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July 3, 2023

Rulemaking Petitions Docket
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C., 20552

Re: Comment Intake—Statement of Policy Regarding Prohibition on Abusive Acts or Practices (Docket No. CFPB–2023–0018).

Dear Director Chopra:

On behalf of the Association of Credit and Collection Professionals (“ACA International” or “Association”), I am writing in response to the Consumer Financial Protection Bureau’s (“Bureau” or “CFPB”) Policy Statement summarizing how it analyzes the elements of abusiveness under its unfair, deceptive, or abusive act or practice (“UDAAP”) authority.

ACA International represents approximately 1,700 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates, in an industry that employs more than 125,000 people worldwide. Most ACA International member debt collection companies are small businesses. Women make up 70% of the total diverse debt collection workforce.

I. About ACA International:

ACA International members play a critical role in protecting both consumers and providing liquidity to lenders. ACA International members work with consumers to resolve their debts, which in turn saves every American household, on average, more than \$700 year after year. The accounts receivable management (“ARM”) industry is instrumental in keeping America’s credit-based economy functioning with access to credit at the lowest possible cost, thereby protecting one of the safety nets of the most vulnerable consumers in society from unplanned expenses. For example, in 2018, the ARM industry returned over \$90 billion to creditors for goods and services they had provided to their customers. And in turn, the ARM industry’s collections benefit all consumers by lowering the costs of

goods and services—especially when rising prices are impacting consumers’ quality of life throughout the country.

ACA International members also follow comprehensive compliance policies, are diligent about employing strong compliance management systems and high ethical standards to ensure consumers are treated fairly and the wide range of federal and state laws that govern collections are followed. The Association contributes to this end goal by providing timely industry-sponsored education as well as compliance certifications. In short, ACA International members are committed to assisting consumers as they work together to resolve their financial obligations, all in accordance with the Collector’s Pledge¹ that all consumers are treated with dignity and respect.

II. Background

The CFPB Policy Statement interprets the Consumer Financial Protection Act of 2010’s (“CFPA”) prohibition on abusive practices, 12 U.S.C. 5531.²

The CFPA allows the CFPB to declare an act abusive—and thus prevent an entity from engaging in the act—when the practice:

- (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or*
- (2) takes unreasonable advantage of-*
 - (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;*
 - (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or*
 - (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.³*

The Policy Statement discusses the interpretation of the CFPA’s abusiveness test.⁴

Material Interference Standard

The Policy Statement outlines three possibilities to prove material interference: (1) an act or omission is “intended to impede consumer’s ability to understand terms or conditions,” (2) the act or omission has “the natural consequence of impeding consumers’ ability to understand,” or (3) the act or omission “actually impedes understanding.”⁵

¹ Collectors Pledge states that ACA members • believe every person has worth as an individual. • believe every person should be treated with dignity and respect. • will make it their responsibility to help consumers find ways to pay their just debts. • will be professional and ethical. • will commit to honoring this pledge.

² Consumer Finance Protection Act §1031(d), 12 U.S.C. § 5531(d).

³ *Id.*

⁴ Press Release, Consumer Financial Protection Bureau, CFPB Issues Guidance to Address Abusive Conduct in Consumer Financial Markets (Apr. 3, 2023).

⁵ Policy Statement at 5.

The Policy Statement appears to hold three actions as *per se* materially interfering with the consumer's ability to understand. First, the Policy Statement states that when terms of importance like price, limitations of use of service, or consequences of default are "not conveyed to people prominently or clearly, it may be reasonable to presume that the entity" materially interfered with consumers' ability to understand.⁶ Second, the Policy Statement contends that when a product or service is so complicated that "**material information about it cannot be sufficiently explained,**" the entity has materially interfered.⁷ And third, when the product or service of an entity's "business model functions in a manner that is inconsistent with its product's or service's apparent terms," the Policy Statement also asserts the entity has materially interfered.⁸ The Policy Statement offers no citation to precedent for any of these three examples of material interference.

Notably, the Policy Statement states that *material interference* requires no intent or actual interference; the Statement would see *any omission, intended or not*, with the natural consequence of interfering with a consumer's understanding as material interference and thus abusive.

This section makes the clear point that disclosures alone are not enough for companies to rely on if the CFPB does not think they are understandable. This is extremely problematic for businesses because it is not clear where the CFPB will draw the line. Thus, businesses can be at a disadvantage even if they add a disclosure. The process of adding disclosures is a timely and costly exercise for various products and services, as demonstrated with rule changes related to disclosures over recent years. While ACA International members support the use of disclosures to ensure that consumers understand their rights and options, unclear rules about their use are not beneficial to anyone. Here, the CFPB is essentially telling businesses that even if you take the right steps and try to do the right thing, it might not be good enough at its discretion. The CFPB has drawn clear lines on disclosures in several rulemakings and should not be using UDAAP authority to create new and arbitrary standards outside of the law or rulemakings.

