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BY EMAIL & OVERNIGHT MAIL

Rohit Chopra
Director, Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

Assistance Requested: State Investigations of Federally Chartered Banks

Dear Director Chopra:

We, the undersigned twenty-one attorneys general (the “State AGs”) write to request that the Consumer Financial Protection Bureau (the “CFPB” or “Bureau”), as a federal regulator with supervisory authority over national banks, federal savings associations and other federally-chartered institutions (the “Banks”), take appropriate action to make clear to the Banks that it creates a material risk that may give rise to unfair or abusive acts or practices for any Bank to refuse to cooperate with State AG information requests that seek to further enforcement of applicable state laws, including enforcement of generally applicable state consumer laws.

For more than a century, the Banks participated in a dual-banking system under which both state and federal authorities chartered, supervised, and enforced laws against both the Banks and their state-chartered counterparts. In the early 2000s, however, the Banks began to claim immunity from state oversight: they refused to cooperate with investigations or respond to requests for documents or testimony. This aggressive posturing was aided by certain federal regulators who asserted the Banks’ immunity from state law enforcement. While these assertions of immunity were repudiated by the Supreme Court and Congress a few years later—after the worst financial crisis since the Great Depression, which also led Congress to create the Bureau itself—the Banks’ intransigence has not abated. And while it is now well settled that the Banks are obligated to comply with state laws of general applicability (including those laws that make up the core source of consumer protections in the United States), a key aspect of effective state law enforcement remains unaddressed at present: the ability of the State AGs to seek information, documents, and testimony from the Banks in the course of enforcing indisputably applicable laws.

The result is that State AGs can enforce the law but many Banks regularly refuse to provide the documents or testimony necessary to shed light on their practices. This is untenable

and unworkable. It forces State AGs who have reason to suspect legal violations to sue first and ask questions later. It leaves the Banks in an adversarial posture vis-à-vis the State AGs rather than a cooperative one, resulting in costly litigation rather than collaborative dialogue. And it leaves consumers behind most of all, neutering state-level consumer protections and saddling consumers with the consequences. The Banks, meanwhile, risk allowing serious violations to fester and grow, which in turn creates real risks of them engaging in unfair or abusive acts and practices, threatening their own reputations, safety, and soundness, undermining economic fairness, and even threatening the stability of the economy. Given the CFPB’s role as a federal supervisory authority and its mandate to ensure the safety and fairness of consumer financial markets, we write to request your partnership in ensuring that state law enforcement agencies are able to investigate potential violations of state consumer laws and hold national banks accountable for any violations.

I. BACKGROUND: STATE LAW ENFORCEMENT AND NATIONAL BANKS

We have written extensively on the pre-CFPB history of the dual-banking system, federal and state supervision of banks, and regulatory preemption in a letter to Michael J. Hsu, the Acting Comptroller of the Currency, on which you were copied, and thus we will not repeat that well-known history here. Critically, however, in the late 2000s both the Supreme Court and the United States Congress enshrined State AGs’ authority to enforce state laws against the Banks. *First*, the Supreme Court held prior federal regulatory actions did not comport with the National Bank Act.¹ Observing that states “have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years,” the Court held that when “a state attorney general brings suit to enforce state law against a national bank,” the State AG is legitimately acting as a “sovereign-as-law-enforcer.”² *Second*, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,³ which—in addition to creating the Bureau itself⁴—codified “the authority of any attorney general . . . of any State to bring an action against a [Bank] in a court of appropriate jurisdiction to enforce an applicable law or to seek relief as authorized” by state law.⁵ The legislation also narrowed the scope of federal preemption of state law,⁶ put in place strict procedural requirements for future preemption determinations,⁷ and limited judicial deference to such future determinations.⁸

Congress, through Dodd-Frank, also created the CFPB to act as the federal partner to the State AGs in that mission, empowering the Bureau to “regulate the offering and provision of consumer financial products or services under federal consumer financial laws.”⁹ The CFPB, through Dodd-Frank, can promulgate rules and regulations necessary to administer federal

¹ *Cuomo v. Clearing House Ass’n, LLC*, 557 U.S. 519, 531 (2009).

² *Id.* at 535–36.

³ Pub. L. No. 111-203 (2010)

⁴ 12 U.S.C. § 5491.

