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July 3, 2023

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

RE: Policy Statement on Abusive Acts or Practices - Docket Number: CFPB-2023-0018

Dear Director Chopra:

The Independent Community Bankers of America ("ICBA")[1] appreciates the opportunity to respond to the Bureau of Consumer Financial Protection's ("CFPB" or "Bureau" or "Agency") Policy Statement on Abusive Acts or Practices ("Policy Statement" or "Statement").

According to the CFPB, the Policy Statement "helps elucidate how enforcers evaluate potential wrongdoing."[2] Remarks made by Director Rohit Chopra convey his hopes that the Policy Statement "provide a practical analytical framework for identifying abusive conduct,"[3] operate as a "practical educational tool,"[4] and provide a straight-forward and analytical framework that helps promote a visceral understanding of the prohibition."[5]

ICBA appreciates the Bureau's charge to protect consumers, as it is the same charge the community banks consider the core of their business. We appreciate the Bureau's desire to provide a framework that financial institutions ("FIs") can utilize when assessing products/services and practices to ensure consumers are not harmed. At the same time, we

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding $5.8 trillion in assets, $4.8 trillion in deposits, and $3.8 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

[2] Director Rohit Chopra's Prepared Remarks at the University of California Irvine Law School, April 3, 2023

[3] Ibid.

[4] Ibid.

[5] Ibid.

believe that the Bureau has an awesome opportunity to develop guidance that is reasonable and designed to protect entities from policies, that even when followed, could render them defenseless from claims of abusive conduct. The notion that FIs are defenseless from abusive claims is laid bare by the Director's own remarks that he hopes this Statement promotes a "visceral" understanding. The Merriam-Webster dictionary defines "visceral" as "*felt in or as if in the internal organs of the body; not intellectual: instinctive, unreasoning;* and *dealing with crude or elemental emotions*." The Oxford Learner's Dictionary defines it as "*resulting from strong feelings rather than careful thought*." In essence, visceral is a gut feeling – absent careful thought. The CFPB's admission underscores how much of a "catch-all" framework, based on an entity's gut, the CFPB is pursuing. The Policy Statement, as published, fails to reconcile, or merely even acknowledge the myriad of rules and regulations by which insured depository institutions are both required to comply and supervised for compliance thereof. As written, the Policy Statement takes a broad-brush approach that ultimately places community banks at a disadvantage and could impede normal and legally permitted bank operations or offering of services out of concern for newly conceived UDAAP risk.

ICBA Comments

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "DFA") regards it unlawful for FIs to engage in any unfair, deceptive, or abusive act or practice ("UDAAP").[6] The Dodd-Frank Act also gives the CFPB rulemaking and enforcement authority to prevent covered persons and service providers from engaging in such acts and practices.[7] Pursuant to the Dodd-Frank Act, an act or practice may be declared "abusive" only if it satisfies one of two prongs:

- It materially interferes with the consumer's ability to understand a term or condition of the consumer financial product or service;[8] or
- It takes unreasonable advantage of the consumer's lack of understanding of the material risks, costs or conditions of the product or service, the consumer's inability to protect his or her interests in selecting or using the product or service, or the consumer's reasonable reliance on a covered person to act in the interests of the consumer.[9]

The Statement summarizes these two prohibitions as obscuring important features of a product or service or leveraging certain circumstances to take an unreasonable advantage. The Policy Statement also asserts that a showing of substantial injury is not required to establish liability for abusiveness.[10] Here again lies a missed opportunity for the Bureau to distinguish an insured

[6] 12 USC 5531(a)
[7] 12 USC 5531(b)
[8] 12 USC 5531(d)(1)
[9] 12 USC 5531(d)(2)(A-C)
[10] Policy Statement on Abusive Acts or Practices, p.4 (April 3, 2023).

depository institution's compliance with the substantial disclosure requirements prescribed by regulation and in which a presumption of compliance with the spirt and intent of UDAAP can reasonably be inferred.

Material Interference

According to the CFPB, material interference may include actions or omissions that obscure, withhold, de-emphasize, confuses, or hide information related to a consumer's ability to understand terms and conditions, such as:

- *Buried Disclosures* that limit a consumer's comprehension of a term or condition including, but not limited to, through the use of fine print, complex language, jargon, or the timing of the disclosure.[11]

- *Physical Interference* that physically impedes a person's ability to see, hear, or understand the terms and conditions, including, but not limited to, physically hiding, or withholding notices, using pop-ups, drop-downs, and hiding important information—that can prevent a consumer from fully understanding a product or service.[12]

- *Overshadowing* includes the prominent placement of certain content that interferes with the consumer's understanding of the terms and conditions.[13]

Unfortunately, intent is not a required element to show material interference. Yet, the absence of an intent standard enables an atmosphere of regulatory inconsistency and subjects FIs to claims of abuse spelled out in the Policy Statement. The above listed categories juxtaposed by current regulations describe a predicament that ICBA members experience when they comply with regulations, work within the parameters provided, and yet find themselves running afoul of UDAAP. Using Regulation DD, Truth in Savings Act, as an example, § 1030.3, the official interpretation clearly establishes that there are no specific design, font, or ordering requirements, for disclosure formats.[14] This clear contradiction of regulatory source material, both overseen by the CFPB, creates uncertainty and confusion for community banks and could severely impact the offerings they provide to consumers, and communities. An intent element, coupled with evidence that a bank purposefully deviated from regulatory requirements, would mitigate uncertainty by providing clear, sound, and reasoned guidance. The DFA did not include intent as a factor in the statute, but it did not preclude the CFPB from adding an intent element. Absent intent, parameters such as those established in the official interpretation of Regulation DD are

[11] Id. at 5
[12] Id. at 6
[13] Id.
[14] 12 CFR Part 1030 Comment 3(a)-1

meaningless and render banks open to unfair, unwarranted, inconsistent, and unexpected abusive claims.

