July 3, 2023

The Hon. Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

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

Dear Director Chopra:

The American Financial Services Association (AFSA)[1] welcomes the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) proposed Statement of Policy Regarding Prohibition on Abusive Acts or Practices (Policy Statement).[2] You have said that "[p]roducing clearer and simpler guidance is an important goal for the CFPB."[3] AFSA agrees with that goal and appreciates clear and simple guidance. The Policy Statement is, unfortunately, not that kind of guidance. It is the most expansive interpretation yet of what the Bureau deems to be an "abusive" act or practice, provides virtually no guidance to the industry, and should be withdrawn.

Though there are many, AFSA's main objections to the Policy Statement are:

(1) It is inconsistent with the statutory term it seeks to clarify;

(2) It would make common business practices "abusive" and demonstrates a fundamental lack of understanding of consumer-credit businesses;

(3) It is not sustainable; and

(4) It cannot be implemented in practice or with fairness.

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[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

[2] AFSA is also joining a joint trade letter, signed by the Bank Policy Institute, Consumers Bankers Association, Credit Union National Association, Mortgage Bankers Association, and the U.S. Chamber of Commerce. The joint trade letter focuses on the failure of the Policy Statement to clarify the distinction between unfair and deceptive acts or practices, on the one hand, and abusive acts or practices on the other. In addition, the joint trade letter demonstrates that abusiveness means something more egregious than something unfair or deceptive. And, the joint trade letter explains that the Policy Statement does not accord with the statutory language or fully account for the Bureau's prior rulemaking or enforcement history in distinguishing between a "reasonable advantage" and an "unreasonable advantage."

[3] "Director Rohit Chopra's Prepared Remarks at the University of California Irvine Law School," Consumer Financial Protection Bureau, April 3, 2023, http://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/.

AFSA and its members are keenly interested in the Policy Statement. It drastically expands the conduct that can lead to liability and thus creates substantially more risk that AFSA members will be faced with enforcement actions alleging standard (and heretofore legal) industry practices are now considered abusive. The fact that one unelected official – the CFPB Director – can sanction such a sweeping change demonstrates the need for the CFPB to be more accountable to Congress, and thus to the electorate. For the reasons stated above and more fully explained below, AFSA urges the CFPB to withdraw the Policy Statement.

I. The Policy Statement is Inconsistent with the Plain Meaning of "Abusive."

The Bureau's Policy Statement purports to give its view of what the statute's text means. In reality, the Policy Statement expands the concept of what is "abusive" in a manner unmoored from the underlying statute; indeed, in a manner that is inconsistent with the normal understanding of the word "abusive" itself.

Commonly understood, something is abusive if it is "extremely offensive and insulting" or involves "injustice or illegality."[4] Yet the Policy Statement first reduces the abusive prohibitions to general concepts and then dilutes them to the point where virtually any act or practice is "abusive" as long as a consumer experiences an outcome that is less than ideal. But the Bureau cannot interpret § 5531(d)'s subsections in a way that changes the plain meaning of the word they are defining.[5]

Although AFSA and its members appreciate the Bureau's attempt to give a high-level summary of the practices Congress sought to prohibit, by overgeneralizing abusive as "gaps in understanding," "unequal bargaining power," and "consumer reliance," the Policy Statement divorces itself from the text and the critical limitations that distinguish legal conduct from abusive conduct. In short, the Policy Statement improperly attempts to change the law.

Take the Bureau's position on materially interfering with consumers' ability to understand a term or condition of a financial product or service. This can be shown, according to the Policy Statement, "when an act or omission is intended to impede consumers' ability to understand terms or conditions, has the natural consequences of impeding consumers' ability to understand, or actually impedes understanding." But only the last of those three methods of proof actually adheres to the statute's text.

- An entity's intent to interfere cannot be sufficient on its own: the statute does not prohibit the intent to interfere or attempts to interfere. It requires actual *interference*. An entity that intends to interfere with a consumer's ability to understand a term or condition does not commit an abusive act or practice under § 5531(d) if, despite that intent, no interference took place.

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[4] The New Oxford Am. English Dictionary at 945 (2d ed. 2005)

[5] *See Sackett v. EPA*, 598 U.S. ___, ___ (2023) (slip op. at 15) (reading the phrase "waters of the United States" so it aligns with the normal understanding of "navigable waters," the term the phrase was meant to define).

- The same is true for relying solely on behavior that has the natural consequences of interfering. As before, the Bureau must establish that actual interference took place. Moreover, looking solely to the behavior without regard to the actual consequence or surrounding circumstances eliminates the necessity to prove that the interference was material.

