June 30, 2023

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

Consumer Financial Protection Bureau
Attn: Legal Division Docket Manager, CFPB
1700 G Street NW
Washington, DC 20552

Submitted via Federal eRulemaking Portal

Dear Director Chopra:

The Consumer Relations Consortium ("CRC") is an organization comprised of more than 60 national companies representing creditors, data/technology providers and compliance-oriented debt collectors that are larger market participants. Established in 2013, CRC is dedicated to a consumer-centric shift in the debt collection paradigm. It engages with all stakeholders—including consumer advocates, federal and state regulators, academic and industry thought leaders, creditors and debt collectors—and challenges them to move beyond talking points.

CRC members exert substantial positive impact in the consumer debt space, servicing the largest U.S. financial institutions and consumer lenders, major healthcare organizations, telecom providers, government entities, hospitality, utilities and other creditors. CRC members engage in millions of compliant and consumer-centric interactions every month at all stages of the revenue cycle. Our members subscribe to the following core principle:

"Consumer protection and debt collection are not mutually exclusive ideas. They can, and should, coexist."

In line with that belief, the CRC focuses on fashioning real world solutions that seek to improve the consumer's experience during debt collection. CRC's collaborative and candid approach is unique in the market.

We appreciate the opportunity to provide comments and a response to the Statement of Policy Regarding Prohibition on Abusive Acts or Practices, Docket No. CFPB-2023-0018. The CRC supports the regulations issued by the CFPB and improving consumer's experience during the debt collection process. However, as explained in the enclosed comment, we believe that (1) further defining and limiting the scope of "material interference"; and (2) tying the concept of "unreasonable advantage" to a reasonable industry standard will create greater clarity, consistency, and better serve the consumers the policy seeks to protect.

Sincerely,

Missy Meggison
Co-Executive Director, Consumer Relations Consortium

COMMENTS TO STATEMENT OF POLICY REGARDING PROHIBITION ON ABUSIVE ACTS OR PRACTICES

Re: Docket No. CFPB-2023-0018

The Consumer Relations Consortium ("CRC") is submitting its comments to the Statement of Policy Regarding Prohibition on Abusive Acts or Practices, Docket No. CFPB-2023-0018 ("Policy"), released by the Consumer Financial Protection Bureau ("CFPB" or "Bureau") on April 3, 2023.

Though the CRC supports the goal of ensuring consumers are protected during the debt collection process, the ambiguity and vague concepts in the Policy will make compliance extremely difficult, if not impossible, and ultimately harm the very consumers the CFPB seeks to protect.

Debt Collection is a highly regulated industry, and compliant entities work exceptionally hard to track and implement the various applicable requirements. Debt collection representatives are often the most sophisticated person a consumer will speak with as they try to get their financial lives back on track, and the industry takes this responsibility seriously. For example, collection firms often assist consumers directly by serving as their primary liaison to the original creditor, gathering documents on their behalf, helping process disputes and hardship applications, and offering extended payment plans, settlements, etc.

To create and implement compliant policies and procedures which allow debt collectors to assist consumers and ensure all (and sometimes conflicting) applicable laws are followed, the language and expectations set out in those rules, regulations, policies, and pronouncements need to be clear and unambiguous. Rules with clear guardrails and guidance simplify the collections process; they provide clarity for consumers and debt collectors. Clear rules lead to positive interactions which are in the best interest of the consumer and the debt collector.

When rules are unclear, and debt collectors cannot draw solid lines for compliance, the net result is that consumers do not have the opportunity to speak with anyone about their debt; they are prevented from getting their financial lives back on track. Here, the lack of clarity and vague concepts in the Policy will make compliance with it exceedingly difficult and therefore make communications- including those that provide assistance to consumers- exceedingly difficult.

As discussed in detail below, the CFPB can better serve the consumers the Policy seeks to protect by (1) further defining and limiting the scope of "material interference"; and (2) tying the concept of "unreasonable advantage" to a reasonable industry standard.

A. Material Interference

The Policy describes material interference as:

> Material interference may include actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide information relevant to the ability of a consumer to understand terms and conditions[.]

