STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

212.416.8050

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**BY EMAIL & OVERNIGHT MAIL**

Michael J. Hsu
Acting Comptroller of the Currency
400 7th St. S.W.
Washington, DC 20219

*Supervisory Guidance Requested: State Investigations of Federally Chartered Banks*

Dear Acting Comptroller Hsu:

We, the undersigned twenty-one attorneys general (the "State AGs") write to request that the Office of the Comptroller Currency (the "OCC") issue supervisory guidance to all national banks, federal savings associations and other institutions chartered and regulated by the OCC (collectively, the "Banks") advising that it is unsafe and unsound, and that it creates a material risk of 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 OCC regulations asserting the Banks' immunity from state law enforcement. While those regulations were repudiated by the Supreme Court and Congress a few years later—and after the worst financial crisis since the Great Depression—the Banks' intransigence has not abated. And while the OCC has subsequently recognized the Banks' obligations to comply with state law (including those that make up the core source of consumer protections in the United States), the OCC has left unaddressed a key aspect of effective state law enforcement: 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—at times with the blessing of the OCC. 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 the vanguard of consumer protections in this country and saddling them with the consequences. The Banks, meanwhile, (and the OCC through its role in supporting the status quo) risk allowing serious violations to fester and grow—imperiling the Banks' reputations, safety, and soundness when such matters come to light or otherwise compromising the stability of the Banks and the economy.

Senior enforcement attorneys with the New York State Office of the Attorney General raised these matters last year during a meeting with senior counsel for the OCC. The New York attorneys explained the risks posed when the Banks feel empowered to ignore legitimate State AG investigations of plainly applicable laws and described several instances in which certain Banks declined to provide information after the New York attorneys had identified Bank practices that violated New York law. Yet despite a plea for partnership, the OCC offered no substantive response. We therefore write directly to seek supervisory guidance to address these matters.

## I. BACKGROUND: STATE LAW ENFORCEMENT AND NATIONAL BANKS

State regulation of the Banks as part of the nation's dual-banking system—a system that involves "both federal regulation of state banks and state regulation of national banks"[1]—has a lengthy history. Shortly after the National Bank Act was enacted, the Supreme Court affirmed that the Banks "are subject to the laws of the State and are governed in their daily course of business far more by the laws of the State than of the nation."[2] For the century that followed, State AGs enforced applicable laws against the Banks in the same manner as any multi-state corporation.[3] The State AGs conducted investigations where there was some evidence of wrong doing, making requests for information, documents, and testimony. The Banks, meanwhile, generally cooperated with inquiries, which often concluded with findings that no laws were violated or in consensual resolutions providing remediation without costly court intervention. As the Supreme Court stated: "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."[4]

In 2004, however, the symbiotic nature of the dual-banking system was upended by the OCC's adoption of a final rule (the "2004 Rule")[5] that, among other things, expanded the test for when a state law was preempted—which previously was limited to instances where the state law "significantly interfered" with a Bank's exercise of its powers[6]—in two key ways: *first*, the 2004 Rule omitted the phrase "significantly"; *second*, the 2004 Rule permitted preemption any

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1 Congressional Research Service, *Federal Preemption in the Dual Banking System* at i, R45726 (May 17, 2019), *available at* https://sgp.fas.org/crs/misc/R45726.pdf.

2 *National Bank v. Commonwealth*, 76 U.S. 353, 362 (1869).

3 *See generally* Arthur E. Willmarth, Jr.*, The OCC's Preemption Rules Exceed the Agency's Authority & Present a Serious Threat to the Dual Banking System*, 23 ANN. REV. BANKING & FIN. L. 225 (2004).

4 *Cuomo v. Clearing House Ass'n, L.L.C.*,557 U.S. 519, 534 (2009).

5 12 C.F.R. 34.4(a), 7.4007, 7.4008, 7.4009.

6 *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

time Banks were not able to "fully" exercise their powers.[7] In addition, the 2004 Rule promulgated a definition of "visitorial powers" that included "[e]nforcing compliance with any applicable federal or state laws"[8]—in other words, for the State AGs to enforce state law at all. In response, the Banks quickly adopted aggressive stances (often aided by the OCC[9] )in opposition to state law enforcement, including challenges to requests for documents and testimony.

