July 3, 2023

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

Comments of the Center for Responsible Lending on Docket No. CFPB-2023-0018-0001;
Statement of Policy Regarding Prohibition on Abusive Acts or Practices.

The Center for Responsible Lending (CRL) appreciates the opportunity to comment on the Statement of Policy Regarding Abusive Acts and Practices issued by the Consumer Financial Protection Bureau on April 3, 2023 and published in the Federal Register on April 12, 2023.

CRL is a non-profit, non-partisan research and policy organization that works to ensure a fair, inclusive financial marketplace. CRL's work focuses on those who may be marginalized, underserved, or disserved by the existing financial marketplace.

The prohibition on abusive acts and practices that Congress enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protect Act is of vital importance to the communities that CRL and the other organizations signing this comment represent. The enormous income and wealth gap between non-Hispanic white families on the one hand and Black and Hispanic families on the other—a gap that is the result of centuries of racist policies and practices which continue to this day—means that a large and disproportionate share of people of color are living financially precarious lives. They are the ones most likely to be victimized by financial service providers who choose to use their superior power position to prey on the vulnerable. And they are therefore the ones most in need of the protection provided by the prohibition of abusive acts or practices.

CRL applauds the CFPB for moving forward to clarify and concretize the prohibition on abusive acts and practices contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act, a step that industry representatives have been urging the Bureau to take since virtually the inception of the CFPB. As Part Two of this comment explains, we likewise support the overall approach the Bureau has taken to explicating the elements of the statutory definition of "abusive" and key principles the Bureau has articulated. However, we believe that the Policy can and should be strengthened by further elaborating on some of these principles, especially, as we discuss in Part Three, on what it means to take "unreasonable advantage" of a consumer's "inability to protect the interest of the consumer in selecting or using a consumer financial product or service."

Before turning to the specifics of the Policy Statement and the ways in which it should be strengthened, we first briefly review the history of the prohibition on abusive acts and practices, a history that demonstrates the broad sweep Congress intended this prohibition to have.

I. The Legislative History of the Prohibition on Abusive Acts and Practices Demonstrates the Broad Sweep Congress Intended

It goes without saying that the Dodd-Frank Act was enacted in response to the financial crisis. The precipitating cause of that crisis was, of course, the collapse of the mortgage market which, in turn, was the product of the large number of unaffordable—and thus unsustainable—mortgages that irresponsible lenders made during the boom years preceding the crisis. As defaults skyrocketed and housing values collapsed, the economy fell into a deep recession, one from which it took years and years to recover. As is all too often the case, the burden of these events fell disproportionately on people of color. For example, a study by economists from the Federal Reserve Bank of St. Louis found that among mortgages taken out between 2004-2008, 28.6% percent and 31.7% of mortgage loans for Black and Hispanic borrowers, respectively, had entered foreclosure compared to 11.3% for White borrowers.[1] All of the homeownership gains realized by Black families during the boom years were wiped out by the Great Recession and the Black-White homeownership gap returned to levels that had not been seen since prior to the enactment of the Fair Housing Act of 1968.[2]

To prevent a recurrence of the type of misconduct that led to the crisis, Congress made both structural and substantive changes to the regulatory landscape. The CFPB is, of course, the embodiment of the primary structural change. In creating the CFPB, Congress elected to separate the responsibility for assuring the safety and soundness of depository institutions from the responsibility for assuring compliance with the consumer protection laws and to create a single agency whose sole mission is consumer protection with authority over depositories and non-depositories alike.

