduct a lender may engage in, "the natural consequence of which is to harass, oppress, or abuse any person" in connection with the sale or marketing of a consumer financial product.<sup>174</sup>

Government reports and academic studies outline some of these practices. These include engaging in incessant sales calls, either made through the telephone or door-to-door visits; discouraging borrowers from investigating lower cost alternatives; pressuring borrowers to sign documents immediately or without reading them; and so forth.<sup>175</sup> One tactic that has been particularly effective occurs when lenders "send out solicitations that are designed to resemble collection notices, so that frightened homeowners will reply, only to be cajoled into taking out high cost loans."<sup>176</sup> These acts are done with the purpose of selling a loan by subjecting the borrower to undue psychological or emotional pressure.<sup>177</sup>

#### **2. Overly Aggressive Sales and Marketing Tactics Fall Within CFPA's Standard**

##### **a. Falling Under the Statutory Definition of Abusive**

Section 1031(d)(1) of the CFPA states that any practice is abusive if it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service."<sup>178</sup> Aggressive sales and marketing tactics materially interfere with a consumer's ability to understand the terms of the product because they are intended to be or have the effect of overwhelming, confusing, or causing anxiety in the consumer.<sup>179</sup> Lenders rely on threats, emotional and psychological pressure, and borrower ignorance to push prospective borrowers through an application process in pursuit of credit beyond what the borrowers want, need, or can afford.<sup>180</sup> All of this severely limits a consumer's ability to make sound judgments on the product being offered.<sup>181</sup>

A joint federal taskforce characterized the effect of aggressive sales tactics like the CFPA's §1031(d)(1) definition of an abusive practice. The report stated: "These practices *interfere with, and in some cases, deprive borrowers of the opportunity to understand the terms of a proposed loan.*"<sup>182</sup>

Some lenders even use federally required disclosures to



confuse consumers.<sup>183</sup> Loan officers “typically schedule a home loan closing every thirty minutes, an unrealistic amount of time for even a highly literate borrower to read through all the [approximately 50 pages] fine print.”<sup>184</sup> Buried in the documents will be the three to five pages of disclosures.<sup>185</sup> Lenders move through the documents rapidly; by doing so, it communicates to the borrower that they are expected to not ask questions or are expected to understand the documents easily.<sup>186</sup> This is designed to “overload, overwhelm, distract, and . . . fatigue borrowers.”<sup>187</sup> This rushed feeling creates a sense of stress, “leading to truncated reasoning” rather than a careful understanding of aspects of the loan.<sup>188</sup> This articulates the negative impact overly aggressive sales and marketing tactics have on a consumer’s ability to understand the important terms of a loan. Therefore, overly aggressive sales and marketing tactics fall within the CFPA’s definition of abusive.

### ***b. Analogous Federal Legislation***

The Bureau’s decision to prohibit overly aggressively sales and marketing tactics as abusive can leverage similar reasoning and definitions used by Congress and the Federal Reserve used to curb such practices under the Fair Debt Collection Practices Act<sup>189</sup> and the Federal Telemarketing Sales Rule.<sup>190</sup> Like the CFPA, the purpose of these provisions is to prevent and eliminate abusive practices that became serious national problems.

### ***i. The Fair Debt Collection Practices Act***

In 1977, Congress established *abusive* as a legal standard in the Fair Debt Collection Practices Act (“FDCPA”). The standard, enforced by the FTC, was intended to protect a major part of consumer finance: debt collection. The FDCPA uses the abusive standard broadly to encompass abusive, deceptive, and unfair practices.<sup>191</sup> Specifically section 1692(d) states: “A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.”<sup>192</sup> This section also enumerates specific conduct as a violation of this prohibition, including the use of repeated calling to annoy or harass the listener; use of obscene language or “language the natural consequence of which is to abuse the hearer or reader”; and threats of violence.<sup>193</sup> These behaviors are akin to overly aggressive sales and marketing practices discussed above. The statute gives the FTC added flexibility by enabling “the courts, when appropriate, to proscribe other *improper conduct*, which is not specifically addressed” in the statutory language.<sup>194</sup>

Since 1978, the FTC has brought over sixty enforcement actions against parties who violated this Act,<sup>195</sup> many involved lenders engaging in abusive debt collection in violation of 1692(d).<sup>196</sup> This gives the Bureau a considerable body of case law to consider in forming policy and regulations to further define abusive under section 1031 of the CFPA.<sup>197</sup>

### ***ii. The Federal Telemarketing Sales Rule***

The Bureau can also look to the Federal Telemarketing Sales Rule (“FSTR”), a part of the Telemarketing and Consumer Fraud and Abuse Prevention Act,<sup>198</sup> for more recent guidance.<sup>199</sup> Congress designed the FSTR to prohibit deceptive and abusive telemarketing activities.<sup>200</sup> It is estimated that unscrupulous businesses utilize advances in telemarketing as a way to victimize consumers, costing consumers \$40 billion a year.<sup>201</sup>

To implement the Act, the FTC promulgated the FTSR based in large part on the FDCPA definition of prohibited practices—conducts that “harass, oppress, or abuse” a borrower.<sup>202</sup> The FTSR enumerates certain acts as abusive, including: all types of threats, intimidation, or obscene language;<sup>203</sup> patterns of unsolicited calls intended to annoy, abuse, or harass any person;

and refusal to identify the calling party.<sup>204</sup>

Commentary by the FTC also provides an even more expansive definition of abusive acts of intimidation including “acts that would place undue pressures on the consumer, or which call into question a person’s intelligence, honesty, reliability, or concern for family . . . [or] [r]epeated calls to a consumer who has declined a telemarketing offer.”<sup>205</sup> Lenders engaging in any of these acts render consumers unreasonably more susceptible to telemarketing schemes. Such practices are, therefore, considered abusive. The Bureau should look to the FSTR and the FDCPA for considerable guidance when justifying the prohibition of overly aggressive sales and marketing practices in other consumer financial contexts.

