

July 3, 2023

Via Electronic Mail

Comment Intake—Statement of Policy Regarding Prohibition on Abusive Acts or Practices
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
2023-AbusivenessPolicyStatement@cfpb.gov

Re: Docket No. CFPB–2023–0018 - Statement of Policy Regarding Prohibition on Abusive Acts or Practices

To Whom it May Concern:

The Consumer Bankers Association (“CBA”)¹ appreciates the opportunity to submit comments² to the Consumer Financial Protection Bureau (the “Bureau”) in response to the policy statement regarding the prohibition on abusive acts or practices (the “Policy Statement”).³

We would like to thank Director Rohit Chopra for recognizing CBA as a leading voice of the financial services industry in his recent testimony to Congress⁴ when he repeatedly cited CBA’s response to the Bureau’s 2020 proposed procedural rule on the Advisory Opinion Program.⁵ As articulated in CBA’s Advisory Opinion Program comment letter, we “greatly appreciate the Bureau taking this further step to try to alleviate regulatory uncertainty across the various laws under its purview,” by issuing this Policy Statement on “abusiveness.” However, CBA is concerned generally that the Bureau has utilized guidance as a substitute for formal rulemakings, to the extent that this Policy Statement and other recent Bureau guidance have attempted to communicate new legal standards and binding requirements on industry. We appreciate that the Bureau has taken CBA’s suggestion (as articulated in in CBA’s Advisory Opinion Program

¹ CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

² This comment letter is submitted in addition to the joint trades letter submitted by the Bank Policy Institute (BPI), which CBA has joined.

³ 88 Fed. Reg. 21883 (Apr. 12, 2023).

⁴ *The Semi-Annual Report of the Bureau of Consumer Financial Protection: Hearing on H. J. Res. 66 Before the H. Comm. on Financial Services*, 118th Cong. (2023) (statement of Rohit Chopra, Director, Consumer Financial Protection Bureau) (“We got input from the Consumer Bankers Association a few years ago that they wanted to see more guidance and advisory opinions.”).

⁵ Advisory Opinions Proposal, 85 Fed. Reg. 37394 (June 22, 2020).

comment letter)⁶ to open the Policy Statement to formal notice and comment in the Federal Register. CBA urges the Bureau to take this approach in all of its policy guidance (including Advisory Opinions) and we welcome the opportunity to provide feedback on this Policy Statement.

The Policy Statement as currently drafted does not clarify the abusiveness standard in a way that would allow regulated entities to understand what may be “abusive” in the Bureau’s future judgment. As a result, the Policy Statement as currently drafted is of little value to industry—or the Bureau—because there is no specificity that market participants can use to comply or that the Bureau can easily enforce. However, CBA has confidence that with appropriate revisions, the Bureau’s goal of providing “an analytical framework for identifying abusive acts or practices”⁷ can be achieved. Below CBA has identified some specific aspects of the Policy Statement that could be revised to make it a useful tool for both industry and the Bureau to utilize going forward.

Eliminate New, Ambiguous “Prominent and Clear” Disclosure of Terms Standard in Favor of the FTC’s Well-Established “Clear and Conspicuous” Standard

The Policy Statement posits that certain transaction terms are so consequential that it “may be reasonable to presume” that a party engages in acts or omissions that materially interfere with a consumer’s ability to understand when those terms are not conveyed “prominently or clearly.”⁸ The Policy Statement goes on to list some of those terms, such as pricing or costs, limitations on the person’s ability to use or benefit from the product or service, and contractually specified consequences of default.⁹ The Federal Trade Commission (“FTC”) has given detailed guidance in the past regarding the “clear and conspicuous” disclosure of information, including through its Dot Com Disclosure Guide.¹⁰ CBA urges the Bureau to mirror the FTC’s guidance and use the “clear and conspicuous” standard, which has established industry understanding and significant regulatory guidance. Otherwise, it is unclear how the “prominent and clear” standard articulated in the Policy Statement differs from the established “clear and conspicuous” standard.