At the same time, Congress recognized that it was not enough simply to change the regulatory structure as the crisis had revealed large gaps in the fabric of federal consumer protection laws that had been enacted over four decades beginning with the Truth in Lending Act. Because the weaknesses of those laws had been most plainly and painfully revealed with respect to mortgage lending, Congress included in the Dodd-Frank Act as Title XIV the "Mortgage Reform and Anti-Predatory Lending Act." That Act/Title adopted a number of specific prohibitions on mortgage lenders—including, most notably, the ability-to-pay requirement—for the stated purpose of

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[1] Garriaga *et al., The Home Ownership Experience of Minorities During the Great Recession* (2017), https://files.stlouisfed.org/files/htdocs/publications/review/2017-02-15/the-homeownership-experience-of-minorities-during-the-great-recession.pdf.

[2] Urban Institute, *Reducing the Racial Homeownership Gap,* *https://files.consumerfinance.gov/f/documents/cfpb_zywicki-written-statement_symposium-abusive.pdf*

assuring that mortgage loans are made "on term that reasonably reflect [consumers'] ability to repay … and that are … not unfair, deceptive or abusive."[3]

Beyond that, in Title XIV Congress directed the CFPB to "prescribe regulations to prohibit … abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender or age,"[4] and further provided that the CFPB "shall, by regulations, prohibit or condition terms, acts or practices relating to residential mortgage loans that the [Bureau] finds to be abusive, unfair, deceptive, [or] predatory."[5] These directives were in addition to the one Congress had enacted in 1994 as part of the Home Ownership and Equity Protection Act that directed the Federal Reserve Board—and now directs the CFPB—"by regulation or order" to "prohibit acts or practices in connection with … refinancing of mortgage loans that the Bureau finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower."[6] (To our knowledge, the Board never exercised its HOEPA authority over abusive refinancing nor has the CFPB initiated any rulemakings pursuant to either this provision of HOEPA or the directives contained in Title XIV with respect to abusive lending practices.)

As the foregoing indicates, in enacting the DFA Congress was acutely focused on abusive mortgage lending. But mortgage lending was by no means the only area susceptible to predatory practices and one of the key issues worked out as the Dodd-Frank Act moved through the legislative process was how best to strengthen federal consumer protection law writ large.

As originally proposed by (then) Professor Elizabeth Warren, the consumer financial protection agency would have the authority, akin to that of the Consumer Product Safety Commission, to establish "uniform safety standards" for financial products and to "require modification of dangerous products before they can be marketed to the public."[7] The Obama Administration, in the legislation it sent up to Congress, took a different tack, proposing a three-pronged approach to strengthening the law. First, the proposal would have empowered the contemplated consumer agency to define and proscribe abusive (as well as unfair and deceptive) acts and practices. Second, the proposal would have directed the agency to adopt rules to "ensure fair dealing with consumers" and also would have authorized the agency to adopt "rules establishing duties regarding compensation practices ... for the purpose of promoting fair dealing with consumers." And third, the proposal would have authorized the consumer agency to develop transparent, low risk, "standard" consumer financial products or services and to require financial institutions to make such products their default offerings.[8]

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[3] Dodd-Frank Act § 1402, 15 U.S.C. § 1639b(a)(2).
[4] Dodd-Frank Act § 1403, 15 U.S.C. § 1639b(c)(3)(C).
[5] Dodd-Frank Act § 1405, 15 U.S.C. § 1639b(e)(1).
[6] P.L. No. 103-325, 15 U.S.C. § 1639(p)(2)(B)
[7] Warren, "Unsafe at any Rate," DEMOCRACY (Summer 2007).
[8] The Administration's draft bill can be found at https://www.llsdc.org/assets/DoddFrankdocs/dodd-frank-act_admn-reg-reform-bill.pdf

The bill that the House passed followed the first two prongs of the Administration's proposal—embracing both a prohibition on abusive acts and also an authority to adopt rules of "fair dealing" but the House added a definition of the term "abusive" under which:

> The Director … may determine that an act or practice is abusive only if the Director finds that—
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> (A) the act or practice is reasonably likely to result in a consumer's inability to understand the terms and conditions of a financial product or service or to protect their own interests in selecting or using a financial product or service; and
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> (B) the widespread use of the act or practice is reasonably likely to contribute to instability and greater risk in the financial system.[9]

