Comments to the

Board of Governors of the Federal Reserve System
Consumer Financial Protection Bureau
Federal Deposit Insurance Corporation
National Credit Union Administration
Office of the Comptroller of the Currency

Interagency Guidance Regarding Unfair or Deceptive Credit Practices[1]

12 CFR Part 227
[Docket No. R-1490]
RIN 7100 AE-19
79 Fed. Reg. 51115 (Aug. 27, 2014)

Unfair or Deceptive Acts or Practices
(Regulation AA)

by the
National Consumer Law Center
On behalf of its low-income Clients

And
Consumer Action
National Association of Consumer Advocates
New Economy Project
U.S. PIRG

Submitted Oct. 27, 2014

The National Consumer Law Center,[2] on behalf of its low-income clients, Consumer Action, the National Association of Consumer Advocates, the New Economy Project, and U.S. PIRG,[3] writes to comment on the issuance of the Interagency Guidance regarding Unfair or Deceptive Credit Practices ("Guidance") and the proposed repeal of Regulation AA ("Reg. AA"). We commend the issuance of the guidance, but urge that the Consumer Financial Protection Bureau

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[1] Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, "Interagency Guidance Regarding Unfair or Deceptive Credit Practices." August 22, 2014. http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20140822a2.pdf.

[2] The **National Consumer Law Center** (www.nclc.org) is a nonprofit organization specializing in consumer issues affecting low-income and elderly people. NCLC publishes twenty practice treatises, most of which are updated annually and which describe the law currently applicable to all types of consumer transactions. These comments are filed on behalf of our low-income clients and written by NCLC attorney Margot Saunders.

[3] The **National Association of Consumer Advocates** (NACA) is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

issue an immediate interim final rule with the substantive language in Reg AA. We also urge that the Guidance be strengthened.

We are disappointed that the agencies determined that Reg. AA must be repealed, as we believe it has provided extensive consumer protections over the past three decades. However, we understand that the change in the provisions of the FTC Act, made by the Dodd-Frank Act, necessitate this repeal by the banking regulatory agencies.[4] Nonetheless, we urge the agencies to keep in mind the reasons behind the promulgation of both the FTC's Credit Practices Rule, and the concomitant version applicable to financial institutions in Reg. AA. We write these brief comments to accomplish three related goals:

1. To urge the Consumer Financial Protection Bureau ("CFPB") to immediately issue an interim final rule re-adopting Reg. AA applicable to financial institutions.
2. To urge the banking agencies to improve the language of the Guidance so that it clearly prohibits practices that are prohibited under Reg. AA.
3. To urge the CFPB to issue regulations, and the banking agencies to issue guidance, to address more modern unfair practices in the credit marketplace.

CFPB Should Immediately Issue an Interim Final Rule Adopting its Own Version of Reg. AA

As noted by the banking agencies in their repeal of Reg. AA, only the Consumer Financial has the authority under Dodd-Frank to issue a rule equivalent to Reg. AA, applicable to financial institutions.[5] It should do so immediately, re-adopting the repealed rule as an interim final rule while also accepting comments.

Once passed, Reg. AA has prohibited a considerable amount of anti-consumer behavior. It is still necessary to ensure that this behavior does not make resurgence in the marketplace. The extensive findings underlying the FTC's version of the Credit Practices Rule, as described in considerable detail in the FTC's Preamble,[6] described a series of onerous behaviors that were routine in the credit industry before the rule. Pyramiding of late fees, taking value-less security interests in debtors' household goods for the sole purpose of terrorizing the debtors into repaying their loans, misleading co-signers regarding the extent of their potential liability, and taking assignments of wages were routine, and damaging practices. Both the FTC's Credit Practices Rule and Reg. AA were key to eliminating those practices from the marketplace. The weakening of the prohibitions against these activities when conducted by financial institutions may well revive them.

Guidances – even if they were worded exactly as the language in a rule – are not as strong as regulations. They are only recommendations, with a more onerous and complex set of requirements for regulatory agencies to follow before they can be the basis of enforcement actions. Moreover, as discussed below, the proposed guidance is not a clear rule with clear prohibitions. It is not identical to the rule and does not have the same force.

