INFiN℠ A Financial Services Alliance

July 3, 2023

SUBMITTED via Federal E-rulemaking Portal (www.regulations.gov)

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

RE: Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Docket Number CFPB–2023-0018

Dear Director Chopra:

This comment letter is submitted on behalf of INFiN, A Financial Services Alliance ("INFiN"), in response to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") Statement of Policy Regarding Prohibition on Abusive Acts or Practices and request for public comment published in the Federal Register on April 12, 2023 (the "Policy Statement" or "Statement").[1] Though the Bureau announced the immediate applicability of this Statement on the very day it was published, which calls into question whether any comments it receives will be fully considered, INFiN appreciates the opportunity to provide comment on the Policy Statement during this public comment period. We respectfully request that the CFPB withdraw the Statement in its entirety.

INFiN, A Financial Services Alliance

INFiN is the leading national trade association representing the diverse and innovative consumer financial services industry. INFiN's membership includes more than 350 companies operating approximately 8,000 locations throughout the United States and online.[2] Headquartered in Washington, DC, INFiN serves as the voice of this vital and rapidly evolving industry to advocate on behalf of its customers. INFiN's membership consists of a range of large companies operating in multiple states, mid-size companies, and small "mom and pop" operators.

INFiN members offer access to critical financial services to millions of Americans, particularly middle-income working families, who are often underserved by banks and credit unions and who value the wide range of services provided by community-based financial service providers. Consumers choose these providers because they are affordable, offer integrated services through multiple convenient channels, and deliver services in a transparent and regulated environment.

[1] *Statement of Policy Regarding Prohibition on Abusive Acts or Practices*, 88 Fed. Reg. 21883 (April 12, 2023) (12 C.F.R. Ch. X).
[2] For more information, visit www.infinalliance.org.

The consumer financial services offered by INFiN members include check cashing, money orders, pre-paid cards, electronic bill payments, and small-dollar loans, among others. These simple, popular financial solutions play an integral role in the financial lives of millions of American households, helping them to manage their financial obligations and challenges and providing essential financial inclusion and stability. The consumer financial services offered by INFiN members are available across a range of platforms and channels – from community-based storefronts to online tools powered by the latest technology.

The most fundamental aspect of INFiN members is that they are licensed and regulated in the jurisdiction in which their customers reside and, as such, are subject to state and local consumer protection laws throughout the U.S. INFiN members also comply with a myriad of applicable federal consumer financial protection laws. As licensed and regulated financial service providers, INFiN members are accessible to regulators and law enforcement for supervision, examination, and enforcement. INFiN members also comply with INFiN Best Practices[3], which impose other requirements related to the provision of consumer financial services.

INFiN offers the following comments about the Policy Statement for consideration:

I. General Comments

The CFPB asserts that its Statement sets out that abusive conduct generally includes:

(1) obscuring important features of a product or service to consumers; or
(2) leveraging certain circumstances—including gaps in understanding, unequal bargaining power, or consumer reliance—to take unreasonable advantage of consumers.

The Policy Statement states that a showing of substantial injury is not required to establish liability for abusiveness. Rather, the statutory framework is focused on the types of conduct that Congress presumed to be harmful or distortionary to the market. The CFPB Statement also describes how the use of dark patterns, set-up-to-fail business models, profiteering off captive customers, and kickbacks and self-dealing can be examples of abusive behavior. However, the CFPB makes it clear that these (and other) examples it provides do not represent a full and complete list of abusive behavior but are instead merely illustrative. Thus, rather than clearly delineating a definition of abusive conduct, and making the rules of the road clear for supervised entities, the Bureau fails to issue helpful guidance.

a. CFPB Policy Back-and-Forth

[3] INFiN's Best Practices are available at: https://infinalliance.org/Dev/Resources/Best-Practices/Dev/Content/Best-Practices.aspx?hkey=be92a443-4f3f-4b9e-8f14-a487d956346c.