When the bill reached the Senate, Senator Dodd proposed a different approach. The bill he introduced dropped the Administration and House provisions with regard to "fair dealing" and instead developed a broader definition of "abusiveness," one that ultimately was enacted verbatim as Senator Dodd proposed it.[10] In reporting the bill, the Senate Banking Committee observed that although "the problems in the mortgage market have received most of the public's attention, consumers have long faced problems with many other consumer financial products and services without adequate federal rules and enforcement. Abusive lending, high and hidden fees, unfair and deceptive practices, confusing disclosures, and other anti-consumer practices have been a widespread feature in commonly available consumer financial products." The Committee report pointed specifically to "the abusive nature of overdraft coverage programs," "abusive debt collection practices," and "abusive and discriminatory" auto lending.[11] (The Committee also singled out practices involving payday lending, albeit without using the word "abusive.")[12]

The short of the matter, then, is this: rather than authorizing the CFPB to establish product safety standards or general standards of fair dealing, Congress elected to address the deficiencies in the preexisting law by adopting a sweeping definition of what constitutes an abusive act or practice. Unlike the House bill, the language that Congress adopted does *not* require an assessment of whether a financial institution is acting in a manner that is "reasonably likely to result in a consumer's inability to understand the terms and conditions of a financial product" or "reasonably likely to result in [a consumer's] inability … to protect their own interests in selecting or using" such a product; rather, the law states that, whatever the cause of a consumer's lack of understanding or inability to protect themselves, financial institutions cannot take

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[9] H.R. 4173, § 4301(c)(3), https://www.govinfo.gov/content/pkg/BILLS-111hr4173rfs/pdf/BILLS-111hr4173rfs.pdf. This definition was not contained in the bill that the House Financial Services Committee reported to the House but was added by Rep. Frank's Manager's Amendment on the House floor.

[10] S.3217, 111th Cong. 2d. Sess. § 1031(d), https://www.govinfo.gov/content/pkg/BILLS-111s3217pcs/pdf/BILLS-111s3217pcs.pdf

[11] S. Rep. No. 111-176, 11th Cong. 2d. Sess. at 17-21.

[12] *Id.* at 20-21

"unreasonable advantage" of such consumers. And, whereas under the House bill abusive practices would have been actionable only if their "widespread use" would be "reasonably likely to contribute to instability and greater risk in the financial system," under the law as enacted abusive acts or practices are outlawed because of their inherent potential to destabilize the financial lives of individuals and families and without regard to their impact on the broader financial system.

It is against this background that we now turn to the Bureau's Policy Statement.

II. The CFPB Policy Statement Articulates a Set of Core Principles That Faithfully Hews to the Text of 1031(d) of the Dodd-Frank Act and to Congress' Underlying Intent

In contrast to other consumer protection laws that proscribe, or authorize a regulator to proscribe, "abusive" conduct without defining the term[13]—and, indeed, in contrast to the similar provisions in the Mortgage Reform and Predatory Lending Act described above—§ 1031(d) of the Dodd-Frank At contains a detailed, multi-part delineation of the elements that make an act or practice abusive. Some commentators have attempted to knit these elements together into what could be termed a "unified theory" of abusiveness, but the vast differences in the various theories that commentators have propounded underscores the challenge—if not the futility—of such a task.[14] Thus, in our view, the better approach is precisely the one taken by the Policy Statement: walking through the statutory elements step by step and elaborating on their meaning based on the text of the statute, informed by its purposes.

We do not attempt here to discuss all of the elements of the statutory definition or all of the details of the Policy Statement with which we agree. Instead, we identify several core principles that are central to understanding when an act or practice rises to the level of being abusive within the meaning of the DFA, most or all of which the Policy Statement recognizes in one form or another. We also offer some concrete suggestions for making the Statement's discussion of these principles clearer.