Hence, only behavior that *actually* and *materially* impedes consumers' understanding can be characterized as "extremely offensive" or "unjust." Two examples demonstrate the Policy Statement's overbreadth here.

First, the Policy Statement claims that "[c]ertain terms of a transaction are so consequential that when they are not conveyed to people prominently or clearly, it may be reasonable to presume that the entity engaged in acts or omissions that materially interfere with the consumers' ability to understand." Under this conception, an entity can commit an abusive act or practice if it does not affirmatively make certain terms *more* apparent. That is, the failure to facilitate understanding, whether the consumer needed the help or not, is no different than causing material interference and can be an abusive practice. Plus, neither the statute nor the Policy Statement give any guidance on when something is prominent or clear enough. Contrary to the statute's express elements—stated in plain language—a covered entity could be liable without any proof that any actual interference occurred or was material.

Second, the Policy Statement asserts that digital interference can occur when there are "user interface and user experience manipulations such as the use of pop-up or drop-down boxes, multiple click-throughs, or other actions or 'dark patterns' that have the effect of making the terms and conditions materially less accessible or salient." Putting aside the issue of "dark patterns" and assuming the Bureau would require the "effect" of interference, user interfaces like drop-downs, click-throughs, and pop-ups are a part of everyday modern life between apps on smart phones and online shopping. Indeed, your recent testimony before the House Financial Services Committee confirmed that drop-downs, pop-ups, and click-throughs are not abusive.[6] Yet again, the Policy Statement seems to condemn purely innocent acts or practices that would never in the normal parlance be considered "abusive."

The Policy Statement fares no better with the other type of abusive conduct—taking unreasonable advantage of situations specified in the statute. The Policy Statement, to be sure, recognizes that an advantage is "unreasonable" if it "exceed[s] the bounds of reason or moderation." Despite that, the Policy Statement proposes to apply the "unreasonable advantage" prong of abusiveness even in circumstances where a covered entity received a benefit (referred to as an "advantage") as a result of a transaction, not as a result of leveraging an "unreasonable advantage."

For example, the Policy Statement says that the "statutory text of the prohibition does not require the consumer's lack of understanding was reasonable to demonstrate abusive conduct." That interpretation is overly broad given that the covered entity must take "*unreasonable* advantage of"

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[6] "Opening Statement of Director Rohit Chopra before the House Committee on Financial Services," Consumer Financial Protection Bureau, June 14, 2023, https://www.consumerfinance.gov/about-us/newsroom/opening-statement-of-director-rohit-chopra-before-the-house-committee-on-financial-services/.

a consumer's "lack of understanding." As the Policy Statement admits, "[e]valuating unreasonable advantage involves an evaluation of the facts and circumstances that may affect the nature of the advantage and the question of whether the advantage-taking was unreasonable under the circumstances." And yet despite the concession that reasonableness must be judged against all the facts and circumstances, it still strays from the statue's text by placing the spotlight almost entirely on the covered entity's conduct and what it gained—*i.e.*, it focuses on the benefit gained, not how it was gained.

But the statute requires that both the conduct and the advantage be considered in relationship to the specific vulnerability Congress identified—namely, the consumers' "*lack of understanding*." Whether a consumer's understanding is entirely absent or deficient, if all the facts and circumstances are considered as the Policy Statement says they should be, requires an evaluation of whether the consumer made some modicum of effort to understand, in other words, acted reasonably. And because the prohibited "taking advantage of" is relative to the consumer's "understanding," if a consumer's lack of understanding is not reasonable, and the covered entity is advantaged, the advantage received, without more, would not exceed the bounds of reason or moderation. That is, to prove an abusive act, one that is unjust, requires more than a bare lack of understanding on the consumers' part. Removing all reasonableness on the consumers' part, moreover, would sow tremendous uncertainty by calling millions of otherwise valid contracts into question. Worse, it perversely incentivizes consumers to not try to understand the particular financial product or service in question, which will only lessen industry participants' willingness to offer the product or service in the first place.

Still, the Policy Statement goes further, proclaiming that a "person may lack understanding of the risks, costs, or conditions, *even if they have an awareness that it is in the realm of possibility* that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product or service." Yet if the consumer appreciates the material risks, costs, and conditions of a financial product or service, how can the covered entity's advantage be *unreasonably* gained? Imposing liability even when consumers are aware of the risks—*i.e.*, *have* an understanding—directly contradicts the statute's plain text.