Clarify That the Use of Form Contracts is Not Per Se Abusive

⁶ Consumer Bankers Ass’n, Comment Letter, Bureau of Consumer Financial Protection Advisory Opinions Proposal (Aug. 21, 2020), available at <https://www.consumerbankers.com/cba-issues/comment-letters/cba-comment-letter-re-cfpb-advisory-opinion> (“CBA further supports efforts to publicize issued advisory opinions in the federal register; however, CBA urges the Bureau to open advisory opinions to formal APA notice and comment.”).

⁷ 88 Fed. Reg. 21883, 21884 (Apr. 12, 2023).

⁸ See 88 Fed. Reg. 21883, 21885 (Apr. 12, 2023).

⁹ *Id.*

¹⁰ See, e.g., Leslie Fair, *Full Disclosure*, Federal Trade Commission (Sept. 23, 2014), available at <https://www.ftc.gov/business-guidance/blog/2014/09/full-disclosure> (last visited June 1, 2023); *Com Disclosures: How to Make Effective Disclosures in Digital Advertising*, Federal Trade Commission (March 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> (last visited June 1, 2023).

The Policy Statement articulates that “consumers may also lack power to protect their interests in selecting or using a consumer financial product or service when entities use form contracts, where contractual provisions are not subject to a consumer choice. Similarly, where the person is unable to bargain over a clause because it is non-negotiable, they may be deprived of the ability to protect their interests.”¹¹ It is unclear in this section of the Policy Statement whether the Bureau intends to assert that the consumer’s inability to negotiate form contracts is per se abusive, or, whether the Bureau intends to assert that there may be terms in form contracts that take unreasonable advantage of the consumer, and thus may be considered abusive. If it is the latter, CBA urges the Bureau to clarify that the Policy Statement is not declaring that the general use of form contracts¹² is abusive. Additionally, to the extent that there are particular terms the Bureau considers abusive if those terms appear in form contracts, CBA urges the Bureau to identify those terms.

If the Bureau’s intention *is* to declare the general use of form contracts as abusive, there are wide-ranging practical and legal concerns with the Bureau taking this position. First, the suggestion that the use of form contracts is potentially an “abusive” practice is inconsistent with the reality that form contracts allow large institutions (in any industry) to provide services at scale. Financial institutions must be able to service the contracts they enter into, and if every contract is different, it would be impossible to service a portfolio of individual agreements. Second, in the highly competitive financial services marketplace, while consumers may not be able to negotiate form contract terms, they are able to walk away from and choose a different provider if they disagree with a specific provider’s form contract terms.

Additionally, the notion that form contracts are abusive appears to conflict with many of the other laws the Bureau administers. For example, under the Equal Credit Opportunity Act¹³ and Regulation B¹⁴ creditors are required to treat consumers equally and avoid discrimination (or the effect of discrimination). Using standard form contracts is a way of fulfilling that mandate. All consumers are treated equally because, absent state-to-state regulatory compliance differences, all consumers are signing the same contract. Additionally, laws and regulations like the Truth in Lending Act¹⁵ and Regulation Z¹⁶ require form disclosures in consumer credit contracts,¹⁷ and indeed the Bureau itself provides model forms for creditors to use to comply with TILA and other laws.¹⁸ In fact, form contracts exist in large part as the repository of terms required by law.

Specify that the Bureau is Relying on the FTC’s Standard of Materiality

¹¹ See 88 Fed. Reg. 21889 (Apr. 12, 2023).

¹² CBA’s use of the term “form contracts” in this letter is intended to reference only those form contracts that are legally permissible, well-drafted, and legally compliant.

¹³ 15 U.S.C. §§ 1691, *et seq.*

¹⁴ 12 C.F.R. pt. 1002.