The 2004 Rule came under fire in the wake of the United States experiencing the most severe financial recession since the Great Depression—a crisis caused in significant part by reckless subprime mortgage lending[10] that substantially accelerated at a time when states' ability to legislate against predatory lending had been "effectively gutted"[11] by aggressive preemption of state lending laws.[12] *First*, the Supreme Court held that the 2004 Rule and the OCC's interpretation of it did not comport with the National Bank Act.[13] 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."[14] *Second*, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[15] which 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.[16] The legislation also narrowed the scope of federal preemption of state law,[17] put in place strict procedural requirements for future preemption determinations,[18] and limited judicial deference to such future determinations.[19]

The inescapable conclusion of both the *Cuomo* decision and Dodd-Frank is clear: state law and its enforcement by State AGs has a central role to play in promoting the soundness and safety of all financial institutions, including the Banks. The House Report on the legislation itself stated Congress sought to "revis[e] the standard the OCC will use to preempt state consumer

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7 CRS, *Federal Preemption*, *supra*, at 12.

8 12 C.F.R. 7.4000(a)(2)(iv).

9 *See, e.g.*, OCC, Interpretive Ltr. No. 957 n.2 (Jan. 27, 2003), *available at* https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2003/int957.pdf (instructing Banks to "contact the OCC in situations where a State official seeks to assert supervisory authority or enforcement jurisdiction over the bank").

10 *See generally* Fin. Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* at 67–80 (2011), *available at* https://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

11 Nicolas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274, 2275 (2004).

12 CRS, *Federal Preemption*, *supra*, at 14 n.136 (collecting citations).

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

14 *Id*. at 535–36.

15 Pub. L. No. 111-203 (2010)

16 12 U.S.C. § 25b(i).

17 *Id*. § 25b(b)

18 *Id*. § 25b(b) & (c).

19 *Id*. § 25b(b)(5).

protection laws."[20] Similarly, the Department of the Treasury's general counsel explained that "Congress intended that a state consumer financial law may be preempted only if the law 'prevents or significantly interferes' with the exercise of a national bank's powers."[21]

## II. CURRENT LIMITATIONS ON STATE INVESTIGATIONS OF THE BANKS

The decade and a half that followed *Cuomo* and Dodd-Frank has not, however, seen a return to State AGs acting in the "role of sovereign-as-law-enforcer" that the Supreme Court envisioned and Congress codified.[22] The Banks continue to frequently decline to cooperate with ongoing State AG investigations, rendering the states reactive parties that can merely respond and seek redress for violations of state law once those violations have come into the public view, rather than able to proactively investigate and stop ongoing or hidden violations. The Banks' resistance continues to be aided by the OCC, which in 2011 adopted a final rule that, while acknowledging the power of the State AGs to enforce state law,[23] did nothing to address the simple fact that since at least 2004 most of the Banks have simply declined to meaningfully engage with the State AGs when they decide it is in their own interest not to do so. Indeed, most troubling of all is that the OCC's Advisory Letter 2002-9, which effectively tells the State AGs to refer potential violations of state law to the OCC rather than investigate themselves,[24] has not been rescinded. And evasion of state law enforcement is likely only to grow: state-chartered institutions continue to steadily re-charter into federally chartered Banks,[25] "rent-a-bank" efforts to end-run state usury and lending laws continue apace,[26] and financial technology companies have begun to seek charters from the OCC for the express—and arguably sole—purpose of evading state law enforcement.[27]

The harms from the hobbling of state law enforcement have been and will continue to be profound. 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.[28] 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

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20 H.R. Rep. No. 111-517, at 875 (Conf. Rep.).

21 Letter from Gen. Counsel, Dep't of the Treasury, to Acting Comptroller of the Currency (June 27, 2011), *available at* http://graphics8.nytimes.com/packages/pdf/business/20110629bank/treasury.pdf.

22 *Cuomo*, 557 U.S. at 536.

23 76 Fed. Reg. 43,549, 43,555 (July 21, 2011).

24 OCC, 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.

25 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.

26 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-bank-scheme-what-it-and-what-can-we-do-stop-it.

27 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.