First, while the *remedy* for an abusive act or practice may vary depending upon the number of consumers affected, the prohibition on abusive acts applies if an act or practices materially interfere with the ability of " a consumer," i.e., *any* consumer, or group of consumers, to understand

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[13] *E.g.,* Fair Debt Collection Practices Act § 806, 15 U.S.C. § 1692d ("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");Telemarketing and Consumer Fraud and Abuse Prevention Act § 3, 15 U.S.C. § 6102 (FTC shall "prescribe rules prohibiting…abusive telemarketing acts or practices).

[14] *E.g.,* Moglinicki & Veta, *Defining Abusive Acts and Practices* (2017), https://www.cov.com/-/media/files/corporate/publications/2017/02/defining_abusive_acts_and_practices.pdf; Levitin, *"Abusive' Acts and Practices: Towards a Definition* (2019), https://files.consumerfinance.gov/f/documents/cfpb_levitin-written-statement_symposium-abusive.pdf; Zywicki, *Statement Prepared for the CFPB Abusive Acts or Practices Symposium* (2019), https://files.consumerfinance.gov/f/documents/cfpb_zywicki-written-statement_symposium-abusive.pdf.

a term or condition of a consumer financial product or service" or takes unreasonable advantage of *any* consumer who lacks "understanding … of the material risks, cost or conditions of the product or service or who is unable to "protect the interests of the consumer in selecting or using" the product or service. This is true even if some or even most consumers are able to understand the risks, cost, and conditions, or are able to protect themselves in the selection or use of a product. The Policy Statement makes this point well in the context of its discussion of the "lack of understanding" prong of the statute, stating that "the prohibition does not require proof that some threshold number of people lacked understanding to establish that an act or practice was abusive." We urge the Bureau to amend the Policy Statement to make clear that this same principle applies to each prong of the abusiveness definition.

We start by highlighting this principle because it is all too clear that many financial institutions have found, and continue to find, it to be in their interest to exploit those with the greatest needs and the fewest choices available to them precisely to be able to confer benefits on, and compete for the business of, consumers who are sophisticated in their understanding of consumer financial products and fully able to protect themselves in selecting or using such products. Invariably, the former group is disproportionately comprised of those who have historically been discriminated against and marginalized, especially people of color. It is vitally important that § 1031(d) be understood as a prohibition on acts or practices that, e.g., take unreasonable advantage of those consumers even if they make up only a small portion of a financial institution's customers or potential customers.

Second, there is no scienter requirement in 1031(d): the focus of the text is on whether the "acts or practices" at issue had the *effect* of materially interfering with some consumers' ability to understand terms and conditions, or whether the act or practice *in fact*, took "unreasonable advantage" of any of the specified vulnerabilities. It is simply irrelevant whether the financial institution subjectively intended to "materially interfere" with consumer's understanding or intended to take "unreasonable advantage" of consumer vulnerabilities; indeed, it is not even necessary to show that the financial institution recognized consumers' vulnerabilities to establish that an act or practice took unreasonable advantage of them. The Policy Statement recognizes that "intent is not a required element to show material interference" but the Statement is not explicit on this point when it addresses acts or practices that take "unreasonable advantage" of consumer vulnerabilities. Again, we urge the Bureau to amend the Policy Statement to make clear that this principle applies to all prongs of the definition of abusiveness.

Third, when it comes to acts that take unreasonable advantage of the lack of understanding, inability to protect themselves, or reasonable reliance, of some consumers it is irrelevant whether the financial institution caused or even contributed to the consumer's situation. These conditions may be entirely unrelated to anything that the financial institution did or failed to do but even so, the statute plainly prohibits financial institutions from taking unreasonable advantage of such circumstances. The Policy Statement says this explicitly in its discussion of lack of understanding,

noting that the statutory text "does not require that the entity caused the person's lack of understanding through untruth statements or other actions or omissions." Here, too, we urge the Bureau to amend the Policy Statement to make explicit that this principle applies as well where a financial institution takes unreasonable advantage of some consumers' inability to protect themselves or of some consumers reasonable reliance on the financial institution.