¹⁵ 15 U.S.C. §§ 1601, *et seq.*

¹⁶ 12 C.F.R. pt. 1026.

¹⁷ See, e.g., 12 C.F.R. §§ 1026.6 (open-end credit), 1026.18 (closed-end credit).

¹⁸ See, e.g., 12 C.F.R. pt. 1026, App. G (open-end credit), App. H (closed-end credit).

The Policy Statement asserts that the Bureau can make a determination of what is material, based on several factors such as “impeding” a consumer’s understanding or omitting material terms and conditions. However, the Policy Statement fails to specifically define what is “material” and what is not.¹⁹ Materiality is a critical prong of deception. The FTC developed guidance on materiality’s application for purposes of deceptiveness under UDAAP and the that guidance has been in use for nearly 40 years.²⁰ Even though the Bureau purports to adopt the FTC’s general notions on materiality to enforce the prohibition on deceptive acts or practices, it does not specifically incorporate the FTC’s prior specific guidance into the Policy Statement. Specifically incorporating the FTC’s guidance would provide welcome clarity to the industry that the Bureau is not changing the standard of materiality from a specific workable framework to an undefined one that industry cannot implement.

Clarify Statements Regarding the Reasonableness of a Consumer’s Lack of Understanding, Thresholds Regarding the Number of Consumers Harmed, and Consumer Awareness of Negative Consequences

The Policy Statement’s standard for finding that a financial services provider took unreasonable advantage of a consumer’s lack of understanding is ambiguous and lacks key, necessary tenets to help facilitate compliance. Specifically, the Policy Statement (1) excludes a reasonable person standard, (2) does not define a threshold number of people who would need to be affected, and (3) notes that a practice can potentially be abusive, even if consumers are aware of the possibility of negative consequences.

(1) Revise Policy Statement to Include the “Reasonable Person” Standard

The Policy Statement posits that an abusiveness finding does not require that the consumer’s lack of understanding be “reasonable.”²¹ This is inconsistent with the statutory language. The actual standard is taking “unreasonable advantage of a lack of understanding.”²² CBA was encouraged to hear Director Chopra clarify in his testimony to Congress that a consumer’s lack of understanding must be reasonable.²³ We urge the Bureau to articulate the position that Director Chopra confirmed in his testimony directly in this Policy Statement.

¹⁹ See 88 Fed. Reg. 21885 (Apr. 12, 2023).

²⁰ See FTC Policy Statement on Deception, Federal Trade Commission (Oct. 14, 1983), available at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception> (last visited June 2, 2023). The Bureau instructs its examiners to be “informed” by the FTC Policy Statement on Deception. See UDAAP Examination Manual fn. 10 (March 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf (last visited June 2, 2023).

²¹ See 88 Fed. Reg. 21883, 21887 (Apr. 12, 2023).

²² 12 U.S.C. § 5531(d)(2)(A) (emphasis added).

²³ *The Semi-Annual Report of the Bureau of Consumer Financial Protection: Hearing on H. J. Res. 66 Before the H. Comm. on Financial Services*, 118th Cong. (2023) (statement of Rohit Chopra, Director, Consumer Financial Protection Bureau (CFPB)). Transcript of the exchange:

To the extent the Bureau has specific scenarios in mind that it would like to clarify through this Policy Statement on what “reasonable” versus “unreasonable” could entail, CBA encourages the Bureau to include those specific examples to provide industry helpful guidance on how to assess consumer understanding. Unfortunately, jettisoning the entire “reasonable person” standard, unmoored from the statutory text and decades of understanding, instead of providing more examples and detail, makes it impossible for industry to implement the Bureau’s guidance in practice.

(2) Identify Specific Instances Where a “Threshold” Number of People May Not Be Needed to Indicate a Lack of Understanding

The Policy Statement notes that, for purposes of determining whether there has been a lack of understanding, there does not need to be proof that a certain threshold number of people lacked understanding.²⁴ Thus, an act may be found abusive even where only a small number of people, or maybe even only one person, complained about a specific action or practice.