The Bureau asserts that "[t]his Policy Statement is the CFPB's first formal issuance that summarizes precedent on abusive acts or practices and provides an analytical framework for identifying abusive acts or practices."[4] However, under prior leadership, the Bureau issued its first Policy Statement on abusiveness back in 2020 ("2020 Statement"), seeking to clarify its plan to enforce compliance with this standard in its supervisory and enforcement activities. The 2020 Statement adopted a restrained posture towards enforcing the prohibition on abusive acts and practices and was designed to create clear rules of the compliance road for supervised entities, thus having the goal of fostering a culture of compliance.

The 2020 Statement was also notably developed following a significant effort by prior leadership to better understand the marketplace and to create clear and fair rules of the road. For example, the Bureau held a Symposium on Abusive Acts and Practices in Washington, DC, to discuss the abusiveness standard with academics, legal and compliance practitioners, and industry experts ("Symposium"). There, the Bureau heard testimony that provided helpful perspectives on the need for clarity – and fairness – in defining the abusiveness standard. The Symposium was an opportunity for the Bureau to hear various perspectives regarding the potential need for, and the benefits of, presenting a clearer explanation of the abusiveness standard. Most Symposium participants agreed that the Bureau should take steps to address the uncertainty around the abusiveness standard, and to create clearer rules for compliance. When the Bureau issued its 2020 Policy Statement the next year, it noted that the feedback from the Symposium and other input played an important part in its decision to issue its 2020 Statement.

The current leadership of the Bureau quickly rescinded the 2020 Statement. Providing no facts or evidence, a new (and interim) Director concluded that the 2020 Statement did not provide clarity, added market uncertainty, and should be withdrawn. Interestingly, the Bureau did not provide much explanation or justification for rescinding the 2020 Statement, and citied no new information supporting its conclusion that market uncertainty had been created by the Statement. Rather, the Bureau, ignoring the input received from the earlier Symposium, reached broad conclusions without any concrete evidence. When presented with an opportunity to build off the initial guidance by conducting further research or even initiating a federal rulemaking, the Bureau instead decided to strike down the 2020 Statement.

Unfortunately, this Policy Statement is another example of the Bureau electing to regulate by enforcement, rather than following the Administrative Procedure Act (APA) requirements and engaging in public notice-and-comment rulemaking. As a result, the Statement is itself not a formal, official rule, which does not have the force and effect of law – something that Director Chopra himself acknowledged during the June 14 hearing before the House Committee on Financial Services. This Statement lays the groundwork for supervision and enforcement action not just by the CFPB but also by other financial enforcement agencies and state attorneys general. While the Bureau may call it "providing an analytical framework," in reality it is regulation by enforcement and failing to follow the APA.

[4] *Statement of Policy Regarding Prohibition on Abusive Acts or Practices*, at 21886.

b. The Legal Efficacy of the Statement is Murky

The legal efficacy of the Bureau's Statement is murky. The Bureau suggests that the mere existence of an abusiveness Policy Statement will provide certainty and helpfulness to supervised entities, other enforcement bodies, and practitioners. It quickly likens its Statement to those from the Federal Trade Commission (FTC) on deception and unfairness. There is, however, no comparison between the Policy Statement and the FTC's policy statements. Accordingly, the Bureau's Statement on abusiveness should not be afforded the same level of reliance as FTC policy statements, which were more firmly grounded in case law, judicial precedent, and federal notice-and-comment rulemaking. In contrast, the Bureau's Statement is based on its own interpretation of the Consumer Financial Protection Act (CFPA), its own complaints and views of enforcement activities, and on consent orders that have not seen judicial review. As a result, the Statement does not enjoy the same type of accountability as FTC policy statements. It certainly remains to be seen to what extent courts and others will defer to this Statement and its questionable and incomplete approach to defining abusive conduct.

c. Delegation to Other Regulators

The Policy Statement continues the CFPB's goal of encouraging other agencies, including the attorneys general of every state, to enforce the CFPA's prohibition on abusive conduct. Like other pronouncements by the Bureau, the purpose of the Statement appears to be to empower state attorneys general and financial regulatory agencies to follow the approach set forth in the Statement, even if subsequent CFPB leadership changes course. As we have already seen, the Bureau can change course even with respect to the "standards" contained in the Statement, leading to inconsistent interpretations of what is abusive. Once again, covered entities will be left to figure out where the sidelines are.

d. Ignoring the Congressional Review Act

One concerning example in the Statement is the suggestion 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." This appears to be a potential example of the Bureau continuing to disregard the Congressional Review Act (CRA) resolution that disapproved, and thereby struck down, the Bureau's final rule addressing pre-dispute arbitration agreements in financial services contracts ("Arbitration Rule").

