New Civil Liberties Alliance

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RE: *REQUEST FOR INFORMATION REGARDING BUREAU GUIDANCE AND IMPLEMENTATION SUPPORT*, DOCKET NO. CFPB-2018-0013

Director Mulvaney:

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the Bureau of Consumer Financial Protection's *Request for Information Regarding Bureau Guidance and Implementation Support*, CFPB-2018-0013.

NCLA sincerely appreciates this opportunity to provide commentary on the Bureau's past use of guidance and its invitation for suggestions as to how it can ensure that its future guidance adheres to law. Unfortunately, the Bureau's past use of guidance has been marked by unlawful practices that undermine representative government and the due process of law. Instead of merely explaining existing legal duties, the Bureau has attempted to impose new or additional legal duties through informal guidance. The Bureau has also threatened aggressive enforcement efforts for perceived noncompliance with these informal modes of regulation. The Bureau has thereby exercised powers that were never given to it in the first place.

To stop these improper practices, and remedy past actions, NCLA proposes that the Bureau immediately revise its use of all forms of guidance. As set out below, the Bureau should only issue guidance formally—in the form of rules, after notice and comment—and, moreover, must ensure that its guidance will not be used to improperly coerce compliance with legal duties that are not clearly set out by statute. Further, the Bureau should examine its past practices and revise or rescind prior guidance that is inconsistent with the new policy.

I. Statement of Interest

The New Civil Liberties Alliance is a nonprofit civil rights organization founded to defend constitutional rights through original litigation, amicus curiae briefs, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to live under laws made by the nation's elected lawmakers rather than by prosecutors or bureaucrats, and the right to be tried in front of an impartial and independent judge whenever the government brings cases against private parties.

NCLA defends civil liberties by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution's design sought to prevent. This unconstitutional administrative state within the Constitution's United States violates more rights of more Americans than any other aspect of American law, and it is therefore the focus of NCLA's efforts.

Even where NCLA has not yet brought a suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA) and with the Constitution.

II. The Bureau's Request for Information

NCLA submits this commentary in response to the following areas of inquiry set out in the Bureau's Request for Information (RFI). First, NCLA responds to the Bureau's general request for

input concerning "changes that it may make, consistent with applicable law, to the formats, process, and delivery methods for providing guidance." *RFI*, CFPB-2018-0013, at 8. As set out in Topic 19, the Bureau asked for input concerning "[o]ther approaches, methods, or practices not currently employed by the Bureau that would enhance external stakeholders' ability to comprehend, implement, or comply with statutes and regulations subject to the Bureau's purview." *Id.* at 20. The Bureau also asked for "[s]pecific suggestions regarding any potential updates or modifications to the Bureau's approach to providing guidance," with preference given to suggestions that "focus on revisions that the Bureau could implement without changes in the law, consistent with the Bureau's authorities and in light of tradeoffs under the APA framework described above." *Id.* at 9-10.

Second, NCLA responds to the Bureau's requests for commentary concerning the application of notice-and-comment procedures prior to issuing guidance. In Topic 11, the Bureau asked, "Whether there are circumstances in which the Bureau should use the notice-and-comment process (even though not legally required) for standalone interpretive rules." *Id.* at 16.[1] The Bureau also asked more generally about what formal procedures should be employed prior to issuance of all types of guidance documents. *Id.* at 8.

Third, NCLA responds to the Bureau's request for comment "on the disclaimers used for its non-rule guidance." *Id.* at 8. Specifically, Topics 21, 22 and 23, requested commentary concerning "[d]esired changes to the Bureau's disclaimer language or approach to disclaimers generally, and whether other Federal agencies have adopted disclaimer language or approaches to disclaimers that would be useful to the Bureau," "whether the Bureau should adopt a single, more generic disclaimer to be used in most instances," and "[o]ther feedback" on this topic. *Id.* at 22.