### **3. How will the Bureau Implement this Prohibition?**

Consulting applicable federal legislation, the Bureau will establish regulations to eliminate the most abusive practices. While reports indicate overly aggressive marketing and sales tactics are common in several areas, the industry requiring immediate regulation is home mortgages, given its gross impact on the financial crisis.<sup>206</sup>

There are two reasons the Bureau should deem overly aggressive sales and marketing tactics to be abusive in home mortgages. First, prohibiting these practices will reduce the kinds of predatory subprime loans that resulted in millions of foreclosures. The severity of the financial crisis resulted in part from the proliferation of such unaffordable loans.<sup>207</sup> Once borrowers realized they could not afford these subprime loans that were inherently designed to fail, foreclosures ensued.<sup>208</sup> There is a broad consensus amongst commentators that aggressive marketing and solicitation tactics are central aspects of predatory subprime lending.<sup>209</sup> Practices, such as incessant calling and excessive disclosures, negatively impacted borrowers’ abilities to make informed decision and allowed lenders to take advantage of them.<sup>210</sup>

Most subprime borrowers have lower income, often have less education, and frequently lack the financial sophistication to adequately scrutinize a loan.<sup>211</sup> Unscrupulous subprime lenders preyed on unsophisticated borrowers by using fear and psychological pressure to interfere with consumers’ understanding of the terms and conditions of a given transaction. Certain groups, such as the elderly, who have significant equity in their homes but limited financial education, were the most susceptible to lenders engaging in these tactics.<sup>212</sup> Ultimately, lenders engaged in overly aggressive sales and marketing tactics coerced borrowers “to continue through the loan application process in cases in which the customer would prefer to discontinue the process.”<sup>213</sup> Consequently, lenders “direct[ed] them to products that may not be the best for their needs – or affordable in the long run.”<sup>214</sup> Under the abusive standard, the Bureau has the flexibility to ban overly aggressive sales and marketing tactics, reducing the numbers of consumers who are pressured into unfair loans.

Second, the nation’s current financial straits demand regulation of overly aggressive sales and marketing tactics far more than aggressive debt collection or telemarketing. Congress justified the FDCPA prohibitions by pointing to the size and growth of the \$5 billion debt-collection industry in 1976.<sup>215</sup> By the same reasoning, restricting overly aggressive sales and marketing tactics is even more necessary. The total losses resulting from the subprime mortgage crisis are estimated to hit \$636 billion;<sup>216</sup> eight million borrowers will lose their homes to foreclosures “because of an inability to repay unsound loans.”<sup>217</sup>

Given the magnitude of the subprime mortgage crisis, and the common association between consumer foreclosures and aggressive sales tactics—the Bureau should

prohibit overly aggressive sales and marketing tactics as abusive.

### **C. Steering Practices**

The fallout of the subprime-mortgage crisis not only revealed the need to regulate aggressive marketing and sales tactics and asset-based lending but also loan steering.

#### **1. Conduct Constituting Abusive Steering Practice**

Steering occurs when a lender or loan originator directs a consumer away from a certain type of product towards a less beneficial alternative.<sup>218</sup> Most often the lender has access to alternative products or terms for which the consumer is eligible, yet lenders will steer consumers away from better suited products, toward a detrimental alternative.<sup>219</sup> Steering is done to increase the lender's revenue through additional kickbacks or profits generated for the lender by selling a different product.<sup>220</sup> These acts occur despite an expectation or reliance by the consumer that lenders will act in the consumer's best interests.<sup>221</sup>

The practice of loan steering is commonly reported in mortgage lending, overdraft fees,<sup>222</sup> student loans, and other consumer products.<sup>223</sup> Consider overdraft payment programs.<sup>224</sup> Cases have been reported where banks steered consumers who frequently overdraw on their accounts into fee-based overdraft programs in order to maximize bank revenue, rather than less expensive overdraft options or other credit alternatives.<sup>225</sup> The most frequent users of overdraft programs are lower-income individuals with less financial sophistication. Critics allege banks use these programs to exploit these consumers' lack of knowledge and naivety to generate an estimated \$38 billion annually.<sup>226</sup> In November 2010, the FDIC issued guidance, strongly discouraging steering in overdraft programs, but only after the CFPA was proposed.<sup>227</sup>

#### **2. How Does Steering Fall Within the Definition of Abusive**

##### **a. Falling Under the Statutory Definition of Abusive**

Steering should be defined abusive under section 1031(d)(2)(C) of the CFPA. Section 1031(d)(2)(C) states an act or practice is abusive if it "takes unreasonable advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."<sup>228</sup> For many consumer finance transactions, there is evidence that consumers rely heavily on a lender's advice when selecting a product or loan.<sup>229</sup> In the mortgage context, this reliance is developed as lenders may cultivate themselves as a "trusted advisor"<sup>230</sup> or through an established relationship between the borrower, lender, and an affiliated institution.<sup>231</sup> Because of this reliance, consumers inaccurately (though commonly) believe lenders are obligated to obtain the best interest rates and terms for them.<sup>232</sup> For example, in a national Fannie Mae Survey, over half of all Hispanic and African-American borrowers surveyed believed that "lenders are required by law to provide the best possible loan rates."<sup>233</sup>

Despite recognizing that many consumers rely on their lenders, lenders still steer consumers towards products or loans with disadvantageous terms compared to other available products. In a speech to the Consumers Union, Professor Warren observed "[t]oo many profit models have been built around *steering* customers into products they can't understand or may not be able to afford."<sup>234</sup> Accordingly, lenders profit from and take unreasonable advantage of this reliance by placing consumers in loans which did not meet their financial and personal needs.<sup>235</sup> In many cases, this practice forces borrowers into unmanageable or crippling debt.<sup>236</sup>

##### **b. Analogous Federal Legislation in the CFPA**

Prohibitions against steering already exist in the home-mortgage context and thus steering should no longer be tolerated in other consumer credit contexts as well.<sup>237</sup> The CFPA amended TILA to impose restrictions on steering by loan originators and on yield spread premiums for mortgages. In home mortgages executed prior to April 1, 2011, lenders typically paid loan originators—mortgage brokers and their employees—higher compensation if the borrower agreed to an interest rate that is higher than the rate required by the lender. This is commonly referred to as a yield spread premium.<sup>238</sup> Because of this compensation structure, brokers were highly incentivized to steer and influence borrowers towards loans with higher interest rates in order to gain the additional compensation, often at the expense of the borrower.<sup>239</sup> The practice became so prevalent that Fannie Mae estimated that as many as 50 percent of subprime borrowers could have qualified for lower prime rate interest loans.<sup>240</sup> While disclosure requirements existed, they had little impact.<sup>241</sup>