Like the concerns we expressed in an INFIN comment letter to the Bureau's proposed rule for "Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Protections" ("NPRM" or "Rule Proposal"), to the extent the NPRM seeks to establish a registry related to the use of arbitration agreements, the Bureau is barred from proceeding by the CRA.

There is little distinction between the nonbank registry the CFPB has proposed, and its intention to publish information, and the now-disapproved Arbitration Rule. Moreover, the intent of each CFPB rule, and likely the Statement at hand, is the same – to discourage the use of arbitration agreements. This Statement appears to be yet another attempt by the Bureau to "end run" around the 2017 CRA resolution.

II. The Policy Statement

a. Materially Interfering with Consumers' Understanding of Terms and Conditions

According to the Policy Statement, an act or omission can materially interfere with the ability of a consumer to understand a term or condition of a product or service if it obscures, withholds, or de-emphasizes information relevant to the consumer's understanding of those terms or conditions. The categories of relevant terms for prohibition include, but are not limited to, pricing or costs, limitations on the person's ability to use or benefit from the product or service, and contractually specified consequences of default. Once again, the Policy Statement reaffirms that intent is not a required element to establish material interference.

Since the majority of the Policy Statement is devoted to providing examples of alleged abusive practices, from enforcement actions and publicly reported supervisory resolutions, it fails to provide concrete examples of acceptable conduct. Moreover, many of the examples that purport to explain what satisfies the prongs of its abusiveness test could easily be deception or unfair practices as well. While intended to give examples of conduct that would be abusive, the Policy Statement gives no clear examples of "material interference with the ability of a consumer to understand a term or condition of a consumer financial product or service" that would not be actionable under the unfairness or deception prong of the statute. Because each of the examples focuses on withholding material information from consumers or presenting that information in such a way that a consumer cannot understand it, the Statement lacks any guidance as to how a provider can avoid violating the new guidance.

The Statement also seems to indicate that there are circumstances in which, despite fully disclosed terms and conditions that consumers can understand, a product or service may be so complicated that material information about it cannot be sufficiently explained. No examples or references to prior enforcement actions are provided to explain the type of product that might trigger this prohibition.

b. Taking Unreasonable Advantage Without Actual Consumer Injury

According to the Policy Statement, the unreasonable advantage prohibition generally concerns gaps in understanding, unequal bargaining power, and consumer reliance. The Policy Statement explains that abusiveness can entail taking advantage of a factual circumstance that a provider or a third party did not create. Therefore, instead of focusing on consumer injury, the Policy

Statement instead focuses on charging parties that benefit from others' wrongdoing or that profit (financially or through non-pecuniary benefits to the entity, its affiliates, or partners) from other circumstances, such as differences in bargaining power or education. Moreover, in contrast to conduct that the CFPB deems "unfair," the Policy Statement clarifies that government enforcers do not need to independently prove that an act or practice caused substantial injury to establish liability under the abusiveness prohibition benefits to the entity.

c. Lack of Understanding or Inability of Consumers to Protect their Interests

The Policy Statement repeatedly emphasizes that, unlike a deception claim, disclosure is no protection against a charge of abusiveness. Thus, even if a consumer is presented with accurate information (thus not giving rise to a deception allegation), and could have made a different choice (avoiding an unfairness allegation), a covered person can still be subject to an allegation of abusive practices if it is known that a consumer is making a poor financial choice, is under duress, or is unable to shop, and the covered person generates profit from those circumstances. A consumer's lack of understanding need not even be reasonable, or that it arose through the covered entity's use of untruthful statements, to demonstrate abusive conduct. This expansion of potential liability expands the definition of "inability" well beyond its literal meaning, extending it to include situations in which it is simply impractical for a consumer to protect their interests in selecting or using a consumer financial product or service, a conclusion acknowledged by the Bureau. The Policy Statement also notes that the prohibition does not require proof that enough people lacked understanding to establish that an act or practice was abusive.