28 NCLC, *Restore the States' Traditional Role*, *supra* at 14.

the failure to clearly and conspicuously disclose rate changes, late fees and overdraft fees.[29] 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.[30] Harassing and unlawful debt collection practices likewise have proliferated.[31] 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.[32]

The OCC simply cannot fill this void. Its scope is national and its primary mission is systemic. Expecting the OCC to allocate substantial resources to policing 50 states' laws concerning data privacy, debt collection and other key consumer protections is unrealistic. In the same meeting last year with the OCC described above, senior state-level enforcement attorneys described multiple examples of the Banks's refusal to cooperate—including one incident in which a 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 then immediately hung up the phone. Yet despite being informed of multiple existing and ongoing violations of law by various Banks, the OCC representatives took no further action and sought no further information. This is untenable. The OCC previously declared: "we stand ready to work with the states in the enforcement of applicable laws."[33] If that sentiment remains at all true, then now is the time for the OCC to work with states (and protect consumers) by empowering the State AGs to enforce state consumer protection laws that indisputably apply to the Banks.

## III. OCC SUPERVISORY GUIDANCE IS APPROPRIATE AND NECESSARY

The State AGs therefore write to request that the OCC issue supervisory guidance[34] to the Banks (and other OCC-supervised institutions) stating that voluntary compliance with a State AG's targeted information requests for purposes of state law enforcement is appropriate and expected. Such guidance is an appropriate exercise of the OCC'S authority and is urgently needed to prevent unsafe and unsound business practices and significant consumer harm.

Supervisory guidance "provides examples of practices that the [OCC] generally consider[s] consistent with safety-and-soundness standards or other applicable laws and

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29 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.

30 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/.

31 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.

32 NCLC, *Restore the States' Traditional Role*, *supra*, at 15.

33 69 Fed. Reg. 1895, 1903 (Jan. 13, 2004) ("[W]e stand ready to work with the states in the enforcement of applicable laws.").

34 "Supervisory guidance," as used herein, is given the same meaning as described in the OCC's final rule, Role of Supervisory Guidance, Dkt. No. OCC-2020-0005, codified at 86 C.F.R. 9253 (2021), which adopted as binding the Interagency Statement Clarifying the Role of Supervisory Guidance, Sep. 11, 2018, *available at* https://www.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf.

regulations, including those designed to protect consumers."[35] While not itself binding,[36] such guidance often touches upon matters of importance to the Banks' financial health and stability. In recent years, the OCC has issued supervisory guidance to instruct the Banks on how to properly prepare for the transition away from use of the London Interbank Offered Rate,[37] how to safeguard sensitive financial data,[38] and how to identify and account for the anticipated effects of global climate change on the U.S. and world financial systems.[39] As the Administrative Conference of the United States recognized, regulatory statements of policy, such as supervisory guidance, play a vital role in the regulatory state, as they "shield regulated parties from unequal treatment, unnecessary costs and unnecessary risk, while promoting compliance with the law."[40]

Today, there is an urgent need to clarify and codify the State AGs' practical ability to enforce applicable state laws. There is a world of difference between a targeted inquiry to investigate discrete violations of state law, which is a power the State AGs exercised for more than a century, and the general administrative supervision of Banks, which is exclusively reserved for the OCC. Supervisory guidance that acknowledges the distinction will have several benefits:

***First***, the State AGs' ability to investigation violations of state law is vital to protecting both consumers and the Banks. 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.[41] 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—all while citing the OCC's views on preemption. For example, one Bank declined to cooperate while citing the OCC's recent bulletins stating that the Banks are "not required to provide . . . information" in response to "a request from a state or local official seeking

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35 *Id*. at 1.

36 86 C.F.R. 9253, at 9254 (2021).

37 LIBOR Transition: Joint Statement on Managing the LIBOR Transition, OCC Bulletin 2021-48 (Oct. 20, 2021), *available at* https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-48a.pdf.

38 Information Security: FFIEC Statement on Authentication and Access to Financial Institution Services and Systems, OCC Bulletin 2021-62 (Dec. 16, 2021), *available at* https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-36a.pdf.

39 Principles for Climate-Related Financial Risk Management for Large Banks, OCC Bulletin 2021-62 (Dec. 16, 2021), *available at* https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62a.pdf.

40 Administrative Conference of the United States, *Recommendation 2017-5: Agency Guidance Through Policy Statements* (Dec. 14, 2017), *available at* https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20%28Agency%20Guidance%20Through%20Policy%20Statements%29_2.pdf, codified at 82 C.F.R. 61734 (Dec. 29, 2017).