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[4] *See* Section 1092(2) of the Dodd-Frank Act, amending 15 U.S.C. § 57a(f).
[5] The CFPB has authority to issue regulations governing unfair, deceptive, or abusive acts or practices pursuant to 12 U.S.C. § 5531(b).
[6] These findings are primarily located in the preamble to the FTC's Credit Practices Rule. See Trade Regulation Rule; Credit Practices, 49 Fed. Reg. 7740 (Mar. 1, 1984). The FTC's findings were used by the Board, the FHLBB, and NCUA in their determinations of whether to adopt regulations that were substantially similar to the FTC's Credit Practices Rule.

A regulation can be enforced by state enforcement authorities, which have authority to enforce regulations issued by the CFPB. States do not, however, have authority to enforce the Dodd-Frank Act's general prohibition against unfair and deceptive acts and practices against financial institutions. They would have this authority if the CFPB issued a rule prohibiting these behaviors by financial institutions. Similarly, courts, when considering challenges to banking practices that are alleged to be unfair or deceptive under state laws, often look to federal rules. Courts are more likely to rely on clear rules than on guidance.

We appreciate that the CFPB has a full rulemaking plate. However, simply re-issuing the existing rule as an interim final rule should not take a significant amount of CFPB resources. The CFPB could then take comments on those rules without any particular deadline for making any changes.

This is the approach that the agency took with regulations under the Regulation D, under the Alternative Mortgage Transaction Parity Act (AMTPA). The CFPB issued a fast interim final rule on July 22, 2011 without making significant changes in the regulation as required by Dodd-Frank. The agency believed that it was necessary to adopt an interim final rule without public comment in order to avoid creating a regulatory gap.[7]

For the same reason, the CFPB should immediately pass its own version of Reg. AA – applicable to financial institutions – to avoid creating a regulatory gap. The agency can then take comments and, hopefully, update the rule to address more modern issues, as discussed at the end of these comments.

Guidance Should Clearly Prohibit Behavior.

As the banking agencies note, "the Agencies have supervisory and enforcement authority regarding unfair or deceptive acts or practices, which could include the practices previously addressed in the former credit practices rules."[8] Therefore, the Guidance issued to prohibit activities that have been illegal now for twenty years should clearly and unequivocally continue to prohibit those activities. Unfortunately, the language of the Guidance does not provide as clear a mandate as it should.

The passage of the Credit Practices Rule – and the subsequent passage of Reg. AA – made a big difference. Reg. AA clearly specified, and made illegal, a list of prohibited practices applicable to financial institutions. Yet the new proposed Guidance – with its new language allowing some

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[7] *See* 76 Fed. Reg. 44226 (July 22, 2011). However, in the three years since the interim final rule was adopted and comments were taken, the CFPB has failed to make necessary changes to the rule to comply with the changes to AMPTA made in the Dodd-Frank Act. As we explained in our comments, we agreed with many of the interpretations of the new AMTPA, but in several, quite serious, matters the rule misinterprets both the clear language in the new AMTPA and Congressional intent. *See* Comments of NCLC et al., http://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/Final_AMTPA_Comments.pdf.

[8] Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, "Interagency Guidance Regarding Unfair or Deceptive Credit Practices." August 22, 2014 at 1. http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20140822a2.pdf.

situations to justify the previously prohibited behaviors – represents a real and dangerous retreat from the protections of former Reg. AA.

While no law now requires the banking-regulatory agencies to issue the Guidance, its issuance is an acknowledgement that financial institutions still need to be warned away from the proscribed behaviors. However, there are several significant differences between the well-defined prohibitions in Reg. AA, and the equivocating language of the Guidance.

Reg. AA *prohibits* the defined behavior. In contrast, the Guidance indicates that the behavior previously prohibited is *now only possibly* in violation of the statute:

> The Agencies believe that, depending on the facts and circumstances, if banks, savings associations, and Federal credit unions engage in the unfair or deceptive practices described in these former credit practices rules, such conduct may violate the prohibition against unfair or deceptive practices in Section 5 of the FTC Act and Sections 1031 and 1036 of the Dodd-Frank Act.[9] (Emphasis added).