The factors provided for when a "material interference" occurs are broad and unclear. The Policy provides that a material interference exists when: (1) an entity intends for an act or omission to interfere with a consumer's understanding of a term or condition; (2) an act or omission (whether or not intended) impedes a consumer's ability to understand; and (3) an act or omission did in fact impede a consumer's understanding. The examples provided regarding what constitutes a "material interference" involve both "digital" and "physical" interference including buried disclosures, undisclosed pricing or costs, and overly complicated terms. No other examples are provided.

If this provision aims to create more uniformity and clarity around terms and conditions, the Policy should be crafted to address that concern expressly. As it stands, the language in this provision is so vague and broad that it appears to apply to any conduct in conjunction with a consumer interaction.

The main concern with the current language around purported material interference is that the definition applies equally to both intentional and unintentional conduct. There is no distinction. An entity's good faith compliance with these various laws should not be a means by which to trigger liability or fault. CRC requests that the "material interference" guidance include a safe harbor from liability or fault for entities' good faith attempts to comply with state and federal regulations. Without a safe harbor, the overbreadth of this language will necessarily create compliance uncertainty, additional litigation, and, as a result, inconsistency among jurisdictions regarding its meaning.

B. Unreasonable Advantage

The CFPB tackles the second formation of abusive conduct that rests on when one takes unreasonable advantage of a consumer. This can come in the form of three vintages, 1) a lack of understanding, 2) the inability of the consumer to protect the consumer's interest, and 3) reasonable reliance by the consumer that – in our case – the debt collector acts in the consumer's interest. We will provide comments on each vintage below; however, we highlight that in each instance, the scope of what could constitute taking unreasonable advantage of a consumer is so subjective and uncertain that the Bureau will leave industry, *especially the numerous good actors*, paralyzed with regard to how to establish compliance management systems reasonably designed to ensure strict adherence to these standards that have no apparent compliance line.

1. Lack of Understanding

CFPB notes that "*[w]hen there are gaps in understanding regarding the material risks, costs, or conditions of the entity's product or service, entities may not take unreasonable advantage of that gap.*"

The Bureau premises this position that under the text of section 1031(d)(2)(A), the consumer's lack of understanding, regardless of how it arose, is sufficient to demonstrate abusive conduct, and this may be true regardless of any act or omission of the debt collector or whether that lack of understanding by the consumer was reasonable. The Bureau goes further in defining the scope of this position as independent of a generally reasonable person standard stating that "[s]ince there can be differences among consumers in the risks, costs, and conditions they face and in their understanding of them, there may be a violation concerning some consumers even if other consumers do not lack understanding." While the CRC fully supports consumer financial education and the mission to empower consumers by giving them the tools to make well-informed financial decisions, risk-shifting a lack of knowledge onto industry is patently unfair.

The debt collection industry strives to operate in a way that treats every consumer according to legal benchmarks and frameworks set by Congress and case law. Those standards have ensured that the "least sophisticated consumer" can understand our communications and interactions. There is a concern that the Bureau is attempting to disrupt this functioning consumer-centered paradigm by further imposing a nebulous case-by-case evaluation not based on any definable set standard.

This lack of certainty is impractical in our industry, where we engage in inbound and outbound phone calls, emails, and other communications with limited knowledge of a consumer's financial background or competency. Without describing more about what the lack of consumer understanding would entail, this standard leaves collectors unsure of what additional information or disclosures are needed.

This provision leaves debt collectors wondering what level of diligence is required to ensure that consumers fully understand the implications of their decisions around material risks, costs, or conditions in a collection interaction; how should a debt collector make sure there is no supposed "gap" in understanding when even the notion of this gap could be quite subjective. Further, for industry to meet this new standard, will it not require the collection of additional consumer information beyond what other laws would deem "more than minimum info necessary", like required in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and other privacy laws.

Punctuating the clear uncertainty this provision would result in, the Bureau lists several examples of how it believes one can demonstrate a person's lack of understanding, which includes:

- Complaints and consumer testimony.