⁵ *Id.* § 25b(i).

⁶ *Id.* § 25b(b)

⁷ *Id.* § 25b(b) & (c).

⁸ *Id.* § 25b(b)(5).

⁹ *Id.* § 5491(a).

consumer protection laws,¹⁰ possesses supervisory authority to ensure Banks’ compliance with those same laws,¹¹ and is authorized to investigate¹² and bring enforcement actions¹³ for violations of those laws, including the then-newly created Consumer Financial Protection Act (“CFPA”).¹⁴ While empowering the CFPB, Congress also elevated the State AGs to a position of partner in the pursuit of safe and fair consumer financial markets throughout the United States, expressly providing State AGs concurrent authority to “bring a civil action” against the Banks “to enforce a regulation prescribed by the [CFPB]”¹⁵ and expressly disavowing any limitation on State AGs’ authority “to bring an action or other regulatory proceeding arising solely under” state law.¹⁶

The CFPB itself has recognized that Congress sought to “significantly restrict[] the ability of federal banking regulators to broadly preempt state consumer financial protections” through enactment of Dodd-Frank.¹⁷ In May of this year, the CFPB issued an interpretative rule acknowledging Congress’s recognition of “the important role that States play in overseeing the consumer financial marketplace.”¹⁸ In addition to enforcing CFPB regulations against Banks, that interpretive rule acknowledges State AGs’ existing authority “to enforce federal consumer financial laws . . . including against national banks and federal savings associations.”¹⁹

II. CURRENT LIMITATIONS ON STATE LAW ENFORCEMENT

Despite Congress’s intent to empower State AGs to protect consumers—including through enforcement of state or federal consumer protection laws as applied to the Banks—gaps remain that effectively hobble such efforts. While subsequent regulations acknowledged the State AG authority to enforce generally applicable state laws,²⁰ they did not address a practical reality: since at least 2004, most Banks have simply declined to meaningfully engage with State AGs or cooperate with state-level law enforcement investigations when they decide it is in their interest to do so. In one recent instance, for example, a Bank’s general counsel announced that a State AG’s inquiry into his Bank’s exposure of confidential financial data belonging to hundreds of thousands of consumers was “inappropriate” and immediately hung up the phone. Yet notwithstanding *Cuomo* and Dodd-Frank, federal supervisory guidance remains in effect that advises both State

¹⁰ *Id.* § 5512.

¹¹ *Id.* § 5515(b).

¹² *Id.* § 5562.

¹³ *Id.* § 5564.

¹⁴ *Id.* § 5531 *et seq.*

¹⁵ *Id.* § 5552(b)(2).

¹⁶ *Id.* § 5552(d)(1).

¹⁷ CFPB, *CFPB Bolsters Enforcement Efforts by States* (May 19, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bolsters-enforcement-efforts-by-states/>.

¹⁸ 87 Fed. Reg. 31,937, 31,940 (May 26, 2022).

¹⁹ *Id.* at 31,941. See 12 U.S.C. § 5481(12) for the enumerated list of federal consumer financial laws.

²⁰ 76 Fed. Reg. 43,549, 43,555 (July 21, 2011).

AGs and Banks to contact federal banking regulators “when state officials may seek information from a national bank about its compliance with any law.”²¹

We know that the Bureau is familiar with the harms from the hobbling of state law enforcement, which have been and will continue threaten the safety and fairness of our economy. Beyond the abusive mortgage practices that resulted in the financial crisis, the past few decades of aggressive preemption of state law enforcement has resulted in an explosion of consumer debt held by the Banks.²² States have been limited in their ability to address a wide range of unfair and deceptive practices that affect their citizens, including bait-and-switch practices and the failure to clearly and conspicuously disclose rate changes, late fees and overdraft fees.²³ And although some Banks have limited use of overdraft fees, those fees remain a tremendous source of Bank revenue but are often not clearly understood by consumers.²⁴ Harassing and unlawful debt collection practices likewise have proliferated.²⁵ And the limitation of active state law enforcement has resulted in what commentators describe as a “culture of deception” in which substantive state protections are preempted in favor of weaker disclosure requirements.²⁶

These ongoing evasions of state law enforcement are only likely to grow. State-chartered institutions continue to steadily re-charter into federally chartered Banks,²⁷ at times expressly to assert preemption benefits, “rent-a-bank” efforts to end-run state usury and lending laws continue apace,²⁸ and financial technology companies have begun to seek charters from the OCC for the express—and arguably sole—purpose of evading state law enforcement.²⁹

²¹ Office of the Comptroller Currency, Advisory Ltr. 2002-9 at 4 (Nov. 25, 2002), available at <https://www.occ.gov/news-issuances/advisory-letters/2002/advisory-letter-2002-9.pdf>.

