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Written Testimony of

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abusive,[42] but does not define "abusive" per se.) To date, the CFPB has not finalized any rulemakings under the abusive prohibition, and it has undertaken only a handful of enforcement actions that invoke the abusive standard. The prohibition on abusive acts and practices is a critical gap-filler for the traditional prohibition against unfair and deceptive acts and practices (UDAP). Too many things can fall between the cracks of "unfair" and "deceptive" as currently interpreted. Unfair requires a cost-benefit analysis that allows sharp practices to continue if they benefit *some* consumers even at the expense of others. Deceptive requires an actual misleading statement or omission. That is hardly the universe of sharp practices. For example, consider the following practices that might qualify as abusive, and that should, at the very least, give us pause:

- A lender lending to consumers whom the lender knows cannot repay in full and on-time (likely because the lender receives high rollover or upfront fees or has the ability to sell the loan to a third party);
- A lender whose business model anticipates default rates of over 50%;
- A loan broker steering consumers into higher cost loans when they qualify for lower cost ones because the high cost loan will result in greater compensation for the broker might both qualify as abusive.

There is a reasonable critique of the "abusive" power as drafted, namely that the statute should actually define "abusive", rather than limit what the CFPB can do in terms of rulemaking. The CHOICE Act, however, does not just restrict the CFPB's power under 12 U.S.C. § 1131 to undertake rulemakings designating certain acts and practices as "abusive." Nor does the CHOICE Act tighten the definition of "abusive." Instead, the CHOICE Act actually makes "abusive" acts and practices *legal* by also repealing 12 U.S.C. § 1136.[43] Apparently financial liberty includes the liberty to engage in abusive acts and practices.

C. The CHOICE Act Facilitates Discriminatory Lending

Financial liberty also apparently includes the right to engage in discriminatory lending. Among the most invidious provisions in the CHOICE Act are a trio that would shield discriminatory lenders from legal repercussions. The CHOICE Act would nullify the CFPB's indirect auto lending guidance and impose an onerous process for any future guidance.[44] The CHOICE Act would reduce the data collected under the Home Mortgage Disclosure Act, a key anti-discriminatory lending law.[45] And under the cynical heading of "Right to Lend," the CHOICE Act would prohibit data collection on small business lending, ensuring that regulators will lack the data necessary to conduct examinations for discriminatory small business lending.[46] The choice being made by the CHOICE Act is a choice to protect discriminatory lending.

D. The CHOICE Act Effectively Prevents Regulation of Payday Lending in Any State

The CHOICE Act showers love on payday lenders. Section 333 of the CHOICE Act allows states and Indian tribes to opt out of federal out of payday regulation. The opt-out can be renewed perpetually. There are other state opt-out provisions in federal consumer financial protection statutes, but those provisions are designed to allow for *greater* not *lesser* state consumer protection.[47]

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[42] Dodd-Frank Act § 1031.
[43] CHOICE Act § 337
[44] CHOICE Act § 334.
[45] CHOICE Act § 1171(c).
[46] CHOICE Act § 1161.
[47] *See, e.g.,* 12 U.S.C. § 3804.