Finally, the Bureau equates "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service," with unequal bargaining power. The Bureau further explains that this situation may exist "where contractual provisions are not subject to consumer choice" or "the person is not able to bargain over a clause because it is non-negotiable." Calling these situations in which consumers are unable to protect their interests, however, runs roughshod over decades of state contract law on so-called "adhesion" contracts; and it utterly ignores whether the consumer could decline the offer and walk away, or shop around for financing or the goods to be financed. The Bureau simply cannot, by proclamation, sweep aside whole bodies of state contract law through an expansive view of its "unfair, deceptive, or abusive acts or practices" (UDAAP) authority or relieve itself of the obligation to prove facially legal conduct exceeded the bounds of reason.

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II. The Policy Statement's Dramatic Overbreadth Makes Common Business Practices Abusive and Demonstrates a Fundamental Lack of Understanding of the Consumer-Credit Business.

Considering the tremendous elasticity the Policy Statement reads into § 5531(d)'s subsections, it is not surprising that acts and practices that have long been a part of everyday, legitimate business are caught in its wake. Some of those—like the drop-downs, pop-ups, and click-throughs—have already been mentioned. There are many more that the Bureau considers "indicia" of abusiveness, including:

- Form contracts,
- Non-negotiable terms,
- Complex products,
- Increasing market share, revenue, or profits,
- Knowing more than the consumer,
- Having greater bargaining power than the consumer,
- Delays in customer support,
- Arbitration clauses,
- Hedging risk,
- Fine print,
- Receiving consumer complaints,
- Having outsized market power, and
- Attempting to establish trust with consumers.

Moreover, the Policy Statement's view of these acts or practices is purely arbitrary, often shaded by whether the consumer experienced a negative outcome regardless of the entity's conduct. Otherwise legitimate acts or practices may become abusive if the consumer's experience was not perfect, even if the consumer didn't experience a substantial injury. One might say that the Policy Statement is setting industry participants up to fail as some of these named "abusive" acts or practices are part of regular order in other markets. For example, in the mortgage market, the Bureau provides annotated version of forms that adhere to the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA).[7] These Bureau-approved form contracts have non-negotiable terms, however the mortgage industry, like the consumer-credit market, is highly regulated and the Bureau finds these forms sufficiently protective of consumer rights.

As a whole, the Policy Statement shows that the Bureau lacks an understanding of how consumer credit businesses work. Seemingly informed by your April 3, 2023, speech at the University of California Irvine Law School, it paints a picture of a consumer-credit market where creditors and service providers are out to trick consumers and have no interest in their success. That is just not

[7] "Loan Estimate and Closing Disclosure Forms and Samples," Consumer Financial Protection Bureau, accessed July 3, 2023, https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures/forms-samples/#closing-disclosure-blank.

how successful businesses run, particularly in the consumer-lending space where the *sine qua non* is building successful long-term customer relationships that results in repeat transactions.

The Bureau, for instance, claims without any evidence that lenders no longer have an incentive to consider whether borrowers have the ability to repay a debt because lenders can securitize loans. But that assumption is not true. Creditors do not make money when their borrowers do not repay their loans and securitization does not change that fact. The well-known history of increased repurchase demands from secondary market players during the 2010 financial crisis demonstrates that creditors are held accountable.[8] A creditor that packages and securitizes loans without a care as to whether they will succeed or not will not last long. Creditors thus have every incentive to ensure their customers are successful. To suggest otherwise demonstrates an incomplete understanding of the market.

III. The Policy Statement Cannot be Implemented Practically or Consistent with Fundamental Fairness.

Guidance that fails to meaningfully differentiate between innocent conduct and abusive acts and practices and that is so vague as to leave industry participants with no ability to guard against liability cannot realistically be enforced in a fair manner. Guidance is only useful when a regulated entity can implement it and know ahead of time whether its conduct is compliant or not.

By contrast the Policy Statement neither communicates the CFPB's expectations in straight-forward terms nor clarifies the rules of the road. It leaves industry participants at the subjective, *post hoc* mercy of the Bureau. The Policy Statement's presumption that a regulated entity materially interferes with a consumer's ability to understand if factors like "pricing or costs" are not "conveyed to people prominently or clearly" encapsulates this point.

When a legislator or regulator wants to ensure things are conveyed prominently it normally describes the conditions—like positioning within a text, or font size, color, or emphasis in bold or italics—that make those things prominent. Yet, as mentioned above, the Policy Statement provides no guidance on what the Bureau considers prominent or clear. Only the Bureau knows. The Bureau indeed may not know itself until a consumer, in retrospect, complains that something wasn't prominent or clear enough. That, along with all the other *ex post facto* subjective judgments described in the Policy Statement, leaves industry participants completely in the dark. And the Policy Statement's position that the same conduct can be abusive with respect to some consumers but not others makes compliance a total guessing game.