Section 1403 of the CFPA prohibits a "mortgage originator from receiving, directly or indirectly, compensation that varies based on the terms of the loan, other than the amount of the principal."<sup>242</sup> It also prohibits originators from steering borrowers from a qualified mortgage (one with generally less risky terms) to a non-qualified mortgage (one with generally riskier terms); to a loan that the consumer lacks a reasonable ability to repay; or to a loan that has "predatory characteristics (such as equity stripping, excessive fees, or abusive terms)."<sup>243</sup>

Even though changes in the CFPA were not to go into effect until April 2011, on August 16, 2010, the Federal Reserve Board took several actions to immediately protect consumers from steering in advance of the CFPA provisions.<sup>244</sup> From testimony and consumer testing supporting its decision, the Board concluded (1) consumers are simply not aware or lack an understanding of yield spread premiums and the large incentive that brokers have to steer borrowers; (2) consumers who understand that creditors pay loan originators "may not fully understand the implications of this practice"; and (3) consumers place significant reliance on their trust and relationship with the broker to provide terms that are in the consumers' interest.<sup>245</sup> In announcing the new rules, just a month following the enactment of the Dodd-Frank Act, the Board actions may reflect what actions the Bureau may take once it takes authority over consumer financial protection.

#### **3. How the Bureau Should Implement Anti-Steering Prohibitions**

The CFPA and Final Rules to TILA adopted by the Board signaled a willingness to embrace some quasi-form of fiduciary duty owed to borrowers by lenders to act in borrowers' best interests in home mortgages.<sup>246</sup> The spirit of these protections should apply broadly to consumer finance, as the circumstances that led the Board to label steering as an abusive practice in home-mortgage industry are present in other credit markets. One such example is private student loans.

Private student loans are loans extended by private institutions to students and families in order to pay for higher-education costs.<sup>247</sup> These loans are outside of government-sponsored student loan programs and are not subsidized by the federal government.<sup>248</sup> Private loans are significantly more risky and expensive than their federal counterparts.<sup>249</sup> Unlike federal student loans that are offered at fixed rates, private student loans have variable interest rates. On average, the base interest rate is twice that of federal loans.<sup>250</sup> Reported interest rates for private loans in 2010 averaged from 11 to 12 percent<sup>251</sup> and went as high as 18 percent.<sup>252</sup> In contrast, rates at about the same time for government-supported student loans were 5.6 to 6.8 percent.<sup>253</sup>

The private student loan industry bears many alarming similarities to the pre-crisis subprime mortgage industry.<sup>254</sup> It possesses limited regulatory activity, features high-risk borrowers, and appears to inflict disproportionate harm on lower-income borrowers.<sup>255</sup> Other statistics call attention to tremendous growth of the industry. In August 2010, the Federal Reserve reported that national student loan debt surpassed credit card debt; approximately 20 percent of the loans are private student loans.<sup>256</sup> In the 2005–06 year, private student lenders originated \$17.3 billion in loans, tripling in size from the five years prior.<sup>257</sup> These conditions demonstrate a need for active regulation of private student loans.<sup>258</sup> As a result, Congress explicitly included this industry within the Bureau's jurisdiction. Additionally, the CFPA creates a private education loan ombudsman, demonstrating Congress' intent to reign in abuses.<sup>259</sup>

Under its authority to prohibit abusive practices, the Bureau may elect to prohibit private student lenders, who have a preferred lender status with educational institutions, from steering students (1) to enter higher than necessary private student loans when they qualify for low cost federal loans and (2) steering students to larger loans than students need.<sup>260</sup> Such acts have the practical effect of increasing lender compensation, since lenders generate greater interest payments from a larger loan. This practice, however, is of limited or no benefit to the borrowers, because they could have received significantly more favorable terms under federal student loans.

Steering in private student loans may be defined as abusive under two of the CFPA's definitions. The practice takes unreasonable advantage of the borrower's lack of understanding "of the material risks, costs, or conditions of the product,"<sup>261</sup> and of the reasonable reliance by the consumer on the lender to act in their best interests.<sup>262</sup>

When entering into private student loans, students rarely shop around.<sup>263</sup> They instead rely heavily on the preferred vendors recommended by their schools' financial aid office. Over 90 percent of students seeking loans will go with the school's "preferred lenders."<sup>264</sup> Therefore, placement on a preferred list is highly competitive.<sup>265</sup>

A student's reliance on a preferred lender is generally based on the student's lack of understanding of the difference between federal and private loans.<sup>266</sup> Students simply do not possess the financial sophistication to make informed decisions.<sup>267</sup> Also, the reliance on the lender is based on a misguided, but not unreasonable, expectation that as preferred lenders to their school these lenders are required to act in the best interests of the school and, by extension, the student.<sup>268</sup>

Preferred private student lenders are aware of the student's reliance and lack of understanding.<sup>269</sup> In fact, that is likely why they compete so fiercely to get on a school's list of recommended lenders.<sup>270</sup> The incentive structure for these lenders deters them from verifying with the school whether the borrower has exhausted their federal loans and offering a lesser loan amount. Of private student loans extended in 2009, 64 percent of students had not exhausted their federal loans.<sup>271</sup> More concerning is that 26 percent of private loan borrowers, who qualified for federal loans, failed to even use federal loans at all.<sup>272</sup>

By steering a student to a larger loan without regard to federal loan access, lenders take unreasonable advantage of the students' reliance and thus engage in an abusive practice. This is the type of practice that the Bureau and section 1031 seeks to prevent.<sup>273</sup> The larger loan automatically exposes students to more risk than a federal loan.<sup>274</sup> As Senator Jared Polis, a member of the House Education and Labor Committee, observed "[p]rivate student loans are *one of the riskiest and most expensive ways* to pay for college . . . [it] can be riskier than using a credit card."<sup>275</sup> The result

of obtaining private loans without first exhausting one's federal loan options could lead to "a lifetime of excessive and unnecessary debt."<sup>276</sup> This is particularly alarming because student loans cannot be discharged through personal bankruptcy proceedings.<sup>277</sup> Overall, private student loans enjoy fewer consumer protections, have less flexible repayment options, and generally expose borrowers to greater financial risk than federal student loans.<sup>278</sup>

Despite these consequences, many preferred lenders may nevertheless steer students away from federal loans by electing to not confirm whether the student has exhausted his or her federal loans. Sometimes they even discourage students against federal loans, playing into the fears based on misinformation, such as a more complex application process, need for co-signers, and a longer wait for loan disbursement.<sup>279</sup> Such practices are abusive and the Bureau should take action to prohibit preferred private student lenders extend student loans without verifying whether the student has exhausted their federal loan options.

