



July 1, 2023

Director Rohit Chopra  
Consumer Financial Protection Bureau  
1700 G Street, N.W.  
Washington, DC 20552

Re: Consumer Financial Protection Bureau Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Docket No CFPB—2023—0018; 88 Fed. Reg. 21883 (4-12-23)

Dear Director Chopra:

On behalf of the National Creditors Bar Association (“NCBA”), I write to express our concerns with respect to the above-referenced Consumer Financial Protection Bureau (“CFPB” or “Bureau”) Statement of Policy Regarding Prohibition on Abusive Acts or Practices (the “Policy Statement”).

NCBA appreciates the CFPB’s efforts to protect consumers and explain its policy regarding prohibiting abusive acts or practices and the steps that those individuals and companies providing consumer financial products or services should take to avoid engaging in such acts or practices. However, we are concerned that if the requirements announced in the Policy Statement are inappropriately applied to attorneys providing legal representation to creditor clients in the collection of debts, it would undermine the state supreme courts’ longstanding authority to regulate and oversee the legal profession and conflict with many of the specific legal ethics rules adopted by the courts. These conflicts include the attorney’s duties to represent their clients’ positions competently and diligently (including zealous advocacy on behalf of the client in negotiations with or legal actions against opposing parties); to not provide advice to the unrepresented parties or misrepresent the adversarial nature of their relationship; and to protect attorney-client confidentiality and the attorney-client privilege.

To avoid these negative consequences, NCBA urges the Bureau to modify the Policy Statement to exempt attorneys and law firms that provide legal representation to creditor clients in the collection of debts. If the Bureau declines to do so, NCBA requests that it modify the Policy Statement to explicitly provide that it does not require attorneys and law firms to comply with any of the requirements contained in the Policy Statement that conflict with the ethical duties enumerated in the [ABA Model Rules of Professional Conduct](#) or the binding ethical rules adopted by the state supreme court in which the attorney is licensed or authorized to practice.

Such changes are essential to ensure that attorneys representing clients in debt collection matters are not put in the untenable position of potentially having to choose with which set of conflicting requirements to comply: those imposed by the Policy Statement or those imposed by the state supreme courts as part of the ethical and professional responsibility obligations applicable to attorneys.

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NCBA is the only bar association in the country dedicated to promoting and protecting all creditors' rights attorneys, including attorneys who collect consumer debt. NCBA member firms practice law in a manner consistent with their responsibilities as officers of the court and must adhere to rules of state civil procedure, state bar association licensing, certification requirements, and the rules of professional conduct of each state in which they practice.

NCBA's values are: Professional, Ethical, Responsible. Important facts about NCBA member firms are:

- Over 2,500 creditors' rights attorneys in over 400 law firms and other creditors' rights practices across the United States;
- The majority of NCBA law firms are considered small businesses pursuant to the Small Business Administration classification.
- 45% practice creditors' right law across multiple state jurisdictions;
- NCBA member law firms are subject to audits on a regular basis by their clients, many of whom are national banks, and devote significant time and resources on compliance and preparing for those audits; and
- NCBA member firms practice various subsets of creditors' rights law

### **NCBA Specific Concerns Regarding the Statement of Policy**

NCBA recognizes and appreciates the Bureau's efforts to provide an analytical framework for identifying abusive acts or practices. However, applying the Policy Statement to attorneys engaged in adversarial debt collection activities for their creditor clients against the opposing party is inappropriate and unworkable in several different respects.

#### **1. The Policy Statement illogically and improperly requires covered attorneys and law firms engaged in debt collection to act in the interests of the consumer.**

In its Policy Statement, the Bureau focusses primarily on how companies and individuals providing financial products or services to consumers should treat them in those transactions to avoid engaging in abuse and to comply with the law. For example, in the Analysis section of the Policy Statement, the Bureau explains the statutory meaning of abusiveness as follows:

Under the CFPA [Consumer Financial Protection Act], there are two abusiveness prohibitions. [footnote omitted] An abusive act or practice: (1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) 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 interests 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. [footnote omitted]

The statutory text of these two prohibitions can be summarized at a high level as: (1) obscuring important features of a product or service, or (2) leveraging certain circumstances to take an unreasonable advantage. The circumstances that Congress set forth, stated generally, concern gaps in understanding, unequal bargaining power, and consumer reliance.[footnote omitted]<sup>1</sup>

Although all these examples of abusiveness in the Policy Statement and the underlying CFPA statute relate to companies or individuals providing actual financial products or services—such as loans, mortgages, etc.—to consumers, the Policy Statement could technically also apply these abusiveness concepts to attorneys and law firms engaged in debt collection in the absence of an exemption.