- Evidence or analysis showing that reasonable consumers were not likely to understand; and
- Consideration of the course of conduct and likely consequences of a transaction (e.g. "if a transaction would entail material risks or costs and people would likely derive minimal or no benefit from the transaction, it is generally reasonable to infer that people who nonetheless went ahead with the transaction did not understand those material risks or costs").

Although the debt collection industry takes complaints and consumer feedback quite seriously and has established significant mechanisms around customer service and risk and compliance management in these areas, there is no guidance from the Bureau on the type or veracity of complaints or consumer testimony that would suffice to demonstrate a need to correct course.

The second example is at least more structured around a reasonable consumer standard, which in practice, may be implementable in a reasonable fashion. The final example again appears to impose a subjective standard into the equation around "minimal" or "no benefit" from a transaction. In the debt collection space, transactions occur based on a vast set of facts and specific circumstances in the moment for each consumer further complicating this analysis.

The CRC respectfully requests that the Bureau reconsider this standard and tailor it in a manner that creates operational certainty and supports the current and longstanding practices deployed by industry around consumer awareness and respect.

2. Inability of Consumers to Protect their Interests

The second aspect of "unreasonable advantage" addresses situations where consumers and the company providing them a product or service have unequal bargaining power. The Bureau explains this type of unreasonable advantage might occur when a company forces consumers into less advantageous deals, extracts excess profits, or provides inferior service to reduce the company's costs.

The Bureau points to situations where it is impractical for consumers to protect their interests when selecting or using a product or service, they are unaware of the necessary steps needed to protect themselves, or they have limited financial means to do so. The Bureau gave several examples of instances where companies leveraged unequal bargaining power, including when:

- a financial technology company informed consumers they could change their payment amounts, but in reality, consumers were never able reach a live customer-service representative to make any changes;
- a bank issued credit cards, lines of credit, and debit accounts without the consumers knowledge or consent; and
- a company charged prisoners extra fees knowing they had no other service options.

The Bureau's focus here appears to be on unequal bargaining power, including the use of form contracts. This would seem to include most, if not every, consumer who contracts with a covered entity. The CFPB also points to relationships in which a consumer has limited options for obtaining a particular product or service or when a consumer cannot exercise meaningful choice when interacting with or choosing a particular entity, such as a loan servicer. In these instances, the Bureau implicitly suggests there is a higher risk for abusive conduct. The CFPB did recognize that a relationship of this nature is not *per se* abusive but that it could present an opportunity for a company to take unreasonable advantage of consumers' lack of options and inability to choose their service provider.

As an initial matter, as the Bureau is well aware, creditors, data/technology providers, and compliance-oriented debt collectors are already governed by scores of federal and state laws, including many focused on the concerns expressed by the Bureau in this section of the Policy. For example, the Fair Debt Collection Practices Act, which governs debt collectors, prohibits the conduct for which the Bureau provides as examples of violations in this section. For the members of our organization and many others, additional regulation would be redundant. That redundancy is especially problematic if it injects confusion due to vagueness or potentially conflicting guidance.

To the extent the Bureau's position is that the very nature of the customer relationship renders consumers unable to protect their interests in selecting or using a consumer financial product or service, the position misunderstands the relationship between companies and consumers in our markets. The focus here is on unequal bargaining power, including the use of form contracts and the inability of consumers to select the service providers. The examples put forth by the Bureau, to be sure, involve a small selection of instances of bad players within the market. They are not, however, representative of the market participants.

More problematic is that the examples cited by the Bureau cannot reasonably be interpreted as instances that could have been avoided if the consumer had participated in the selection of downstream vendor relationships. Indeed, the very nature of those underlying consumer transactions demonstrates that consumers cannot reasonably be expected to participate in the selection of vendors. While consumers can pick their initial service providers, for example, when obtaining credit, if they default on their obligations under the contract, the reality is that they have lost the right to control which downstream vendors their creditors select to seek recovery of the debt. That does not give vendors a free pass – they are already heavily regulated. But the fact that consumers cannot participate or bargain for the terms of the service does not mean it places consumers at risk. The few select examples provided do not represent the larger industry, which views the Bureau as a valuable resource to regulate those bad players like the ones cited in this section.