The problems of private student loans became so severe that the House passed an amendment to the Dodd-Frank Act, requiring lenders to obtain certification from the borrower's schools confirming students had exhausted federal loans.<sup>280</sup> Congress had recently approved a student self-certification requirement, so the Senate declined to approve the amendment until results on self-certification were more extensive.<sup>281</sup> Initial field studies indicate that self-certification has not been effective in curbing student awareness.<sup>282</sup> In light of the proven ineffectiveness of similar disclosures<sup>283</sup> self-certification is unlikely to provide the necessary protections to stem loan steering.<sup>284</sup> Therefore, the Bureau should prohibit steering as an abusive practice in the context of private student loans.

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#### IV. CONCLUSION

The Bureau of Consumer Financial Protection will play an integral role in redeveloping stability in the consumer financial industry. Practices that once fell outside the FTCA's unfair and deceptive standards will no longer evade regulation under the Consumer Financial Protection Act's abusive standard. Despite some criticism to the contrary, the term *abusive* is neither new nor unduly vague. Further, the abusive standard is necessary to provide adequate protections against future financial crisis related to consumer credit products. By analogy to past application of *abusive* as a legal standard in other statutes, one can confidently say that the CFPA's abusive standard applies at least three classes of practices. Developing the regulation of such practices will allow the abusive standard to be better understood.

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## The "abusive" standard is necessary to provide adequate protections against future financial crisis related to consumer credit products.



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25. *Improving Federal Consumer Protection in Financial Services Hearing*, *supra* note 16, at 153–54 (testimony of John Dugan, Comptroller of Currency).
26. 15 U.S.C § 45(a) (Section 5 of the FTC Act).
27. *Improving Federal Consumer Protection in Financial Services Hearing*, *supra* note 16, at 113–14 (statement of Sheila Bair, Chairman of the Federal Deposit Insurance Corporation).

28. *Id.*
29. Telephone Interview with Kathleen Keest, Ctr. for Responsible Lending (Apr. 6, 2011) (explaining common situations where the FTC's unfairness test is not suitable to prevent common unethical practices).
30. *Id.*
31. Truth in Lending Act: Final Rule, 73 Fed. Reg. 44540 (July 30, 2008).
32. Telephone Interview with Kathleen Keest, *supra* note 29.
33. *Improving Federal Consumer Protection in Financial Services Hearing*, *supra* note 16, at 113–14 (statement of Sheila Bair, Chairman of the Federal Deposit Insurance Corporation).
34. FED. DEPOSIT INS. CORP., COMPLIANCE EXAMINATION MANUAL VII-1.1 ABUSIVE PRACTICES — THE FEDERAL TRADE COMMISSION Act (2006) (noting that on the FDIC and the Federal Reserve Board issued additional on March 11, 2004, regarding what constitutes unfair and deceptive practices).
35. *Id.*
36. *Id.* at 153–54 (testimony of John Dugan, Comptroller of Currency); see Marquette University Law School, Remarks of Kathleen Keest, Ctr. for Responsible Lending, at the Public Service Conference: New Directions in Consumer and Community Financial Protection (Feb. 25, 2011), [http://law.marquette.edu/cgi-bin/site.pl?2216&deEvent\\_eventID=3123&date=2011-02-25](http://law.marquette.edu/cgi-bin/site.pl?2216&deEvent_eventID=3123&date=2011-02-25).
37. *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing on H.R. 1705 Before the Comm. on Fin. Servs.*, 111th Cong. 122 (2009) (testimony of Travis Plunkett, Consumer Federation of American and Edmund Mierzwinski, U.S. PIRG).
38. Interview with Gail Hillebrand, Consumers Union (Mar. 13, 2011) (explaining that because innovation in consumer finance occurs so rapidly and companies can easily adjust to new regulations, the federal government needed a new and flexible standard that would allow agencies to react quickly to changes in the industry).
39. Dodd-Frank Act §1031(a)(emphasis added); BAIRD WEBEL, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: ISSUES AND SUMMARY 11 (Congressional Research Service 2010).
40. Dodd-Frank Act § 1002(6)(A-B); John L. Ropiequest et al., *An Introduction to the Dodd-Frank Act—The New Regulatory Structure for Consumer Finance Emerges*, 29 BANKING & FIN. SERVICES POL'Y REP. 1, 8 (2010).
41. See DAVID S. EVANS & JOSHUA D. WRIGHT, HOW THE CONSUMER FINANCIAL PROTECTION AGENCY ACT OF 2009 WOULD CHANGE THE LAW AND REGULATION OF CONSUMER FINANCIAL PRODUCTS 6 (Bloomberg Law Reports 2009).
42. Thomas A. Durkin, *The Impact of the Consumer Financial Protection Agency on Small Business* 21 (Center for Capital Markets Competitiveness 2009).
43. Dodd-Frank Act § 1031(d) (emphasis added).
44. See *Improving Federal Consumer Protection Hearing*, *supra* note 16, at 40; Hopkins, *supra* note 5.
45. Marquette University Law School, *supra* note 36 (comments made by Kathleen Keest, Center for Responsible Lending).
46. See *Improving Federal Consumer Protection in Financial Services Hearing*, *supra* note 16, at 38–40.
47. *Id.* at 40, 113–15.
48. *Id.* at 40 (statement of Sen. Barney Frank, Chairman of the H. Comm. of Financial Servs, and Sheila Bair, Chairman of the Federal Deposit Insurance Corp.) (emphasis added).
49. Cheyenne Hopkins, 'Chilling Effect' of 'Abusive' in Dodd-Frank, 175 AM. BANKER 1 (2010) (emphasis added).
50. Telephone Interview with Kathleen Keest, Center for