Under [§5481 \(5\) and \(15\)\(A\) of the CFPA](#) that defines the "consumer financial products or services" over which the CFPB has regulatory jurisdiction, the first nine of those products or services deal with ordinary financial products and services (like loans, mortgages, etc.) that mutually benefit the creditor and debtor while the final specific "financial product or service" on the list involves "debt collection". Unlike the other nine products and services, debt collection is the only item that is inherently adversarial in nature.

Although the Policy Statement's obligations to act in the interests of the consumer may be reasonably applied to companies and individuals providing the first nine types of mutually beneficial financial products or services to consumers, they cannot logically be applied to attorneys and law firms engaged in debt collection. Debt collection is inherently adversarial in nature and unlike all the other listed products or services. Therefore, it is not logical—and improper—to require attorneys and law firms engaged in debt collection to act in the interest of the consumer and against the interest of the creditor client.

**2. The Policy Statement conflicts with numerous attorney ethical duties, would undermine the longstanding authority of the state supreme courts, and would unfairly harm attorneys and their creditor clients.**

NCBA is also concerned that if the Bureau applies the Policy Statement to attorneys and law firms and requires them to comply with the requirements and prohibitions outlined in the Statement, those obligations would directly conflict with enforceable professional conduct rules imposed upon attorneys by state supreme courts that the attorneys are legally obligated to follow. As a result, such obligations would undermine longstanding state supreme court judicial regulation and oversight of attorneys and the legal profession.

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<sup>1</sup> Statement of Policy at 21884.

For centuries, attorneys have been regulated and disciplined primarily by the highest court of the state in which the attorney is licensed or authorized to practice. These courts have adopted and enforced extensive and effective regulations governing all aspects of the practice of law, including stringent ethical rules ensuring competence and zealous advocacy for clients within the bounds of the law, protecting client confidentiality, and protecting the rights of opposing parties and others. For many years, the U.S. Supreme Court has recognized the states' inherent authority to regulate the practice of law and has refused to allow certain federal laws and regulations to be applied to attorneys, especially when they would interfere with the state courts' regulatory authority.

The Policy Statement contains numerous requirements and prohibitions that, if applied to attorneys and law firms representing creditor clients in debt collection, would directly conflict with well-established state court ethics rules and thus undermine the state supreme courts' inherent and longstanding authority to regulate and oversee all attorneys engaged in the practice of law. For example, as noted above, the Policy Statement states entities cannot take "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 interests 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.<sup>2</sup>

These and other requirements and prohibitions in the Policy Statement conflict with several of an attorney's duties as enumerated in the [ABA Model Rules of Professional Conduct](#) (ABA Model Rules) and the similar binding rules adopted by the state supreme courts of all U.S. states and territories,<sup>3</sup> including the following:

- **[Preamble](#) to the ABA Model Rules**

The Preamble to the ABA Model Rules sets the table with the duties and responsibilities all attorneys must adhere to.

...[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system...

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<sup>2</sup> *Id.*

<sup>3</sup> Rules identical or substantially similar to the ABA Model Rules of Professional Conduct have been adopted as legal binding ethical rules in all fifty states and the District of Columbia and are binding on all attorneys licensed in each particular state. See [ABA Jurisdictional Rules Comparison Charts](#) comparing individual professional conduct rules as adopted or proposed by state supreme courts to the ABA Model Rules.

Clearly the Policy Statement to “act in the interest of the consumer” directly contradicts an attorney’s basic duties to “zealously asserts the client's position”.

