July 3, 2023

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

Re: Docket No. CFPB-2023-0018 (submitted electronically)

Dear Director Chopra:

On behalf of the members of The Real Estate Services Providers Council, Inc. (RESPRO®), I appreciate the opportunity to comment on the proposed policy statement on abusive acts or practices.

RESPRO® represents the largest and most successful settlement services companies operating throughout the United States. Our members and their more than 700,000 employees and agents facilitate millions of real estate and mortgage transactions each year.

RESPRO® appreciates the CFPB's efforts to define "abusive acts or practices" and provide additional guidance. Nevertheless, we do have concerns about the subjectivity and breadth established in determining what could be considered abusive and when action is viewed as warranted.

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

Overt attempts to obscure key elements of a transaction are clearly something to be concerned about and would warrant scrutiny. However, the real estate and mortgage transaction is a complicated process. Government regulation and requirements have added to the complexity including the proliferation of disclosures. Transactions often involve dozens of disclosures and multiple issuance of the same disclosure at different times. Furthermore, in some cases, government rules themselves require items to be disclosed in a manner that is confusing.[1] We would encourage the Bureau and other regulators to be judicious and circumspect when examining cases under this provision. To claim that something was "buried in a pile of disclosures" should not be enough to warrant an action since that pile of disclosures is most often required by rules and regulations.

II. Taking Unreasonable Advantage

We are concerned about the vagueness and breadth of this section. Section 1 speaks of a lack of understanding on the part of the consumers. The point of the aforementioned disclosures is ostensibly to alleviate a lack of understanding. What more is expected? It is unclear at best. There are thousands of professions and they are just that, "professions" because they involve complexity beyond the average nonprofessionals understanding. Is a professional obligated to eliminate all gaps in understanding? Why would one hire a professional if they could do something themselves? Once again and for these reasons, it is reasonable to question whether one used their expertise to mislead another but there must be some reasonable limits and objective standards concerning situations where there are gaps in understanding without any overt effort to obscure.

[1] One thinks of the APR or the disclosure of owners title insurance under TRID as two examples.

The equal bargaining power provision is even more problematic when you consider mortgage transactions in particular. Providers are often boxed in by regulations themselves with regard to the terms for one thing. Perhaps more concerning is if one envisions the opposite situation in some cases. At some point, in order for the market to function, an agreement must be made. One can only imagine the chaos if this was not the case and the consumer could change things at will at any time and abrogate otherwise reasonable agreements. In the mortgage case, rules such as TRID require disclosure, provide for shopping, and essentially "lock in" key terms. At some point, a decision needs to be made and the terms finalized in order to complete the transaction. The Bureau should not apply such expansiveness related to bargaining power or the ability to change terms to mortgage transactions and should limit enforcement to the rules it has already established governing these transactions.

With regard to "reasonable reliance by the consumer on a covered person to act in the interests of the consumer" and the ensuing language, considerable vagueness exists that could lead to extremely subjective use of this provision to target otherwise legal and compliant conduct or practices that an enforcement agent simply does not hold in favor for whatever reason. In addition, while it may be asserted that enforcers do not need to prove an injury[2], it might be wise to adhere to such a standard in order to avoid the appearance of gratuitousness, unfairness, or overstepping of authority.

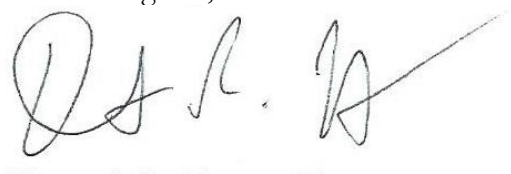
Finally, one should be circumspect with regard to contracts and their associated relationships. It is one thing to examine truly one sided outrageous provisions, it is quite another to target provisions that are well established in contract law and mutual benefit parties. For illustration, arbitration clauses are well established and mutually beneficial even if they limit one manner of redress (litigation) which is often more costly and yields a less timely result for those harmed. Other such provisions exist as well and the Bureau should be cognizant of such.

Conclusion:

We encourage the Bureau to maintain its focus on well-established and defined provisions of law and avoid vague constructs that stretch longstanding interpretations. There are many instances in which the Bureau can aid consumers by focusing and renewing efforts to enforce in these areas of existing law.

Once again, RESPRO® appreciates the opportunity to comment and your ongoing efforts. Thank you for your time and consideration on this matter and many others that affect RESPRO®, its members, and their clients and customers. If we may be of any assistance or help, please do not hesitate to contact me at ktrepeta@respro.org or (202) 862-2051.

With best regards,



Kenneth R. Trepeta Esq.
President and Executive Director

[2] While not always the case, the idea that there must be concrete injury for an action to be brought is a fundamental feature of our judicial system.