

The Biden CFPB's Final Salvo: A Call for State Action

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In its final days under the Biden administration, Consumer Financial Protection Bureau called on states to step it up – following soon after Director Chopra's December [appearance](#) at the NAAG Capital Forum.

In a detailed [report](#), the Bureau attempts to counter looming changes in federal consumer protection under the new Trump administration by providing a roadmap for states and private plaintiffs to take up the Biden administration's key priorities. Junk fees and consumer data privacy were, of course, top-of-mind.

Here are your key takeaways from the report:

- **Banning “Abusive” Practices:** Unlike the FTC Act and many state UDAPs that target “unfair” and “deceptive” practices, the Consumer Financial Protection Act (CFPA) also prohibits “abusive” practices. The CFPB reminds the states they “issued an interpretative rule explaining” how states can enforce the CFPA themselves, including its prohibition on abusive practices. Generally (like in state actions under many existing UDAP laws), proving abusive practices does not require a showing of consumer harm. Rather, banning so-called abusive practices prohibits companies from materially interfering with a consumer's ability to understand a term or condition of a consumer financial product or service and from profiting from consumer reliance, gaps in understanding, unequal bargaining power, and the like.

According to the report, banning abusive practices can further help states target digital “dark pattern” tactics like popups, drop-down boxes, and multiple click-throughs.

- **Expanding State Powers:** The report calls for a “relativity unimpeded” process for state enforcers launching investigations, including not requiring state AGs to petition a court prior to issuing a subpoena or civil investigative demand, and encourages states to provide equitable monetary relief. (Note – most states already have such an unimpeded investigation process, and many do already provide for equitable relief as a remedy). It encourages states to grant municipalities and cities power to bring investigations and suits under consumer protection laws. Even more, it calls for states to hold corporate officers who fail to properly oversee their employees and practices personally accountable.
- **Private Rights of Action and Lower Evidentiary Standards:** The report called for an end to the evidentiary burden of proving monetary harm and individual reliance on deceptive claims to empower private plaintiffs to bring their own claims.
- **Targeting Business-to-Business Transactions:** Consumer protection laws traditionally focused on consumer-facing transactions and acts. However, the report asks states to take a

broader view and apply those laws to transactions between businesses on the theory that those transactions, too, could harm consumers. (Note – many state UDAP laws already apply to certain B2B transactions.)

- **Junk Fees and Data Privacy:** Tackling junk fees and going after companies that mishandle consumer data were hallmarks of Biden’s presidential agenda. The report encourages states to continue this effort, passing [more bright-line laws](#) banning junk fees and encouraging continued data privacy legislation.
- **A State “Civil Penalty Fund”:** The report recommends that states create their own versions of the CFPB’s Civil Penalty Fund, which is used to compensate victims when a company is insolvent and cannot cover its damages.

How will states respond? We anticipate continued attention on junk fees and data privacy, with expected continuing interest to enforce specific state legislation passed over the last two years. Notably, data privacy remains a non-partisan issue as Democrats and Republicans alike are continuing to support and enforce new state legislation, with states like [California](#) and [Texas](#) leading the way. We’ll keep you updated as the new state (and federal) consumer protection landscape takes shape.