The Policy Statement continues the CFPB's focus on competition and "antitrust" issues, by asserting that a financial service provider's "outsized market power" may be sufficient to render a consumer "unable" to protect their own interests. It appears that this conclusion can be reached simply using non-negotiable contract provisions. This aspect of the Policy Statement has no basis in prior law. Nevertheless, financial service providers may be required to resort to a judicial challenge to avoid an enforcement action. Once again, aggressive state attorneys general may proceed against a financial service provider under this interpretation, even if a subsequent CFPB director changes policy.

d. Taking Advantage of Reasonable Reliance

The Policy Statement emphasizes that the statutory standard prohibits taking advantage of consumers' reliance on a covered person to act in their best interests because: 1) the covered person expressly made that representation; or 2) the covered person's role in the transaction as an intermediary implied that relationship. This risk can not only arise from advertising language but can also arise by implication based on the role of the parties alone, since in some instances an entity creates an expectation of trust and the conditions "for people to rely on the entity to act in their best interest," another unnecessary expansion of potential liability on the part of a provider that has no intent to act in an abusive fashion.

III. Failure to Appropriately Follow the Regulatory Flexibility Act

Should the CFPB have engaged in notice-and-comment rulemaking, as we submit it should have done, the Bureau would be required by law, namely the Regulatory Flexibility Act ("RFA"), to conduct an initial regulatory flexibility analysis ("IRFA") and a final regulatory flexibility analysis unless it certified that the rule will not have a significant economic impact on a substantial number of small entities. The Bureau would also be subject to certain additional steps pursuant to the RFA regarding the convening of a panel of small business representatives before proposing a rule for which an IRFA is required. The SBREFA process is particularly important to the rulemaking process as it provides small businesses the opportunity to help to educate the CFPB and its rule-writers in advance of an actual rule proposal.

Unfortunately, the Bureau does not seem interested in gathering helpful input, whether it be from small businesses or the larger entities within its supervised industries. As shown by the fact that it has elected to ignore the information and data provided during its 2019 Symposium, the Bureau seems most interested in issuing a far-reaching, overly broad Statement that would enable most any activity to be considered "abusive" to subjective Bureau officials.

So far, the Bureau has summarily dismissed the RFA requirements. It has chosen to ignore any evaluation of the significant impact on a substantial number of small entities and failed to properly conduct a thorough small-business analysis – thus skipping over the important step of hearing from small businesses who would be adversely affected by this rule.

Rather than the CFPB issuing a policy statement, any supervisory direction should come in the form of an appropriately promulgated rulemaking with APA-required notice-and-comment. The Bureau would benefit from hearing from supervised entities, especially from small businesses, who would be affected by the proposals within the Statement.

Conclusion

While the Bureau's Policy Statement may provide guidance in some respects, it takes an overly aggressive view of "abusive" prohibitions and maintains, rather than resolves, uncertainty by its vagueness and methodology of simply providing examples of what constitutes abusive conduct, rather than defining its parameters. Perhaps the failure of the CFPB to define parameters is indicative of the difficulty on the part of the Bureau and regulated entities alike, to discern the necessary specificity to this elusive concept. In the absence of such specificity, the CFPB should engage in a more fulsome process to gather factual evidence to support providing guidance or concrete guidelines.

Moreover, because the rationale is based largely on the Bureau's own complaints and consent orders, rather than court decisions, it is unclear whether courts or other regulators will accept the Policy Statement's direction. In the meantime, the possibility that other financial regulators, and state attorneys general, may pursue abusiveness claims under the CFP in reliance on the

Policy Statement, covered entities may be left to defend against actions for which they did not have sufficient prior notice that their conduct was wrongful, or actions alleging that conduct is wrongful even if it is not.

INFiN and our members appreciate the opportunity to provide comments with respect to the CFPB's Policy Statement. We hope the Bureau will truly consider these concerns and ultimately withdraw the Statement in its entirety.

Respectfully submitted,

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Executive Director