²² National Consumer Law Center, *Restore the States’ Traditional Role as ‘First Responder’*, at 14 (Sep. 2009), available at <https://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf>.

²³ Testimony of Arthur E. Willmarth, Jr., Professor of Law, George Washington University Law School, *U.S. House of Representatives Hearing on Credit Card Practices: Current Consumer and Regulatory Issues*, at 7–13 (Apr. 26, 2007), available at <http://financialservices.house.gov/hearing110/htwilmarth042607.pdf>.

²⁴ Consumer Financial Protection Bureau, *CFPB Research Shows Banks’ Deep Dependence on Overdraft Fees* (Dec. 1, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/>.

²⁵ NCLC, *Consumer Complaints about Debt Collection: Analysis of Unpublished Data from the FTC* (Feb. 2019), available at <https://www.nclc.org/images/pdf/pr-reports/report-analysis-debt-coll-ftc-data.pdf>.

²⁶ NCLC, *Restore the States’ Traditional Role*, *supra*, at 15.

²⁷ National Consumer Law Center, *Restore the States’ Traditional Role as ‘First Responder’*, at 22 (Sep. 2009), available at <https://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf>.

²⁸ Center for Responsible Lending, *Predatory Lenders’ Rent-a-Bank Scheme: What Is It and What Can We Do to Stop It?* (Jan. 14, 2020), available at <https://www.responsiblelending.org/research-publication/predatory-lenders-rent-a-bank-scheme-what-it-and-what-can-we-do-stop-it>.

²⁹ National Conference of State Legislatures, *National Bank Charter for Payments Companies Would Preempt State Authority* (Oct. 28, 2020), available at <https://www.ncsl.org/blog/2020/10/28/national-bank-charter-for-payments-companies-would-preempt-state-authority.aspx>.

III. CFPB ACTION IS APPROPRIATE AND NECESSARY

The CFPB is not limited in its ability to fully investigate potential violations of consumer protection laws by the Banks. Indeed, in Dodd-Frank Congress granted the CFPB “exclusive authority” to conduct examinations for purposes of assessing compliance with such laws.³⁰ And the Bureau is further authorized to conduct investigations of the Banks, including through the issuance of subpoenas and civil information demands.³¹ These tools can and should be used to make clear to Banks that their refusal to cooperate with State AG investigations into violations of clearly applicable law will not go unnoticed or unchecked, for several reasons:

First, the ability to conduct investigations in the banking industry for purposes of enforcing state law is vital to consumer protection and safety. State laws are front-line protections: common law rules for contracts, property rights, fraud and the like, statutory regimes concerning unfair and deceptive practices, and laws enacted to tackle specific consumer safety issues. Federal law, in contrast, is interstitial in character, enacted against the backdrop of existing state laws.³² In just the last three years, the State AGs have received thousands of consumer complaints about just the five largest Banks alone. Yet in recent years some Banks have effectively stonewalled State AG investigations into, among other violations of law, (i) failure to follow key homeowner protections during the early stages of the pandemic, (ii) discriminatory and otherwise improper allocations of federal funds for distressed businesses, (iii) fraudulent solicitations directed at vulnerable elderly populations, (iv) compliance with new state laws concerning credit card debt collection practices, and (v) adherence to state and federal laws governing unauthorized payment activity resulting from scams. This obstruction creates profound risk of consumer harm and ultimately safety and soundness of the consumer financial system.