Fourth and finally, there is no requirement to prove that an act or practice causes or is likely to cause substantial injury—let alone to find the act or practice to be net harmful—in order for it to be abusive. That is clear from the contrast between § 1031(c)(1)—which makes proof of substantial injury the first element of the definition of unfairness and then requires an assessment of whether such injury is outweighed by countervailing benefits—and § 1031(d) which contains no similar language. As the Policy Statement aptly put it, "Unlike with unfairness but similar to deception, abusiveness requires no showing of substantial injury to establish liability, but is rather focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market."

III. The CFPB Should Amend the Policy Statement to Further Elaborate on the Prohibition on Taking "Unreasonable Advantage" of a Consumer's "Inability to Protect the Interests of the Consumer in the Selection or Use" of a Product or Service

From the perspective of the communities that we represent, perhaps the most important branch of the abusiveness definition is that which declares it to be an abusive act or practice to "take unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." This is not to deny that financial institutions often interfere with the ability of financially vulnerable consumers to understand a term or condition of a financial product or service, whether intentionally or otherwise; indeed, for consumers with limited English proficiency—to take one example—material interference is part of their everyday experience. Nor do we in any way mean to minimize the extent to which financial institutions seek to exploit their superior knowledge relative to that of the financially vulnerable people with whom they deal, since that, too, is a constant reality.

Nonetheless, claims predicated on consumers' understanding or ability to understand can raise messy questions about, e.g., what "risks, cost, or conditions" are "material," the level of understanding that is required to establish a "lack of understanding," and the nature and strength of the evidence required to show that consumers lack understanding. The Policy Statement does an admirable job of seeking to clear through much of that messiness and clarify what a lack of understanding means and how it can be proven but, even so, important questions remain unsettled. [15] Moreover, factual disputes about the extent of consumers' understanding are likely to recur,

[15] In particular, although the Bureau, in repealing the underwriting provisions of the 2017 Payday Rule, reaffirmed that rule's determination that "a general awareness of policy outcomes" is insufficient to establish that consumers

especially if financial institutions elect to secure written statements from applicants or customers attesting to their understanding of whatever terms the financial institution elects to list on a form "understanding" document. And, where the basis for finding an abusive act or practice is consumer's lack of understanding, financial institutions can be expected to resist any remedy that goes beyond mere disclosure requirements, despite the evidence indicating the limited impact that disclosures have.[16]

For all these reasons, we believe that, for those who are underserved or misserved by the financial system, the prohibition on acts or practices that take unreasonable advantage of their inability to protect themselves in the selection or use of a financial service is the most powerful prong of § 1031(d). And while, as with any "reasonableness" test, the determination of whether a particular act or practice takes "unreasonable advantage" of consumers' inability to protect themselves will necessarily turn to some extent on the facts and circumstances of particular cases, there is still much that can be done to explicate the scope of this prohibition.

The Policy Statement makes an important contribution to so doing, starting with its explanation that, "The ordinary meaning of the phrase 'take advantage of' is generally 'to make use of for one's own benefit'" and that "unreasonable" is the opposite of reasonable which the dictionary defines to mean "'[f]air, proper, or moderate under the circumstances.' Thus, a financial institution takes unreasonable advantage of a group of consumers if it derives a benefit from those consumers through actions that are not "fair, proper or moderate under the circumstances."

Of especial importance is the Policy Statement's elaboration on this general principle in the context of acts or practice that "generate benefit for a company when people are harmed"—that is when companies "benefit from … negative consumer outcomes." We agree that acts or practices that create such "misalign[ed] incentives" are a textbook case of unreasonable advantage taking and lie at the core of what this branch of the abusiveness definition is meant to address.