Taking Unreasonable Advantage

The CFPA also prohibits entities from "taking unreasonable advantage" of three specific circumstances laid out in section (d) of the act:

- "*a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service*"
- "*the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service*"
- "*the reasonable reliance by the consumer on a covered person to act in the interests of the consumer*"⁹

⁶ Policy Statement at 7.

⁷ *Id.*

⁸ *Id.*

⁹ CFPA §1031(d)(2), 12 U.S.C. § 5531(d)(2).

The Policy Statement describes each unreasonable advantage, respectively, as (1) gaps in understanding, (2) unequal bargaining power, and (3) consumer reliance. An entity that takes unreasonable advantage of any one of these circumstances is in violation of the CFPA “even if the condition was not created by the entity.”¹⁰

The Policy Statement defines both “take advantage” and “unreasonable.” An advantage can include monetary or non-monetary benefits, like reputational or time benefits.¹¹ When defining “unreasonable,” the Policy Statement relies on both the legal and traditional definitions, calling something reasonable when it is “fair, proper or moderate under the circumstances” or unreasonable when it “exceed[s] the bounds of reason or moderation.”¹² Similar to the material interference interpretation, the Policy Statement states that **regulators do not need to show substantial injury to establish liability.**¹³

Here, the CFPB is basically saying any perceived minor injury could be abusive. This seems to indicate the sky is the limit in terms of the CFPB’s broad authority in this area, since it seems very possible for a business to have a small time, profit, or other advantage over a customer in a capitalistic society. While, of course, any malicious or egregious behavior should be punished, using the broad authority the CFPB has under numerous consumer protection laws that prohibit illegal behavior, targeting a minor advantage seems problematic and surely could stymie innovation and growth for companies that are not sure where the CFPB will draw the line.

The Policy Statement also limits what goes into the unreasonable advantage inquiry. The Policy Statement says that the inquiry does “not require an inquiry into whether advantage-taking is typical or not” and that “even a relatively small advantage may be abusive if it is unreasonable.”¹⁴ **As such, a typical, small advantage gathered by an entity may still be illegal if it is unreasonable.** The specific meaning of “unreasonable” in the context of the Policy Statement’s framework is unclear.

As listed above, the meaning of “unreasonable” seems extremely broad to the point where it could incorporate anything a business might do to take “small advantage,” arguably including any opportunity to create revenue or be successful.

The Policy Statement states that the entity in question need not have caused the consumer’s lack of understanding. Instead, the Policy Statement states that “**the consumer’s lack of understanding, regardless of how it arose, is sufficient.**”¹⁵ The Policy Statement also notes that awareness of risk or cost is not equivalent to having an understanding of risk or cost.

¹⁰ Policy Statement at 8.

¹¹ *Id.* The Policy Statement also notes that something may be to the advantage of an entity even if it does not “accrue a profit.” The Statement refers to the legislative history of the CFPA and specifically abuses in the subprime mortgage market where actions were often profitable in the short term but presented significant long-term challenges. Despite these long-term threats, the actions were still seen to be advantageous.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Policy Statement at 12.

The Policy Statement also suggests that there is no threshold of the number of people required to show that an act or practice was abusive.¹⁶

Significantly, the Policy Statement states that “the statutory text of the prohibition does not require that the consumer’s lack of understanding was reasonable to demonstrate abusive context.”¹⁷ Coupled with the Policy Statement’s proposition that the lack of understanding prong also requires no action by an entity to be at fault, an entity could be liable for taking advantage of an *unreasonable* lack of understanding on the part of the consumer that the entity itself had *no role* in causing.

In practical terms, this interpretation of the CFPB would seem to mean that entities are responsible for educating all consumers on the risks, costs, and conditions of products, but would still be responsible for even an unreasonable lack of understanding after that education. Again, read broadly, this seems like *any* advantage is abusive. ACA International members strongly support financial literacy and consumer education efforts. And, ACA International members are proud of their work with consumers to help them understand their choices and options to resolve outstanding debts. That said, ACA International members are not omniscient and cannot possibly know what each individual consumer’s financial literacy level might be. The CFPB should use more of its resources on financial literacy, not create arbitrary lines in the sand for businesses.

Furthermore, the CFPB itself has put up many obstacles in certain situations impacting ACA International members’ ability to freely communicate with consumers through calls, texts, and emails. It has also not inserted itself into the very real problem of blocking legitimate calls and text messages from industry. If the CFPB is seriously concerned about consumers having all the information they need to make informed financial decisions, a better use of their time than broadening UDAAP authority would be to work with carriers and the Federal Communications Commission to stop much needed calls and texts containing critical financial information from being blocked.