- Responsible Lending (Apr. 6, 2011) (explaining that the abusive standard may be an incorporation of the doctrine of unconscionability that resonated with government and consumers in the 1960s and 1970s); CAREY ALEXANDER, ABUSIVE: DODD-FRANK SECTION 1031 AND THE CONTINUING STRUGGLE TO PROTECT CONSUMERS 9–11 (St. John's University School of Law 2011).
51. Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2006).
52. Riegel Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325 § 151–58, 108 Stat. 2190-98 (1994) (codified throughout 15 U.S.C. §§ 1601–1649).
53. *Id.*
54. AMANDA L. WAIT, THE NEW BUREAU OF CONSUMER FINANCIAL PROTECTION – AN OVERVIEW 1 (American Bar Association 2010).
55. *See, e.g.*, Todd Zywicki, *How to Make the Bureau of Consumer Protection More Consumer Friendly*, THE VOLOKH CONSPIRACY (June 4, 2010, 10:13 AM), <http://volokh.com/2010/06/04/how-to-make-the-bureau-of-consumer-protection-more-consumer-friendly>.
56. Compare the third element in the FTCA's unfairness test: "an act or practice is 'unfair' where it (3) . . . is not outweighed by counter-veiling benefits to consumer or to competition" with § 1031(d)(2).
57. If the consumer cannot repay the auto-title loan, the lender repossesses the car to satisfy the loan amount. Critics argue auto-title lending and other forms of high-risk lending are abusive and cause financial distress, as they take advantage of consumer's lack of understanding of the financial implications of the loan. Jim Hawkins, *Regulating the Fringe: Reexamining the link Between Fringe Banking and Financial Distress*, 86 IND. L. J. (forthcoming 2011) (noted on page 1, 29–31).
58. Durkin, *supra* note 42, at 24.
59. *Id.*
60. Hopkins, *supra* note 5.
61. *Id.*
62. Hilary B. Miller, *The Future of the Payday Loan Industry Revisited Again*, PAYDAYLOANINDUSTRYBLOG (July 28, 2010), <http://paydayloanindustryblog.com/the-future-of-the-payday-loan-industry-revisited-again-an-expert-opinion/>.
63. Zywicki, *supra* note 55.
64. URIAH KING & LESLEY PARISH, PAYDAY LOAN INC.: SHORT ON CREDIT, LONG ON DEBT 1–2 (Center for Responsible Lending 2011).
65. Zywicki, *supra* note 55.
66. Prior, *supra* note 13.
67. John D. Wright and Lisa Magged, 8 BERKELEY BUS. L.J. (forthcoming May 2011).
68. *Id.*
69. *Id.*
70. *See* Hopkins, *supra* note 49.
71. *Cf.* James J. Pullman, *Good Cop, Bad Cop: Market Competitors, UDAP Consumer Protection Law, and the U.S. Mortgage Crisis*, 43.4 LOY. L. REV. 1251, 1258 (2010) (noting that Congress intentionally framed the FTC's UDAPs standard broadly to permit courts flexibility to develop and refine the definitions); *cf.* Todd Davenport, *Too Vague for Both Sides: FTC Act Enforcement Worries Banks, Activists*, 169 AM. BANKER (2004) (illustrating that lack of clear rules for the unfair and deceptive standards has its purpose and has existed for some time).
72. Robert W. Kolb, *Antitrust*, 2 ENCYCLOPEDIA OF BUS. ETHICS & SOC'Y 1, 101–02 (2008).
73. 15 U.S.C. § 1.
74. Kolb, *supra* note 72.
75. *See id.*
76. Elizabeth Warren, Special Advisor for the Consumer Financial Protection Bureau, Remarks at Consumer Union's 75<sup>th</sup> Anniversary Celebration (Feb. 15, 2011).
77. *The Home Ownership and Equity Protection Act of 1993: Hearing on S. 924 Before the S. Comm. on Banking, Hous., and Urban Affairs*, 103rd Cong. 1–4 (1993).
78. Jack Milligan, *A Massive Overhaul*, 70 MORTGAGE BANKING (Sept. 10, 2010) (quoting Beth S. DeSimone, of counsel with Arnold & Porter LLP, Washington D.C.).
79. *Id.*
80. Jack Milligan, *In the Eye of the Storm*, 21 BANK DIRECTOR (2011) (quoting John C. Dugan, former Comptroller of Currency during the 2008 financial crisis).
81. Senator Christopher Dodd, Senate Banking Committee Chairman, Keynote Address, at New York University's Law School's 4<sup>th</sup> Annual Global Economic Policy Forum (Oct. 13, 2010).
82. *See* Milligan, *supra* note 79.
83. Wright & Magged, *supra* note 67; Interview with Kathleen Keest, Center for Responsible Lending (Apr. 6, 2011) (explaining that the Bureau will not open with an overly aggressive regulatory plan, using the abusive standard).
84. Sheryl Harris, *Consumer Financial Protection Bureau Finding Its Footing*, CLEVELAND.COM (Feb. 12, 2011, 5:00 PM), <http://www.cleveland.com/consumeraffairs/>.
85. *Id.*
86. *Id.*
87. *Id.* (noting that while Professor Elizabeth Warren is acting as the Special Advisor charged with setting up the new agency, she is still a highly controversial candidate due to her pro-consumer stance.)
88. Wright & Magged, *supra* note 67; *see* Milligan, *supra* note 78 (quoting John C. Dugan Former Comptroller of the Currency, "There's also this great expectation in the wake of this massive bill that a long it going to happen right away, but it's not. It's going to take time. It's going to take more time than the legislation envision . . . it will take time for that to play out.")
89. *See* Cheyenne Hopkins, *'Chilling Effect' of 'Abusive' in Dodd-Frank*, 175 AM. BANKER 1 (2010) (emphasis added).
90. Legislators and regulators recently established prohibitions against the most abusive practices leading up to the financial crisis. Some measures became effectively immediately. For example, in the home mortgages, regulations against excessive prepayment penalties, yield spread premiums, and loan flipping already exist and are also prohibited in the CFPB. The Credit Card Reform Act of 2009 addressed many abusive credit-card practices. Press Release, The White House, Fact Sheet: Reforms to Protect American Credit Card Holders (May 22, 2009).
91. *Glossary: Definition of "Ability to Repay,"* CENTER FOR RESPONSIBLE LENDING (last visited Nov. 6, 2010) ("A borrower's ability to make timely loan payments as required, both short-term and long-term. Projected ability to repay is based on factors such as income, existing debt and the length of the loan period. Legitimate lenders assess the ability of borrowers to repay their loans; predatory lenders do not.").
92. *Id.*
93. *Top 10 Predatory Practices*, CALIFORNIA REINVESTMENT COALITION (last visited Nov. 5, 2010), <http://www.calreinvest.org/predatory-lending/top-10-predatory-practices>.
94. *Cf.* OFFICE OF THE COMPTROLLER OF CURRENCY, AL 2003-2, GUIDELINES FOR NATIONAL BANKS TO GUARD AGAINST PREDATORY AND ABUSIVE LENDING PRACTICES (2003).
95. *See* U.S. DEP'T OF Hous. & URBAN DEV. & U.S. DEP'T OF TREASURY JOINT TASK FORCE, REPORT ON PREDATORY LENDING, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 1–3 (2000) [hereinafter HUD/Treasury Joint Report].

96. Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class*, 43 LOY. L. REV. 1342 n.2 (2010).
97. See Jim Hawkins, *Regulating the Fringe: Reexamining the link Between Fringe Banking and Financial Distress*, 86 IND. L. J. (forthcoming 2011).
98. See 12 C.F.R. 30, Appendix A (“An institution should establish and maintain prudent credit underwriting practices that . . . Provide for consideration, prior to credit commitment, of the borrower’s overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower’s character and willingness to repay as agreed”).
99. See OFFICE OF THE COMPTROLLER OF CURRENCY, AL 2003-3, AVOIDING PREDATORY AND ABUSIVE LENDING PRACTICES IN BROKED AND PURCHASED LOANS (2003).
100. The Bureau could also define the extension of credit without an ability to repay as abusive because under Section 1031(d)(2)(C). The Dodd Frank Act § 1031(d)(2)(C); see MICHAEL BARR ET AL. BEHAVIORALLY INFORMED FINANCIAL SERVICES REGULATION 4–5 (New American Foundation 2008).
101. Dodd-Frank Act § 1031(d)(2)(a) (2010).
102. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 27–28 (2008).
103. BARR ET AL., *supra* note 100, at 2.
104. Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 713 (2006).
105. BARR ET AL., *supra* note 100, at 2.
106. See Karen E. Francis, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Pay-Day Loan Industry*, 88 TEX. L. REV. 611, 618 (2010).
107. *Id.* at 23–25.
108. Press Release, Fed. Trade Commission, FTC Testifies On Enforcement And Education Initiatives To Combat Abusive Lending Practices (March 16, 1998).
109. The Dodd-Frank Act § 1031(2)
110. See Wright & Magged, *supra* note 67; cf. Glen C. Hasen, *A Lenders’ Loan Approval is Not an Implied Promise that the Borrower Can Afford the Loan*, ABBOTT & KINDERMAN LAND USE LAW BLOG (Nov. 2, 2010, 12:45 PM), <http://blog.aklandlaw.com/2010/11/articles/real-estate/a-lenders-loan-approval-is-not-an-implied-promise-that-the-borrower-can-afford-the-loan/> (noting a legislation requiring lenders to make a reasonable determination of a borrower’s ability to repay the loan could establish a statutory duty of care relating to loan affordability).
111. Interview with Kathleen Keest, Center of Responsible Lending (Apr. 6, 2011) (explaining that the “unreasonable advantage” is likely to adopt a similar perspective to how courts have interpreted the Uniform Commercial Code Article II’s implied warranty of fitness and merchantability, which calls for what is reasonable or unreasonable to be interpreted from the “reasonable consumer in that situation”).
112. Bar-Gill & Warren, *supra* note 102, at 44.
113. See URIAH KING & LESLIE PARISH, PAYDAY LOANS INC.: SHORT ON CREDIT, LONG ON DEBT 1–2 (Center for Responsible Lending 2011).
114. *Id.* (“While the Federal Deposit Insurance Corporation (FDIC) has ruled that it is inappropriate for payday borrowers to remain indebted for more than 90 days in any 12 month period, we find that borrowers are indebted for more than double this limit on average. For example, in their first year of payday loan use, borrowers are indebted an average of 212 days. Over the full two-year period, borrowers are indebted a total of 372 days on average.”).
115. CALIFORNIA REINVESTMENT COALITION, *supra* note 116; Truth in Lending Act: Final Rule, 73 Fed. Reg. 44541 42 (July 30, 2008).
116. *Id.*
117. *See id.*
118. OFFICE OF THE COMPTROLLER OF CURRENCY, AL 2003-2, GUIDELINES FOR NATIONAL BANKS TO GUARD AGAINST PREDATORY AND ABUSIVE LENDING PRACTICES (2003); King & Parish, *supra* note 113, at 12–13.
119. *Id.*
120. *Id.* (noting that abusive and “predatory” are used interchangeably).
121. 12 C.F.R. 226.35(b); 12 C.F.R. 226.51.
122. H. Rep. No. 111-94, at 50–52 (2009).
123. Cf. CENTER FOR RESPONSIBLE LENDING ET AL., FDIC’S PROPOSED OVERDRAFT PAYMENT SUPERVISORY GUIDANCE FIP-47-2010 4, 12 (Sept. 27, 2010) (stating that if certain abusive practices are banned in certain consumer credit products, the same practices should be banned in other credit contexts).
124. RAYMOND NATTER, HOME OWNERSHIP EQUITY PROTECTION ACT OF 1994 1–3 (American Bar Association 2007), *available at* <http://www.abanet.org/buslaw/home.shtml>.
125. H.R. Conf. Rep. 103-652, at 1992 (1993).
126. High-priced mortgage loans have an annual percentage rate exceeding the average prime rate for a comparable transaction by 1.5 points on first-lien loans and 3.5 points on subordinate lien loans; the definition accounts for virtually all subprime loans. *Highlights of Final Rules Amending Home Mortgages Provision of Regulation Z (Truth in Lending)*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (last visited Sept. 13, 2010), <http://www.federalreserve.gov/newsevents/press/bcreg/regz20080714.htm>.
127. Truth in Lending: Final Rule, 73 Fed. Reg. 44539 (July 30, 2008) (to be codified as 12 C.F.R. 226).
128. *Id.* at 44540–41.
129. *Id.*
130. *Id.*
131. *Id.*
132. See Press Release, Federal Trade Commission, FTC Testifies on Enforcement and Education Initiatives to Combat Abusive Lending Practices (Feb. 26, 2001) (on file with author).
133. *Id.*
134. *Id.*
135. See NY CLS Bank § 6-l.
136. H. Rep. No. 111-94, at 50–52 (2009).
137. 12 C.F.R. 226.51; Sen. Chris Dodd, *The Moment for Credit Card Reform*, CHRIS DODD UNITED STATES SENATOR FOR CONNECTICUT (Mar. 31, 2009, 2:20 PM), <http://dodd.senate.gov/?q=node/4877>.
138. Jane Bryant Quinn, *Credit Cards on Campus: How Bank Get Around the Student Protection Law*, CBS MONEYWATCH.COM (Sept. 30, 2010), <http://moneywatch.bnet.com/investing/blog/make-money/credit-cards-on-campus-how-banks-get-around-the-student-protection-law/503/>.
139. AMENDING THE CONSUMER CREDIT PROTECTION ACT, TO BAN ABUSIVE CREDIT PRACTICES, ENHANCE CONSUMER DISCLOSURES, PROTECT UNDERAGE CONSUMER AND FOR OTHER PURPOSE, S. Rep. 111-16, 8 (2009).
140. *Id.*
141. *Three Ways College Students can Avoid Credit Card Catastrophes*, USA TODAY COLLEGE (Oct. 18, 2010), <http://www.usatodayeducate.com/staging/index.php/blog/three-ways-college-students-can-avoid-credit-card-catastrophes>.
142. Quinn, *supra* note 139.
143. Jim Hawkins, *Regulating the Fringe: Reexamining the link Between Fringe Banking and Financial Distress*, 86 IND. L. J.