With this understanding of the phrase "take unreasonable advantage," the question then becomes what it means to say that a consumer lacks the ability to protect their interests in the selection or use of the product. The Policy Statement addresses this question by offering a number of helpful examples of situations in which some (or all) consumers are unable to protect their interests. Some of these examples relate to issues of market structure: consumers, by definition, cannot protect their interests in the selection of a product or service if the consumers do not select the provider

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understand the risks of a product and that consumers must understand the "magnitude and likelihood of risk of harm," 85 Fed. Reg. 44382, 44422 (July 22, 2020), the 2020 Rule rejected the Bureau's prior view that "if borrowers do not understand … their likelihood of being exposed to the risks of these loans…it is quite difficult to maintain the position that those same borrowers in fact understand the material risks and costs associated with unaffordable short-term loans." 82 Fed. Reg. 54472, 54617 (Nov. 17, 2017). The Policy Statement—while noting that the relevant inquiry "is whether some consumers…have a lack of understanding, not all consumers or even most consumers," does not directly address the disagreement between the two payday rules. In our view, the 2017 Rule got it right: risks do not exist in the ether, and if consumers do not understand the risk *to them* of a particular product or service, they lack understanding of those risks. When the occasion presents itself, the Bureau should so interpret the statute.

[16] *See* Ben-Shahar & Schneider, *The Failure of Mandated Disclosure*, 159 U. Penn. L. Rev. 647 (2011).

(as is true, e.g., with respect to outsourced servicing or debt collection) or if, due to competitive failures or otherwise, substantially all providers offer the same terms on a take-it-or-leave-it basis. Other examples focus on the circumstances of individual consumers: as the Bureau states, "when the steps a person would need to protect their interests are unknown to the person or are especially onerous" or when such steps require a payment from "people who do not have monetary means," those individuals are unable to protect their interests because "it is impractical" for them to do so. We urge the Bureau to expand on this discussion in four respects.

First, the Bureau should make clear that in determining what is practical for consumers to do, the analysis should go beyond the state of a consumer's knowledge and finances and consider the totality of the consumer's circumstances. In the 2017 Payday Rule, for example, the Bureau recognized that consumers facing an urgent need for cash cannot be expected "in the moment [to] effectively identify or develop alternatives that would vitiate the need to borrow … or allow them to borrow on … terms more favorable. … Confronted with an immediate liquidity problem, they may determine that a covered loan is the only option they have" or there simply may be "no time to shop for … alternative[s]." In either event, "Because they find themselves in such vulnerable circumstances when they are deciding whether to take out an initial covered short-term loan, they are unable, as a practical matter, to protect their interests."[17] Although the 2020 Rule took issue—quite wrongly in our view—with the evidentiary basis on which the 2017 Rule had relied to find that this was the case, the 2020 Rule did not appear to disagree with the principle that consumers may be unable to protect their interests because of the exigencies in which they find themselves. [18] In any event, the Policy Statement should make clear that it understands inability to protect in this way.

Second, the Bureau also should make clear that just as an act or practice that takes unreasonable advantage of the inability of a small subset of consumers to protect their interests constitutes an abusive act or practice without regard to the size of that group, so, too, an act or practice is abusive if *all* of the consumers selecting or using the product are unable to protect their interests in so doing. This might seem self-evident but the 2020 Payday Rule can be read to cast some doubt on this issue. That Rule somehow read the 2017 Payday Rule as finding that only those payday borrowers who end up in extended loan sequences were unable to protect their interests and faulted the 2017 Rule for failing to "indicate what characteristics of these borrowers made them more vulnerable to the conduct of payday lenders than other payday loan borrowers."[19] To clear up this