It is no answer to say that the Policy Statement, being mere guidance, does not create any legally enforceable obligations. The Bureau's "guidance," as you testified, expresses the Bureau's belief of what existing law is. So, while regulated entities are free to ignore it, they do so at their own risk. Hence, even if the Policy Statement is not legally binding, industry participants know that as a practical matter it will be used in enforcement actions in an attempt to coerce compliance and

[8] The CFPB's claim that the financial crisis was caused by mortgage lenders profiting on loans that set people up to fail is revisionist history. In reality, the crisis was caused by the failure of ratings agencies to account for drops in housing prices. An unprecedented spike in unemployment also played a role.

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bind regulated entities in the same manner as formal rulemaking.[9] This is especially problematic when "interpretive guidance" consists of an agency simply putting the industry on notice that it interprets statutory text as having no practical limits, such as establishing an act or practice is abusive with nothing more than after-the-fact and potentially purely self-serving statements by consumers that there was a lack of understanding at the time the consumer engaged in a transaction.

At the heart of the matter, the Policy Statement gives industry participants no practical way to structure their behavior in a way that will avoid liability. That is fundamentally unfair. This country's rule of law is built on the notion that rights and obligations are known and understandable ahead of time. No matter how benevolent or noble the Bureau's intentions, it is not allowed to dispense with the basic right to fair notice of the conduct that is legal and the conduct that is not.

IV. The Policy Statement is Incapable of Providing Sustainable Clarity for Industry Participants.

While, in general, agency policy statements can be helpful, the ease with which policy statements may be changed lessens their utility as resources for long-term planning for lenders. The Policy Statement is in its second iteration—the last only in effect for 14 months before it was rescinded after a change of Administration.[10] And because the CFPB, unlike the FTC, is run by a single director removable by the President, its guidance is more prone to result in industry whiplash as each new administration "interprets" the statute differently than the previous one.

That is true even if there is no change in the administration's party. Former CFPB Director Richard Cordray, who was appointed by President Obama testified, "I don't think there is a lot of uncertainty here. I think it's very clear in the statute for something to be an abusive practice it would have to be a pretty outrageous practice. If you stay away from pretty outrageous practices, you should be safe."[11] Clearly, the practices outlined in the Policy Statement are more common than "outrageous." The Policy Statement, in other words, is a complete U-turn from existing guidance.

If CFPB directors of the same party can't provide definitions of "abusive" that are in the same ballpark as each other, the only certainty industry participants can have is that the definition of abusive is subject to change every few years. That is not responsible governance. Creating risk and uncertainty will only result in responsible entities doing less business or passing their cost of compliance on to consumers. The Policy Statement therefore defeats the CFPB's supposed mission to ensure a fair, transparent, and competitive market for consumer credit.

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[9] This concern in not new. *See:* Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 Duke Law Journal 1311-1384 (1992). Available at https://scholarship.law.duke.edu/dlj/vol41/iss6/1/

[10] The Bureau previously issued a Policy Statement on Abusive Acts or Practices in 2020, see 85 FR 6733 (Feb. 6, 2020) (2020 Policy Statement), rescinded in 86 FR 14808 (Mar. 19, 2021).

[11] Richard Cordray, "Testimony of Richard Cordray before the Subcommittee on Tarp, Financial Services and Bailouts of Public and Private Programs," Consumer Financial Protection Bureau, January 24, 2012, https://www.consumerfinance.gov/about-us/newsroom/testimony-of-richard-cordray-before-the-subcommittee-on-tarp-financial-services-and-bailouts-of-public-and-private-programs/.

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Ultimately, the Policy Statement's "guidance" will have a chilling effect that restricts access to credit and impedes innovation in consumer financial services and products. This is exacerbated by the Policy Statement's broadening of other statutory terms—such as, replacing "lack of understanding" with "gaps in understanding" so that mere information imbalances are a basis for liability, or expanding "costs" to include things remote from the financial product itself. In short, rather than adding clarity, the Policy Statement clouds the statutory landscape and creates a situation where the Bureau has a free hand to retroactively declare abusive anything hindsight allows it to.

That is why AFSA and its members urge the Bureau withdraw the proposed Policy Statement. The Consumer Financial Protection Act's definition of abusiveness has consistently passed constitutional challenges for vagueness, and it requires no additional clarification. But if the Bureau intends to clarify the meaning of "abusive," it should return to the drawing board and issue guidance that is loyal to the plain meaning of "abusive," gives meaning to every word in § 5531(d), and allows the statute's reasonable contours to be refined through actual judicial decisions and not unproven allegations from enforcement actions.

Sincerely,

Celia Winslow

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