- (forthcoming 2011) (noting that this provision of the Credit Card Act may not be working as credit card companies have found creative way to avoid the law).
144. *Cf.* Comments of the Center for Responsible Lending et al., FDIC's Proposed Overdraft Payment Supervisory Guidance FIP-47-2010 4, 12 (Sept. 27, 2010).
  145. Sara Lepro, *Wild Pitches and Sober Ones to Payday Borrowers*, 176 AM. BANKER (2011).
  146. Bar-Gill & Warren, *supra* note 102, at 44.
  147. Todd J. Zywicki, *The Case Against New Restrictions on Payday Lending* 9 (George Mason University 2009).
  148. *Id.*
  149. Interview by Ray Suarez with Lesley Parrish, Center for Responsible Lending, during PBS Newshour (Mar. 6, 2010).
  150. Jeremy LaMarche, *Payday Lenders under Attack, Seek Protection in Cyber Space*, 19.2 LOY. CONSUMER L. REV. 218, 219 (2007).
  151. Carmen M. Butler & Niloufar A. Park, Note, *Mayday Payday: Can Corporate Social Responsibility Save Payday Lenders?*, 1 RUTGERS L. URB. POL'Y 119, 121 (2005).
  152. Bar-Gill & Warren, *supra* note 102, at 44.
  153. Zywicki, *supra* note 49; Francis, *supra* note 106, at 618.
  154. *See* DEP'T OF DEFENSE, REPORT ON PREDATORY LENDING 11–12 (2007).
  155. Jeremy LaMarche, *Payday Lenders under Attack, Seek Protection in Cyber Space*, 19.2 LOY. CONSUMER L. REV. 218, 219 (2007).
  156. *See* LAUREN K. SAUNDERS ET AL., STOPPING THE PAYDAY LOAN TRAP: ALTERNATIVES THAT WORK, ONES THAT DON'T 17–18 (National Consumer Law Center 2010).
  157. *See id.*
  158. THE RACHEL MADDOW SHOW, *Predatory Lenders Squirm in the Face of Regulation* (MSNBC 2010).
  159. URIAH KING & LESLIE PARRISH, PHANTOM DEMAND: SHORT-TERM DUE DATES GENERATES NEED FOR REPEAT PAYDAY LOANS 10–11 (Center for Responsible Lending 2009).
  160. *Id.*
  161. Bar-Gill & Warren, *supra* note 102, at 44 (emphasis added).
  162. Interview by Ray Suarez with Lesley Parrish, *supra* note 149.
  163. *Id.*; SAUNDERS ET AL., *supra* note 156, at 8.
  164. *Id.*
  165. URIAH KING ET AL., FINANCIAL QUICKSAND: PAYDAY LENDING SINKS BORROWERS IN DEBT WITH \$4.2 BILLION IN PREDATORY FEES EVERY YEAR 2 (Center for Responsible Lending 2006).
  166. *See* DEPARTMENT OF DEFENSE, REPORT ON PREDATORY LENDING 46 (2007).
  167. DoD REPORT ON PREDATORY LENDING, *supra* note 149, at 22, 46; Candice Choi, *Financial Watchdog: Pricing Needs to be Clearer*, HOUS. CHRON., Feb. 1, 2011, at B9.
  168. Dodd-Frank Act § 1027(o).
  169. Interview with Kathleen Keest, Center of Responsible Lending (Apr. 6, 2011) (explaining that payday lending business model is based on consumers having an inability to pay and lenders, through their wealth of data, can predict with a degree of certainty which consumers will not have an ability to repay).
  170. *Id.*
  171. *Id.*
  172. NATIONAL CONSUMER LAW CENTER, AN AGENDA FOR THE CONSUMER FINANCIAL PROTECTION BUREAU: CHALLENGES FOR A NEW ERA IN CONSUMER PROTECTION 1–2 (2010).
  173. JONATHAN L. POMPAN & JEFFREY S. TENENBAUM, THE DODD-FRANK ACT 1–2 (Venable LLP 2010).
  174. *Cf.* Fair Debt Collection Practices Act, 15 U.S.C. § 1692(d) (2006) (defining abusive practices in debt collection as any practice “the natural consequence of which is to harass, oppress, or abuse any person”).
  175. *Id.*; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-280, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 20, 94 (2004).
  176. Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 579–80 (2002).
  177. The definitions of harass, oppress, and abuse all describe circumstances where the borrower is subject to some sort of unwelcomed psychological pressure. *Harass Definition*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/harass> (last visited Oct. 30, 2010); *Oppress Definition*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/oppress> (last visited Oct. 30, 2010); *Abuse Definition*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).
  178. Dodd-Frank Act § 1031(d)(1) (2010).
  179. *See* U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF TREASURY JOINT TASK FORCE, REPORT ON PREDATORY LENDING, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 60 (2000) [hereinafter HUD/Treasury Joint Report].
  180. Eggert, *supra* note 176, at 509.
  181. *See* HUD/TREASURY JOINT REPORT, *supra* note 179, at 60.
  182. *Id.*
  183. Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 789–99 (2006).
  184. *Id.*
  185. *Id.*
  186. *Id.*
  187. *Id.*
  188. *Id.*
  189. Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2006).
  190. 15 U.S.C. § 6102 (2006).
  191. 15 U.S.C. § 1692(a) (2006).
  192. *Id.*
  193. 15 U.S.C. § 1692(d) (2006).
  194. Consumer Credit Protection Act, S. Rep. No. 95-382 (Aug. 2, 1977).
  195. AMANDA L. WAIT, THE NEW BUREAU OF CONSUMER FINANCIAL PROTECTION – AN OVERVIEW 1 (American Bar Association 2010).
  196. *See* Annual Report 2010: Fair Debt Collection Practices Act 10–13 (Federal Trade Commission 2010); *see, e.g.*, Press Release, Federal Trade Commission, *Debt Collection Supervisors Settle FTC Charges* (Jan. 1, 2010).
  197. WAIT, *supra* note 194, at 1.
  198. 15 U.S.C. § 6102 (2006).
  199. POMPAN & TENENBAUM, *supra* note 173, at 1.
  200. § 6102.
  201. 15 U.S.C. § 6101 (2006).
  202. Stephen F.J. Ornstein et al., *Telemarketing Sales Rule*, 62 CONSUMER FIN. L. Q. REP 95 (2008); Telemarketing Sales Rule, 60 FED. REG. 43853 (AUG. 23, 1995) (TO BE CODIFIED AS 16 C.F.R. § 310.4).
  203. Telemarketing Sales Rule, 60 Fed. Reg. 43853 (AUG. 23, 1995) (to be codified as 16 C.F.R. § 310.4).
  204. 16 C.F.R. § 310.3(a)–(b).
  205. Telemarketing Sales Rule, 60 Fed. Reg. 43853 (AUG. 23, 1995) (to be codified as 16 C.F.R. § 310.4).
  206. *See id.*
  207. *Safeguarding Consumer Protection and the Role of the Federal Reserve, Hearing before the Subcomm. on Monetary Pol'y*, 110<sup>th</sup> Cong. 5 (2009) (testimony of Lauren Saunders, representing the Americans for Financial Report).