- **[Rule 1.1: Competence](#)**

This Model Rule governs the basic parameters of the attorney-client relationship. As stated, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” In addition, Comment 1 to the Rule explains that part of the attorney’s diligence obligation includes “zeal in advocacy upon the client’s behalf.”<sup>4</sup> No one would consider an attorney who acts “in the interests of the consumer”—i.e., in the interests of their client’s adversary—to be acting competently. Instead, such actions are in direct contravention of attorneys’ duty to “zealously” represent their clients.

- **[Rule 1.6: Confidentiality of Information](#)**

The Policy Statement also could require an attorney representing a creditor client in a debt collection matter to violate the attorney’s ethical duty to hold the client’s information in confidence and to not reveal that information to others absent informed client consent. Under the Policy Statement, acting in the interest of the opposing party (consumer) could require the attorney to disclose a substantial amount the client’s confidential information. Such disclosures would be directly contrary to the attorney’s ethical obligations under Rule 1.6 and would turn the nature of our adversarial judicial system on its head.

- **[4.3: Dealing with Unrepresented Person](#)**

Finally Model Rule 4.3 outlines the specific responsibilities an attorney has when dealing with an unrepresented party and states as follows:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

If the Policy Statement is applied to creditor attorneys engaged in debt collection activities on behalf of clients—and those attorneys are required to explain certain items to the consumer defendant (to eliminate “gaps in understanding”) or to take other actions in the “interests of the consumer”—such requirements would conflict with Rule 4.3 and directly violate the creditor

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<sup>4</sup> See [ABA Model Rule of Professional Conduct 1.3 \(Diligence\)](#) and [Comment \[1\] to Model Rule 1.3](#).

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attorney's duties to the consumer under that Rule as well as the attorney's duties to competently and zealously represent the client.

### **Conclusion and Requested Relief**

In sum, the CFPB Policy Statement creates serious and unique concerns for NCBA's members who practice creditors rights law, including debt collection. The Policy Statement will also seriously harm our members' clients by denying them the competence, zealous advocacy, confidentiality, and other duties owed to them by their attorneys, while at the same time undermining the longstanding authority of the state supreme court to regulate and oversee the legal profession.

For all these reasons, NCBA respectfully requests the Bureau amend the final Policy Statement to specifically exempt attorneys and law firms who provide legal representation to creditor clients in the collection of debts. If the Bureau declines to do so, NCBA requests that it modify the Policy Statement to explicitly provide that it does not require attorneys and law firms to comply with any of the requirements or prohibitions contained in the Policy Statement that conflict with the ethical duties enumerated in the [ABA Model Rules of Professional Conduct](#) or the similar binding ethical rules adopted by the state supreme court in which the attorney is licensed or authorized to practice.

These changes are necessary to ensure that attorneys engaged in debt collection activities for creditor clients will not be forced to choose whether to comply with the Policy Statement or the longstanding ethical obligations imposed by the state supreme courts that license, oversee, and discipline them. In addition, there is ample precedent of federal agencies including exemptions in their final rules for attorneys engaged in the practice of law to avoid conflicts with state supreme court ethical rules.<sup>5</sup>

Thank you for considering the views of NCBA on these important issues. If you have any questions regarding any of our comments or suggested amendments, please contact NCBA's Government Affairs Officer, Nathan Willner at 410-382-7588 or [Nathan@creditorsbar.org](mailto:Nathan@creditorsbar.org).

Sincerely,



Liz Terry

Executive Director

National Creditors Bar Association

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<sup>5</sup> See, e.g., the attorney exemptions included in the Federal Trade Commission's [final rule on Mortgage Assistance Relief Services](#), at 75143; Department of Housing and Urban Development's [final rule implementing the SAFE Act](#), at 38501; CFPB's interim final rule on Mortgage Acts and Practices—Advertising (Regulation N); Mortgage Assistance Relief Services (Regulation O), at 78137; and exemption language in [FDIC's final rule on Recordkeeping for Timely Deposit Insurance Determination](#) stating that confidential client information in client trust accounts can be held by law firms and not disclosed to the bank or the FDIC unless and until the bank actually fails, at 87750 and 87760.