III. Problems with Existing Use of Guidance

The Bureau's existing guidance and its use of guidance for administrative "extortion" is of dubious lawfulness—under both the APA and the Constitution. While the RFI acknowledged that the Bureau's issuance of informal "non-rule guidance" involves "tradeoffs" between expediency and potentially negative impacts on regulated entities, *RFI*, CFPB-2018-0013, at 7, NCLA respectfully

[1] The Bureau's assertion that it has the authority to issue binding and prospective rules without undergoing notice-and-comment procedures, merely by labeling them "interpretive," is incorrect. As discussed more fully below, the APA generally mandates notice-and-comment procedures any time an agency issues a rule "of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]" *See* 5 U.S.C. §§ 551(4), 553(b)-(c). Even if it is labeled an "interpretive rule," "if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule," which must undergo notice-and-comment procedures. *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*).

submits that the problems associated with such guidance are much more significant than what may be understood by the Bureau. Despite existing legal limitations, agencies in general and the Bureau in particular have often used guidance to effectively create new law without following statutory and constitutional requirements. NCLA submits that the use of such informal guidance by the Bureau constitutes a "commonplace and dangerous" abuse of "extralegal" agency power, which must cease immediately. Philip Hamburger, *Is Administrative Law Unlawful?* 260 (2014).

A. The Unlawfulness of Binding "Guidance"

The problems with binding guidance are both statutory and constitutional. Such guidance violates the APA, as has been acknowledged by the Justice Department, see Memorandum from Attorney General Jefferson B. Sessions III, *Prohibition on Improper Guidance Documents*, at 1 (Nov. 16, 2017), *available at* https://www.justice.gov/opa/press-release/file/1012271/download, and it further runs afoul of the Constitution.

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). This is a constitutional barrier to an exercise of legislative power by an agency. Further, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, even if an agency could constitutionally exercise legislative power, it cannot purport to bind anyone without congressional authorization.

And, instead of conferring such power, the APA categorically *prohibits* the issuance of binding guidance. Under the statute, an agency may only promulgate a "rule," which is any agency action "of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency," following formal notice-and-comment procedures. *See* 5 U.S.C. §§ 551(4) (definition of "rule"), 553(b)-(c) (notice-and-comment procedures). A rule is an action that "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). If an agency issues guidance that purports to be binding—or that the Bureau treats as binding—without following the APA's procedural requirements, it is legally invalid for that reason. *Id.* at 1025.

There are good reasons for the APA's strictures. While eschewing "notice-and-comment obligation makes the process of issuing interpretive rules [and other guidance] comparatively easier

for agencies than issuing legislative rules," *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015), notice-and-comment procedures serve important interests. As the Supreme Court has explained, "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). "APA notice and comment" is one such formal procedure, "designed to assure due deliberation." *Id.* (quoting *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 741 (1996)).

Sweeping aside such formal deliberative processes dilutes whatever "democratic" pretenses remain in agency action. Any authority given to the Bureau to act came with a recognition that it would be at least slightly accountable through the notice-and-comment procedures. *See Mead Corp.*, 533 U.S. at 230. When the Bureau dispenses with such deliberation, it acts without even a nod to popular accountability or open discussion. Legally established processes designed to assure accountability to the people must not be dismissed merely because it is "easier" to act without them.

Further, eschewing formal procedures undermines the ability of regulated entities to discern the precise nature of their legal duties. Formal notice of rulemaking at least gives Americans an idea of the rules they are expected to follow. Hamburger, *supra*, at 341. But interpretation "done by means of guidance," which may or may not be publicly available, and may perhaps become known only through administrative adjudication, provides no meaningful notice of a party's duties. *Ibid.* This creates "incalculable burdens" for regulated entities who must simply guess at what their duties are. *Ibid.* And by itself, it may violate constitutional due process requirements of fair notice. *Id.* at 241.

Next, when regulated entities are made aware of the Bureau's guidance they are often improperly coerced to comply with duties that are not set forth in any law. *Id.* at 114. Guidance often takes the form of the Bureau's "views about what the public should do," "with the unmistakable hint that it is advisable to comply." *Ibid.* Regulated entities readily understand that it is in their best interest to comply with the wishes of their regulatory overlord, even if the Bureau lacks the genuine authority to force compliance at all. *Ibid.* Indeed, "[w]hen agencies want to impose restrictions they cannot openly adopt as administrative rules, and that they cannot plausibly call 'interpretation,' they typically place the restrictions in guidance, advice, or other informal directives." *Id.* at 260. The result is a "sort of extortion," that "allows agencies to exercise a profound under-the-table power, far greater than the above-board government powers, even greater than the above-board administrative powers, and agencies thuggishly use it to secure what they euphemistically call

'cooperation.'" *Id.* at 335. This is a further violation of the Constitution as it evades the due process of law. *Id.* at 353.