In other words, this language appears to allow for the possibility that some facts and circumstances would permit the financial institution to engage in the very behaviors that were expressly prohibited by Reg. AA. This permissive language contrasts negatively with the clear mandates that were in Reg. AA:

> (b) Purpose. The purpose of this part is to prohibit unfair or deceptive acts or practices in violation of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).[10] (Emphasis added.)

There is no reason the agency guidance should be ambiguous. The Guidance should flatly prohibit the same behaviors that were prohibited under Reg. AA. There should never be facts and circumstances that would make such behavior permissible. Suggesting the contrary invites financial institutions to engage in the behaviors that the Reg. AA prohibited. The language in the Guidance allowing facts and circumstances to exist which might justify and permit the prohibited must be removed. The sentence quoted above from the Guidance should be rewritten to read as follows:

> The Agencies believe that, ~~depending on the facts and circumstances,~~ if banks, savings associations, and Federal credit unions engage in the unfair or deceptive practices prohibited in these former credit practices rules, such conduct ~~may~~ *will* violate the prohibition against unfair or deceptive practices in Section 5 of the FTC Act and Sections 1031 and 1036 of the Dodd-Frank Act.

In other words, if a practice is unfair or deceptive and would have violated the rule, there is no reason that is should not violate the Dodd-Frank general prohibition on unfair, deceptive or abusive practices.

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[9] Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, "Interagency Guidance Regarding Unfair or Deceptive Credit Practices." August 22, 2014, at 2. http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20140822a2.pdf.

[10] 12 CFR § 227.1(b).

Prohibit Other Unfair or Deceptive Behavior.

When the Federal Trade Commission issued the Credit Practices Rule to protect consumers against abusive terms and conditions in credit contracts in 1984 it was momentous. While the Fair Debt Collection Practices Act[11] – passed in 1977 – protected consumers from harassment and other abuses by third-party debt collectors, the original credit contracts often contained provisions that led to abusive collections activities by the creditors themselves (as well as their agents).

The FTC's Credit Practices Rule – and Reg. AA – protects consumers from abusive contract provisions that are designed to give the creditor an upper hand in collections and to evade legal protections for the debtor.[12] The rule prohibits confessions of judgment, exemption waivers, irrevocable wage assignments, non-purchase security interests in household goods, pyramiding late charges, and deceptive cosigner practices.

Unfortunately, the credit industry has created a new set of practices in consumer credit relationships that are just as abusive, unfair, and harmful to consumers as those made illegal by the FTC in 1984. Now, the practices of creditors in the 21st century need to be addressed as well. The Credit Practices Rule should be updated to:

1. Prohibit loans secured by check or electronic access to the consumer's bank account, when at the time of the loan, there are insufficient funds in the account to cover the check or promise to pay.
2. Update the list of household goods in which a non-purchase money security interest cannot be taken, to recognize the changes in precious items in the thirty years since the adoption of the original Credit Practices Rule.
3. Prohibit multiple late fees for a single missed payment when subsequent payments are made on time.
4. Require a right to reinstate after repossession of a vehicle or manufactured home.
5. Prohibit the inclusion in consumer contracts of clauses requiring arbitration orwaiving trial by jury or the right to bring a class action.
6. Prohibit creditors and debt collectors from selling or assigning a debt without giving the consumer notice of the transfer and providing the transferee with proof of the details of the debt, including proof that it is not time-barred.
7. Prohibit creditors or their agents from entering a debtor's home for any purpose allegedly authorized by contract without first obtaining a court order.
8. Prohibit a debt collector from collecting a contingent fee from child support payments, unless the payments were solely the result of the debt collector's efforts.
9. Prohibit the attachment of funds or property known to be exempt from collection.
10. Require full assignee liability for all consumer loans.

For more information on these proposals, please see our paper on *Time to Update the Credit Practices Rule: CFPB Should Modernize FTC Rule Addressing Abusive Creditor Collection Practices.*[13]

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[11] 15 U.S.C. § 1692 et seq.

[12] At the time – the early 1980s – most states had healthy limits on the terms and conditions of credit contracts, which meant that these credit origination issues were not as much of an issue.

[13] Available at https://www.nclc.org/images/pdf/debt_collection/credit-practices-rule-update.pdf.