Unequal Bargaining Power

The CFPB prohibits entities from obtaining an “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.”¹⁸ The Policy Statement sees this “lack of autonomy” as presenting the opportunity for entities to “take advantage of the unequal bargaining power” at the expense of consumer interests.¹⁹ These interests can be monetary or non-monetary, including the “time spent trying to obtain customer support assistance.”²⁰

¹⁶ *Id.*

¹⁷ Policy Statement at 12.

¹⁸ CFPB section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B).

¹⁹ Policy Statement at 14. The Policy Statement notes that people can be taken advantage of “at the time of, or prior to, the person selecting eth product or service, during the use of the product or service, or both.”

²⁰ *Id.*

The Policy Statement posits “a consumer’s inability to protect their interests includes situations where it is impractical for them to protect their interests in selecting or using a consumer financial product or service.”²¹

The Policy Statement goes beyond characterizing problematic circumstances built into financial products and services and says even “the *nature* of the customer relationship may also render consumers unable to protect their interests in selecting or using a consumer financial product or service.”²² Here, the Policy Statement is focused on financial relationships entered into without real choice, competition, or negotiation, like “credit reporting companies, debt collectors, and third-party loan servicers.”²³

The framework appears to create something of a heightened standard for entities engaged with consumers “without consumer choice or market competition.” This line of thinking follows flawed rhetoric in recent months concerning the ARM industry and the practice of credit reporting. As ACA has outlined on many occasions to the CFPB,²⁴ a credit-based economy relies on the ability of financial service providers and creditors to collect unpaid receivables. Targeting the ARM industry through a “higher standard” and framing the relationship with consumers in the collections process as an immediate negative overlooks the economic reality that this is a needed part of a functioning economy.

While there are some consumers who truly cannot afford their debts, and those consumers benefit from information about hardship programs or payment plans from ACA International members, there are also many consumers who choose not to pay their debts. This imposes costs on all other consumers in the form of increased prices for products and services. Particularly for this category of consumers, it is unclear why the CFPB makes the assumption that these consumers do not choose to be in the collections process. Consumers benefit from purchasing goods and services. They are not “victims” simply because they are involved in the collections process, and may end up harming other consumers because of their refusal to pay just-owed debts. Making the collections process more onerous through a heightened UDAAP lens will only lead to constricted credit for consumers deemed least likely to pay and increase overall costs for all consumers. Those consumers not in collections should also have their needs considered by the CFPB.

Reasonable Reliance

Finally, the CFPA prohibits entities from taking “unreasonable advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.”²⁵ When a consumer reasonably expects an entity to “make decisions or provide advice in the person’s interest, there is

²¹ *Id.* The Policy Statement cites the CFPB’s rule, 82 FR at 54743, which also includes “impracticality” in the definition of “inability.”

²² Policy Statement at 15 (emphasis added).

²³ *Id.* This can also include entities “have outsized market power,” meaning that a consumer has no real possibility of seeking the services elsewhere. Policy Statement at 16.

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²⁵ CFPA section 1031(d)(2)(C), 12 U.S.C. 5531(d)(2)(C).

potential for betrayal or exploitation of the person's trust.”²⁶ The Policy Statement sees the CFPB as safeguarding this reasonable reliance and prohibiting entities from taking unreasonable advantage.

The Policy Statement offers two examples of establishing reasonable reliance. First, when an “entity communicates to a person or the public that it will act in its consumers’ best interest or otherwise holds itself out as acting in the person’s best interest,” reasonable reliance may exist.²⁷ Second, when an entity acts on behalf of a consumer, helps the consumer select among providers, or otherwise acts as an intermediary, the Policy Statement states consumers “should be able to rely on the entity to do so in a manner that is free of manipulation.”²⁸ Examples of entities with this reasonable reliance burden would be for-profit college financial aid offices or loan servicers processing loan forgiveness programs.²⁹

Student loan servicers and those in institutional receivables are already subject to extensive compliance requirements at the state and federal level. This is on top of the extensive process they go through to be awarded work from either the government or universities. There is no reason to look to UDAAP to create new and opaque standards in an area that is already highly regulated. Consumers benefit from the information they receive about how to address student loan servicing and student loan debt. As student loans become due for the first time in several years this fall, the CFPB should be encouraging more communication in this area, not hindering it.

ACA International members benefit from clear requirements and standards. The abusive prong of UDAAP continues to create uncertainty, particularly in light of the swings in interpreting it during each election cycle. The CFPB should implement new requirements through rulemaking under the Administrative Procedure Act, not through enforcement acidity or interpretive guidance.

Thank you for your attention and due consideration. Please let me know if you have any questions.



Scott Purcell
Chief Executive Officer
On behalf of ACA International

²⁶ Policy Statement at 17.

²⁷ Policy Statement at 17–18. This can happen through an entity’s “statements, advertising, or other means.”

²⁸ Policy Statement at 18.

²⁹ Policy Statement at 17 n. 74.