Most problematic is the opportunity this issue presents for the Bureau to potentially influence winners and losers within the industry in its efforts to remedy this perceived (and, we believe inaccurate) inequity. The Bureau should not be in a position where it expresses an interest in preferred vendors, or disapproved vendors (outside of the examination and enforcement process). Our industry is devoted to compliance initiatives, and the majority of the companies in our industry

are committed to avoiding the concerns expressed by the Bureau. Further regulation in this regard is redundant and would be potentially very disruptive if wrongly implemented.

3. Reasonable Reliance

The third aspect of "unreasonable advantage" deals with companies leveraging "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." The Bureau gives two examples of when "reasonable reliance" may exist:

> First, reasonable reliance may exist where an entity communicates to a person or the public that it will act in its customers' best interest, or otherwise holds itself out as acting in the person's best interest...Second, reasonable reliance may also exist where an entity assumes the role of acting on behalf of consumers or helping them to select providers in the market.

While the Bureau expressly references the two examples above, it also mentions that "[t]here are a number of ways to establish reasonable reliance" and cautions that the scenarios provided are not exhaustive.

The CRC surely agrees with the Bureau's mission to curtail abusive behavior in instances where companies use the expectation of trust or the guise of helping consumers in a manipulative manner. We are concerned, however, that the Bureau leaves this section open-ended with fairly sparse explanations; it remains unclear how this prong will be enforced. The CRC wants to ensure that the debt collection industry, which offers many great benefits to consumers, is not unfairly disadvantaged through the Bureau's interpretations.

Debt collectors operate symbiotically with consumers. Over the past decade, there has been a huge focus on enhancing customer service in our space, which has been encouraged by state and federal regulators, and in some cases, mandated. Collection firms assist consumers directly by serving as their primary liaison to the original creditor, gathering documents on their behalf, helping process disputes and hardship applications, and offering extended payment plans, settlements and the like.

Nowhere was this more prevalent than during the extended Covid-19 pandemic. In 2020 and 2021, the Bureau issued numerous standalone and interagency statements encouraging lenders, creditors, and debt collectors to work cooperatively with consumers to help them meet their needs. Many state regulators issued similar statements. The industry was well-positioned to meet the request and responded in kind. At a time when many original creditors temporarily closed their doors, it was the debt collection firms that took on a heightened customer care role by helping answer account-level questions (even outside of debt collection), explaining financial assistance policies, forgiving late payments, adjusting repayment schedules, and delaying or stopping consequences such as credit reporting or litigation.

While the imminent threat of the pandemic has subsided, the collection industry's penchant for helping consumers has not. Collection firms enthusiastically strive to meet the requirements of Regulation F in a consumer-friendly manner, allowing them more freedom to control the medium of their communications. Firms also take great care to offer beneficial settlements emphasizing

clarity and straightforward interaction. And escalations through consequences typically occur only after extensive and collaborative dialogue happens with consumers. The industry understands very well that in 2023, its role extends far beyond taking and processing payments.

The CRC wants to ensure that the debt collection industry is not wrongfully targeted for abusiveness violations premised on "reasonable reliance" in light of the extensive and interactive assistance it provides consumers. Yes, collection firms must often walk a fine line in the never-ending attempt to simultaneously help consumers, provide excellent revenue recovery services to creditor clients, and follow the law and specific Bureau guidance. But the industry has demonstrated its ability to effectively do so before, during, and after the pandemic.

CRC implores the Bureau to consider and acknowledge that these three initiatives can coexist and mutually benefit all parties. While the industry strives to act in the consumer's best interest and frequently offers to "help" consumers, the sentiment is genuine. Therefore, we want to ensure that in prosecuting abusiveness, the Bureau does not curtail the productive dialogue permitted between debt collectors and consumers, whether related to call scripting, settlement offers, or otherwise. We encourage the Bureau to release further guidance related to this section to clarify that the intent is not to punish good-faith behavior from collection entities, who regularly provide necessary instruction and guidance and are a critical intermediary in the marketplace.