Education Finance Council™

Helping Families Plan & Pay for College℠

NCHER

STUDENT LOAN SERVICING ALLIANCE

June 30, 2023

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

Sent Via E-Mail: 2023-AbusivenessPolicyStatement@cfpb.gov

As the trade associations representing nonprofit, State-based, and private education loan providers, and servicers, we appreciate the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) Statement of Policy Regarding Prohibition on Abusive Acts or Practices (Statement). We share the CFPB's commitment to protecting student loan borrowers from unfair, deceptive, or abusive conduct, and we understand the Bureau's efforts to provide an analytical framework for identifying violative acts or practices. However, we believe that the Statement will create more ambiguity and will open the door to frivolous and unreasonable claims against organizations serving the best interests of consumers, which will ultimately harm consumers through reduced competition and increased costs.

The Statement defines an abusive act or practice under the *Consumer Financial Protection Act of 2020* (CFPA) as an action that: "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service, or takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service, the inability of the consumer to protect the interest of the consumer in selecting or using a consumer financial product or service, or the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." Throughout this definition the CFPA refers to materiality and reasonableness, and we encourage the CFPB to consider these tenets when investigating abusive acts or practices claims.

We believe certain sections of the CFPB Policy Statement are overly broad, which could create an environment ripe for exploitation and lead to worse outcomes for consumers. Specifically, we are concerned with the following four portions of the Statement:

- The elimination of the need to prove that an act or practice caused substantial injury in order to establish liability under the abusiveness prohibition. This interpretation opens the door for anyone to claim abuse even when there is no harm or injury. Without any harm or injury, how would the liability be determined?

- When evaluating unreasonable advantage, the CFPB considers that even a relatively small advantage may be abusive if it is unreasonable. Under this statement, unreasonable advantage will be determined based on a qualitative assessment rather than quantitative measures. It is basing the assessment on something that is open to interpretation and bias – rather than on facts and evidence.

- Under lack of understanding, the CFPB states that a lack of understanding by a consumer does not need to be reasonable for a violation to occur. It also does not require a threshold of people to have lacked understanding – a single individual could be sufficient with no basis in a standard that is measurable. A person can be aware that there is a possibility of a negative consequence and yet still claim they lacked understanding. In addition, a simple complaint or consumer testimony can demonstrate lack of understanding, as can a consumer choosing to take a high-risk transaction even though they are fully aware of the likely minimal benefit. This interpretation removes any personal responsibility for the decisions an individual makes – even if the person is provided with all the necessary information to make an informed decision, and the information is clear and understandable to nearly all other consumers who receive it. In doing so, the Bureau will hold lenders or others liable for the personal, informed choices a consumer makes should the consumer later decide it was a poor choice. It also allows a consumer, who never expressed confusion or a lack of understanding of information that is clear to most other consumers, to later assert a lack of understanding to avoid payment. There is no standard of reasonableness applied to determine if the consumer claims have merit.

- Under inability of consumers to protect their interests, the CFPB's interpretation states that abuse can occur when a consumer does not elect to enter a relationship with an entity and cannot elect to instead enter into a relationship with a competitor. The examples provided are those relationships with credit reporting companies, debt collectors, and third-party loan servicers. While the CFPB states that such relationships are not *per se* abusive; entities cannot take unreasonable advantage of the fact that they are the only source for information or services. It is unreasonable to assume a small lender or servicer can contract with multiple companies under each of these relationships and provide the consumer with multiple options on where their account is assigned and allow the consumer to change it at any time. The CFPB does not provide any clarity on how it will determine that an organization is taking "unreasonable advantage" when there is only one available source.

We request the CFPB amend the Statement to clarify the issues identified above and instead take positions that are measured, based in facts, and rooted in reasonableness, which benefits all parties to a contract. We believe the Bureau should rely on evidence rather than solely qualitative(subjective) opinion (information), which is open to bias and could be used as a means to circumvent personal responsibility. We support protecting consumers and ensuring they have, to the best of our ability, a full understanding of the information they need to make informed decisions. However, our concern is that this guidance opens the door to false claims of abusive behavior simply through an unsubstantiated complaint and without evidence or harm to the consumer.

We appreciate the opportunity to provide comments and assist the Bureau in advancing the interests of consumers while protecting responsible providers from frivolous and unfounded charges. We look forward to working with you to create a consumer finance marketplace that works for the economy as a whole.

Regards,

Gail daMota
President | Education Finance Council

James P. Bergeron
President | National Council of Higher Education Resources

Scott Buchanan
Executive Director | Student Loan Servicing Alliance