[17] 82 Fed. Reg. 54472, 54619-54620 (Nov. 17, 2017)
[18] *See* 85 Fed. Reg. at 44424 ("the Pew study does not provide a sufficiently robust and reliable basis for the Bureau's finding in the 2017 Final Rule that consumers who use covered…loans lack the ability to protect themselves"). The 2020 Rule did inject into its discussion of whether consumers lack the ability to protect themselves a discussion of whether "consumes lack access to alternative sources of credit," *id.* While the absence of alternatives can be *sufficient* to establish that consumers cannot protect their interests in the selection or use of a product, it is not a *necessary condition* to establish an inability to protect for the reasons articulated in the 2017 Rule. Accordingly, when the occasion presents itself, we urge the Bureau to correct this error in the 2020 Rule.
[19] *Id.* at 44420.

confusion, the Bureau should disavow any suggestion that the prohibition on unreasonable advantage taking applies only where there is a sub-group with "a particular vulnerability"[20] who is being victimized by a financial institution's acts or practices.

Third, the Bureau should add to the Policy Statement a determination that an act or practice can take unreasonable advantage of a sub-group of consumers even if that act or practice is not specifically targeted at that sub-group. Consumers may differ in terms of, e.g., the options available to them, their awareness of those options and/or their capacity to explore options, and the fact that a particular "neutral" act or practice takes unreasonable advantage only of those with limited options, awareness, or bandwidth to explore options in no way negates the fact that such an act or practice is abusive with respect to those consumers who, as a practical matter, cannot protect their interests.

This needs to be stated explicitly because of doubts raised by the 2020 Payday Rule. That Rule compounded its error of reading the 2017 Rule to conclude that only borrowers in extended loan sequences were unable to protect their interests[21] by faulting the 2017 Rule because it "did not find that payday lenders targeted their loans to these borrowers" but rather "offer loans on uniform terms to the general public and treat consumers substantially the same."[22] But the fact that a financial institution may treat unequals—that is consumers who may be quite differently situated—equally (i.e., in the same way) in no way immunizes a financial institution from liability if its uniform or so-called neutral practice, in fact, takes unreasonable advantage of a group of consumers who, because of their situation, are unable to protect themselves.

Finally, we urge the Bureau to add to the Policy Statement a determination that the disjunctive "selection or use" in § 1031(d)(2)(B) means that financial institutions violate the law by taking unreasonable advantage of either consumers' inability to protect their interests in the selection of a product or of their inability to protect their interests in the use of the product. Even if, for example, a consumer is able to protect their interest, *ex ante,* in the selection of a product and product provider, once that selection is made the consumer may be locked into the relationship and thus unable to protect their interest in the use of that product. Financial institutions that take unreasonable advantage of that inability are guilty of an abusive act or practice without regard to whether the consumer had been able to protect their interest in the selection of the product.

That "or" means "or" may seem so obvious as to not be worth stating. However, in applying the "reasonable avoidability" prong of the unfairness test, the 2020 Payday Rule concluded that "consumers can reasonably avoid injury through either 'anticipatory avoidance' or 'subsequent

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[20] *Id.*

[21] *Id.* The 2017 Rule had indicated in the context of its discussion of whether consumers' lack understanding of the material risks and costs of payday loans that it was the consumers who ended up in long loan sequences who were least informed of the risks they were running. *See* 82 Fed. Reg. at 54617-54618.

[22] *Id.*

mitigation.'"[23] Whatever the merits of that conclusion in that context, it simply has no relevance here where the focus of the inquiry is not of what consumers can do to avoid injury but rather on whether financial institutions are taking unreasonable advantage of consumers' vulnerability. We believe the Policy Statement would benefit from such a statement.

Thank you for your consideration of these comments and for your work in developing the Policy Statement. We are available at your convenience to discuss these issues further. We look forward to supporting the Bureau's efforts. Please do not hesitate to reach out to Mitria Spotser, Director of Federal Policy, mitria.spotser@responsiblelending.org with any questions or concerns.

[23] 85 Fed. Reg. 44328, 44397 (July 22, 2020).