208. Lauren Willis, *Will the Mortgage Market Correct? How Will Households and Communities Would Fare if Risk Were Priced Well?*, 41 CONN. L. REV. 1177, 1179–83 (2009).
209. Eggert, *supra* note 176, at 513.
210. *Id.*
211. *Id.*
212. *Id.*; Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class*, 43 LOY. L. REV. 1342, n.2 (2010).
213. JAMES H. CARR & LOPA KOLLURI, PREDATORY LENDING: AN OVERVIEW 4 (Fannie Mae Foundation 2001).
214. *Improving Federal Consumer Protection in Financial Services, Hearing Before the H.R. the H. Comm on Fin. Servs.*, 110th Congress 98 (2007) (statement of Sheila Bair, Chairman of the Federal Deposit Insurance Corp).
215. *Id.*
216. Jon Hilsenrath et al., *Worst Crisis Since '30s, With No End Yet in Sight*, WALL ST. J. Sept. 18, 2008, A1.
217. *See Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing on H.R. 1705 Before the Comm. on Fin. Servs.*, 111th Cong. 120–21 (2009) (testimony of Travis Plunkett, Consumer Federation of American and Edmund Mierzwinski, U.S. PIRG).
218. STEVE CONVINGTON, PREDATORY LENDING'S NEW FRONTIER 1 (Mortgage Bankers Association 2005); Lichtenstein, *supra* note 212, at 1342–44.
219. *Id.*
220. *Id.*
221. CONVINGTON, *supra* note 218.
222. FEDERAL DEPOSIT INS. CORP., FIL-47-2010, OVERDRAFT PAYMENT PROGRAMS AND CONSUMER PROTECTION 1 (2010).
223. NATIONAL CONSUMER LAW CENTER, AN AGENDA FOR THE CONSUMER FINANCIAL PROTECTION BUREAU: CHALLENGES FOR A NEW ERA IN CONSUMER PROTECTION 1–2 (2010).
224. Banks offer overdrafts programs offered by banks in anticipation of a customer having insufficient funds in their debit account and a transaction is made. If the customer has signed up for overdraft protection, rather than deny the transaction, the transaction will be authorized, subject to the bank charging a fee. Which on average \$34 per transaction. Felix Salmon, *The Continuing Fight Against Overdraft Fees*, REUTERS, Nov. 10, 2010, available at <http://blogs.reuters.com/felix-salmon/2010/11/26/the-continuing-fight-against-overdraft-fees/>.
225. CENTER FOR RESPONSIBLE LENDING ET AL., FDIC'S PROPOSED OVERDRAFT PAYMENT SUPERVISORY GUIDANCE FIP-47-2010 4, 12 (Sept. 27, 2010).
226. Salmon, *supra* note 224.
227. Press Release, Fed. Deposit Ins. Corp., FDIC Issues Final Guidance on Automated Overdraft Payment Programs (Nov. 24, 2010).
228. Dodd-Frank Act § 1031 (d)(2)(C).
229. *Truth in Lending Act*; Regulation Z, 75 Fed. Reg. 58509–511 (Sept. 24, 2010) [hereinafter *TILA Regulation Z*].
230. *Id.* at 58509.
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