The Bureau considers certain terms of a transaction, as so consequential, that when they are not conveyed prominently or clearly, it may be reasonable to presume that the entity engaged in acts or omissions that materially interfere with consumers' ability to understand. The Bureau does not account for governing regulations that prescribe the disclosure requirements, and in many cases provide for model forms that are utilized by community banks and other highly regulated insured depositories. Community banks offer many deposit account services to best address consumer needs in their markets served. Convenient, consumer-demanded products/services are important aspects of community banks' relationships with their customers and ability to meet market demands. These consumer-requested products/services are accompanied by legally required and clearly disclosed terms, conditions, and fees at account opening, on periodic statements, and when material changes occur, as prescribed by applicable regulation, and examined for compliance therein by prudential regulators.

The Policy Statement considers pricing and costs as consequential terms, and ICBA members would concur. It serves no purpose for community banks to materially interfere with their customers' understanding of the products/services they avail themselves of. Community banks are committed to providing affordable access to financial services to their customers. Relationship banking, the cornerstone of the community banking business model, is built on trust. That trust would be severely damaged if community banks actively engaged in materially interfering with their customers' ability to understand terms and conditions of products/services.

Knowing that consumers accept fees associated with the services they demand, here lies an opportunity for the CFPB to exercise reasonableness. Surely fees that are fully, prominently, and clearly disclosed, and pursuant to laws and regulations administered by the Bureau and examined for compliance by the prudential financial regulators, cannot also be considered abusive. To hold otherwise is wholly capricious. The Bureau's stance, perhaps unknowingly, leaves insured depository institutions exposed to charges of abuse and other speculative claims.

Banks are allowed to assess legally disclosed fees for services and impose fees that are intended to deter certain behaviors. The existence of a fee in of itself does not interfere, materially or otherwise, with the consumer's ability to understand. Furthermore, disclosures are tested by consumers for comprehension and usability.[15] It simply cannot be said that consumers are unaware of these fees or are unable to protect themselves from them through their own behavior. Any suggestion otherwise contradicts the Bureau's own testing, assessments, and survey results, and ultimately diminishes consumer choice, increases the cost of credit and deposit accounts overall, and reduces access to those services.[16]

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[15] Joint Trades Comment Letter in response to Docket No. CFPB-2022-0003; Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services, p.22 (April 11, 2022).
[16] Ibid.

Unreasonable Advantage

According to the Policy Statement, the unreasonable advantage prohibition generally concerns gaps in understanding, unequal bargaining power, and consumer reliance. The Statement also explains that an entity can be held liable, under an abusive claim, for taking unreasonable advantage of consumers even where the entity did not create the underlying condition for which an abuse claim is made. ICBA has serious concerns with the Bureau's position. The Policy Statement purports to support an environment by which a consumer can claim that they did not understand clearly and conspicuously disclosed terms and conditions in order to avoid contractual obligations of a transaction. In other words, compliance with regulatorily prescribed disclosures is meaningless, and liability is limitless whether the FI made an untruthful statement or took some intentional act to create a lack of understanding or followed the letter of the law.

Further problematic is that an abusive claim can be made against an insured depository bank even in circumstances by which the FI did not create the underlying condition. As you are aware, the financial services industry is currently awaiting a crucial rulemaking on DFA Section 1033 which gives consumers the right to allow third-parties, non-bank entities, and data aggregators access into their bank accounts, and to access financial information. Data aggregators often use this information to directly market certain products and services to those customers and also share this information with other third-parties. The likelihood of these data aggregators and those who they share with, soliciting consumers with misleading statements and taking unreasonable advantage of a consumer's lack of understanding is high. And yet, as written, notwithstanding the lack of relationship between a bank and a consumer permissioned third-party, the bank can be held to an abusive claim arising out of the services provided by the third-party.

The prohibition does not require proof that some threshold number of people lacked understanding to establish that an act or practice was abusive. In other words, there could be a violation for one or two customers, even if other consumers do not lack understanding. According to the Policy Statement, a person may lack understanding of 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.[17] The assertion of understanding versus awareness begs the following questions: how is a bank to know whether a consumer's awareness, made possible by legally required disclosures, may not equate to their understanding? Will a consumer be responsible for communicating their lack of understanding, such that a bank is provided an opportunity to clarify and avoid an abusive allegation? Should a bank rely on a visceral, or gut feelings, when determining whether a customer lacked understanding although they were aware of costs and

[17] Policy Statement on Abusive Acts or Practices, p13. (April 3, 2023).

conditions? It is imperative that the Bureau weigh these questions and arrive at the conclusion that such a stance can only be measured subjectively and will unfairly impact the way in which FIs operate.

Conclusion

ICBA appreciates the opportunity to share our concerns with the Policy Statement. We strongly urge the Bureau to reconsider its desire for entities to operate viscerally under a catch-all framework. Instead, we respectfully request the Bureau drafts a policy that accounts for the myriad of regulations and rules that community banks operate within, thereby distinguishing regulated banks from nonbank entities that are not subject to the same oversight and providing a safe harbor thereupon. We further ask that the Bureau takes steps to adopt defined standards for intent and reasonableness; that does not unduly and unfairly punish banks for actions that are not intentionally abusive; that does not contemplate that banks know what a consumer may be thinking; that does not expect FIs to monitor circumstances beyond their control; and provides clear guidelines that factor compliance with current regulatory requirements and parameters.

If you have any questions, please do not hesitate to contact me at Rhonda.Thomas-Whitley@icba.org.

Sincerely,

/s/

Rhonda Thomas-Whitley
Vice President and Regulatory Counsel