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

information"[42] and emphasizing the importance of federal preemption for banks administering pandemic relief programs.[43] This obstruction creates profound risk of consumer harm as well as for the safety and soundness risks for the Banks and the banking system itself.

***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.[44] 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***, tailored supervisory guidance can ensure that Banks' operations will suffer minimal disruption from responding to targeted inquiries by the State AGs in response to suspected violations of state law. The State AGs are not seeking "supervisory" functions but are requesting that the OCC act to meaningfully support enforcement of existing state law. And of course, a Bank would continue to be free, should it believe an investigation unwarranted or burdensome, to decline to cooperate and force the State AG in question to resort to enforcement through the courts—as is the case with any entity that is subject to a State AG's jurisdiction.

***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,[45] particularly when compared to the efficiencies inherent in regulatory investigations. Moreover, the filing of such suits is frequently followed by private class action litigation,[46] 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

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42 OCC, Bulletin 2020-43, *COVID-19 Financial Support Programs: Visitorial Authority* (Apr. 24, 2020), *available at* https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-43.html.

43 OCC, Bulletin 2020-62, *COVID-19 Relief Programs: Preemption* (Jun. 17, 2020), *available at* https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-62.html.

44 NCLC, *Restore the States' Traditional Role*, *supra*, at 18–19.

45 *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.

46 *Id*.

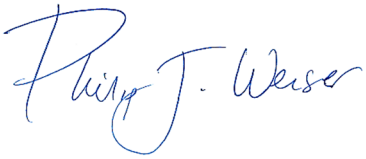
profited through the 20th century, at a time when they were both subject and responsive to state inquiries related to enforcement of state law. Throughout this period, states acted as first responders to protect public welfare, health, and safety in the vital arena of consumer protection, and the financial system as a whole benefited from enhanced stability through a partnership between state and federal oversight and law enforcement in the banking system. The requested supervisory guidance can restore this prior balance, and it should be issued.

Respectfully Submitted,

LETITIA JAMES
ATTORNEY GENERAL
STATE OF NEW YORK

KRIS MAYES
ATTORNEY GENERAL
STATE OF ARIZONA

ROB BONTA
ATTORNEY GENERAL
STATE OF CALIFORNIA



PHILIP J. WEISER
ATTORNEY GENERAL
STATE OF COLORADO

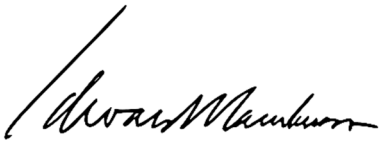
WILLIAM TONG
ATTORNEY GENERAL
STATE OF CONNECTICUT

BRIAN L. SCHWALB
ATTORNEY GENERAL
DISTRICT OF COLUMBIA

ANNE E. LOPEZ
ATTORNEY GENERAL
STATE OF HAWAII

MANA MORIARTY
EXECUTIVE DIRECTOR
HAWAII OFFICE OF
CONSUMER PROTECTION

KWAME RAOUL
ATTORNEY GENERAL
STATE OF ILLINOIS



EDWARD MANIBUSAN
ATTORNEY GENERAL
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

ANTHONY G. BROWN
ATTORNEY GENERAL
STATE OF MARYLAND

ANDREA JOY CAMPBELL
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

DANA NESSEL
ATTORNEY GENERAL
STATE OF MICHIGAN

KEITH ELLISON
ATTORNEY GENERAL
STATE OF MINNESOTA

MATTHEW J. PLATKIN
ATTORNEY GENERAL
STATE OF NEW JERSEY

JOSHUA H. STEIN
ATTORNEY GENERAL
STATE OF NORTH CAROLINA

ELLEN F. ROSENBLUM
ATTORNEY GENERAL
STATE OF OREGON

MICHELLE A. HENRY
ATTORNEY GENERAL
COMMONWEALTH OF PENNSYLVANIA

PETER F. NERONHA
ATTORNEY GENERAL
STATE OF RHODE ISLAND

CHARITY R. CLARK
ATTORNEY GENERAL
STATE OF VERMONT

ARIEL K. SMITH
ATTORNEY GENERAL
U.S. VIRGIN ISLANDS

cc (by email): Rohit Chopra, Director, Consumer Financial Protection Bureau