Second, the ongoing explosion of financial technology, cryptocurrency and other revolutions in financial services requires a proactive response at all levels of government. States, are very often the first responders to these new challenges: federal protections against identify theft were adopted by Congress only after several states had laws on the books, California disclosure laws for credit cards were the model for federal laws, and the federal Expedited Funds Availability Act was enacted only after states took the lead on forcing financial institutions to stop putting long holds on deposited checks.³³ And because states and the State AGs are closer to consumers, they are in a better position to identify newly arising issues in the financial services and banking industries, and are more likely to act quickly to prevent new abuses. Permitting Banks to sidestep State AGs effectively removes these early warning guardrails, allowing threats to the safety and soundness of the financial system to go unaddressed through early intervention.

Third, the status quo results in regulatory asymmetry in the country’s financial markets, as state-chartered banks remain subject to State AG subpoena power while the Banks do not. Given modern trends in online banking and the increased frequency of bank partnerships with non-bank entities, state-chartered banks are equally capable of having a national footprint. There

³⁰ 12 U.S.C. § 5515.

³¹ *Id.* § 5562(b)–(c).

³² *E.g., Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 23–24 (2007) (Stevens, J., dissenting).

³³ NCLC, *Restore the States’ Traditional Role, supra*, at 18–19.

is no sound reason for all of these banking entities to not be subject to the same rules of the road, and no sound reason for the Banks not to answer legitimate law enforcement inquiries.

Fourth, the Banks also will benefit by funneling state law enforcement efforts into cooperative regulatory dialogues and away from costly and protracted litigation. Today, should a State AG seek information and a Bank decline to cooperate, the State AG’s sole recourse is the filing of a public action in court. Litigation is protracted and enormously costly for all sides,³⁴ particularly when compared to the efficiencies inherent in regulatory investigations. Moreover, the filing of such suits is frequently followed by private class action litigation,³⁵ compounding the risks and costs for the Bank. Prior financial crises have made it abundantly clear that Banks cannot be expected to act unilaterally to address every problematic practice. There is no sound reason to wait until the next scandal, and to put the safety and soundness of the next Bank at risk, before taking steps to foster genuine cooperation between the State AGs and the Banks.

Finally, history teaches that a strong dual-banking system, including robust enforcement of both state and federal law, is vital to the country’s economy and financial health. Today’s largest Banks have existed for decades—some for centuries. They thrived, grew and profited through the 20th century, at a time when they were both subject and responsive to state inquiries related to enforcement of state law. Throughout this period, states acted as first responders to protect public welfare, health, and safety in the vital arena of consumer protection, and the financial system as a whole benefited from enhanced stability through a partnership between state and federal oversight and law enforcement in the banking system.

We write in an effort to renew the once strong partnership between state and federal banking regulation. The CFPB is, in its own words, the single federal agency that has “oversight authority to make sure consumer financial markets work for all of us.”³⁶ While, as the Bureau recently acknowledged,³⁷ State AGs often partner with the CFPB in investigations and enforcement actions, to date there exists no formal mechanism for state law enforcement to work with the CFPB to address instances where the State AGs are unable to fully investigate because a non-cooperative Bank is involved. We are prepared to share the details of those circumstances, the unaddressed harms that may be faced by consumers, and the risks that may be present to our economy. In light of our shared commitment to the safety and fairness of consumer financial markets, we look forward to working with you to overcome the limitations faced by state law enforcement agencies today and to developing a plan to ensure that the Banks are fully accountable for violations of state consumer laws.

Respectfully Submitted,

³⁴ E.g., Financial Times, *Bank Litigation Costs Hit \$260bn—with \$65bn More to Come* (Aug. 23, 2015), available at <https://www.ft.com/content/c6d01d9a-47dc-11e5-af2f-4d6e0e5eda22>.

³⁵ *Id.*

³⁶ CFPB, *Building the CFPB*, available at <https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb>.

³⁷ 87 Fed. Reg. 31,937, 31,940 (May 26, 2022).

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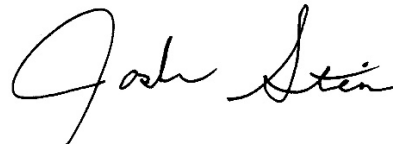
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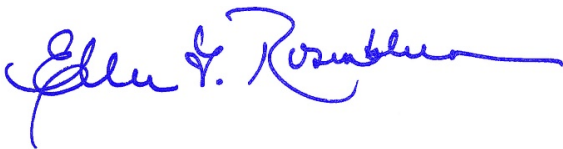
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