The Bureau has asserted for years that financial services providers should pay attention to trends in their complaints, and act upon those trends when a pattern of complaints shows widespread consumer confusion or harmful outcomes.²⁵ But the Policy Statement appears to be inconsistent with this Bureau position. Expecting regulated entities to change products based on a small number of, or even one, idiosyncratic complaint is unworkable unless clarification is provided regarding when specific complaints are rendered significant enough to be considered abusive. Again, if the Bureau has specific scenarios or situations they are envisioning, then the Bureau should provide those example scenarios in the Policy Statement.

(3) Clarify Expectations on Consumer Awareness of Potential Negative Consequences

Barr: What about consumer confusion?

Chopra: Well, that is part of the statutory –

Barr: What if it’s unreasonable consumer confusion?

Chopra: Unreasonable on the part of the consumer?

Barr: On the part of the consumer.

Chopra: That would not be the issue. That would not meet the statutory standard. The standard has two prongs with some sub-prongs, one is material interference with the consumer's ability to navigate, and the second is taking unreasonable advantage...

²⁴ See 88 Fed. Reg. 21883, 21887 (Apr. 12, 2023).

²⁵ See, e.g., *Consumer Response Annual Report*, CFPB (March 2023), available at https://files.consumerfinance.gov/f/documents/cfpb_2022-consumer-response-annual-report_2023-03.pdf (last visited June 2, 2023) (“Companies can similarly use complaint information to gain important knowledge about their business, competitors, and industry more broadly. Consumer complaints can be an indicator of potential risk management weaknesses or other deficiencies, such as violations of laws or regulations. Complaints can reveal a weakness in a particular product, service, function, department, or vendor. Complaints can also identify opportunities to enhance consumers experience and understanding of consumer financial products and services.”).

The Policy Statement provides that a consumer may lack understanding of the risks of a particular financial product or service, even if the consumer is aware that it is in the “realm of possibility” that a particular negative consequence may follow, or a particular cost may occur, as a result of using the product or service.²⁶ The implication seems to be that even if a financial services provider complies with existing law and clearly communicates a contract provision, the Bureau may still find that consumers lacked understanding of it. There is no way for regulated entities to test each individual consumer’s understanding of terms, let alone the degree of potential negative consequences a given consumer attaches to various scenarios in using a financial product or service. Additionally, it appears to propose a troubling precedent if financial institutions are expected to second guess a consumer’s acceptance of terms through attestations of understanding. Without further clarification on what the Bureau intends by the “realm of possibility” or specific facts or scenarios, the Policy Statement is not helpful to industry and does not facilitate compliance.

Conclusion

The above examples illustrate just some of the ways that the Policy Statement could be improved to provide actionable guidance to industry, enhance compliance practices, and better protect consumers. If the Bureau’s aim is providing “rules of thumb” and “practical analytical frameworks,”²⁷ we would encourage the Bureau to revise the Policy Statement to establish objective standards that meaningfully define and place limitations on the meaning of abusiveness, including the ones CBA has identified above. Standards and definitional rigor in this Policy Statement would allow financial services providers to identify specific operations or products as part of their compliance efforts and create better outcomes for consumers.

We look forward to future opportunities to work with the Bureau in providing formulating guidance to industry that furthers consumer protection.

Sincerely,



Shelley Thompson
Vice President, Associate General Counsel
Consumer Bankers Association

²⁶ See 88 Fed. Reg. 21887 (Apr. 12, 2023).

²⁷ See Director Rohit Chopra’s Prepared Remarks at the University of California Irvine Law School, CFPB (Apr. 3, 2023), available at <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/> (last visited June 2, 2023) (“Our objectives with the policy statement on abusive practices were to summarize the existing precedent, provide a practical analytical framework for identifying abusive conduct, and also to offer some simple rules of thumb.”).