This coercion is a consequence that the courts have long recognized, albeit one that they have thus far failed to remedy. Guidance documents, such as warning letters or other enforcement guides, often result in injurious "[p]ractical consequences, such as the threat of having to defend [one]self in an administrative hearing should the agency actually decide to pursue enforcement[.]" *Indep. Equip. Dealers Ass'n v. Envtl. Prot. Agency*, 372 F.3d 420, 428 (D.C. Cir. 2004) (internal citation and quotation marks omitted). These consequences can result in "a dramatic impact on the[] [affected] industry[,]" *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1272 (D.C. Cir. 2018), because a regulated entity "really ha[s] no choice when faced with … 'recommendations' except to fold," and might "feel pressure to voluntarily conform their behavior because the writing is on the wall[.]" *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014).

Of course, at its worst, this coercive and unlawful exercise of power may have been the whole *point* of the Bureau's past reliance on informal guidance. As one court noted, "another advantage" for an agency to issuing informal guidance documents, is "immunizing its lawmaking from judicial review." *Appalachian Power Co. v. Envtl. Prot. Agency*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). Unless a regulated entity wishes to wait until the Bureau brings an enforcement action against it, the only way it can challenge coercive and otherwise improper guidance is through the APA. But the APA typically allows review only of "final agency action." 5 U.S.C. § 704. "[T]wo conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking process … . And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted).

But "an agency's action is not necessarily final merely because it is binding." *Appalachian Power Co.*, 208 F.3d at 1022. An initial or interim ruling, even one that binds, "does not mark the consummation of agency decisionmaking" and thus might not constitute final agency action. *Soundboard Ass'n*, 888 F.3d at 1271; *see also Ctr. for Food Safety v. Burwell*, 126 F. Supp. 3d 114, 118 (D.D.C. 2015) (Contreras, J.) (discussing binding "Interim Policy" of agency that was in effect for 17 years but evaded judicial review as non-final action).

Regrettably, as discussed, courts generally do not consider the coercive effects of guidance documents as sufficiently binding to permit review. "The fact that an opinion of someone at an agency could potentially impact a regulated entity," or even have "a dramatic impact," "says nothing

about whether that opinion is the culmination of the agency's decisionmaking," and whether it is therefore reviewable under the APA. *Soundboard Ass'n*, 888 F.3d at 1272.

The use of binding guidance thus routinely results in abuses of administrative power, and "often leaves Americans at the mercy of administrative agencies." Hamburger, *supra*, at 260, 335. The issuance of such guidance is an "evasion" of the Constitution, and an affront to the basic premise that laws can only be made by the Congress. *Id.* at 113-14; *see also La. Pub. Serv. Comm'n*, 476 U.S. at 374. It is also statutorily forbidden. *Mendoza*, 754 F.3d at 1021. And it often results in violations of the due process of law. Hamburger, *supra*, at 241, 353. But, perhaps by design, such improper agency conduct routinely occurs without any hope of judicial intervention. *See Appalachian Power Co.*, 208 F.3d at 1020.

B. The Bureau's Use of Guidance

While the problems with guidance outlined above are evident at a broad swath of agencies, the Bureau stands out for its egregious abuse of guidance. This is especially obvious from its interpretation of the scope of the Dodd-Frank Act's prohibition on "unfair, deceptive, or abusive acts and practices" (UDAAPs).

In October 2012 the Bureau released its "examination procedures" for identifying "unfair, deceptive, or abusive acts or practices," under the Dodd-Frank Act. CFPB Supervision and Examination Manual, *Unfair, Deceptive, and Abusive Acts or Practices (UDAAPs)* (Oct. 2012), *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf. The "examination procedures" set forth "general guidance on:" "[1] The principles of unfairness, deception, and abuse in the context of offering and providing consumer financial products and services; [2] Assessing the risk that an institution's practices may be unfair, deceptive, or abusive; [3] Identifying unfair, deceptive or abusive acts or practices (including by providing examples of potentially unfair or deceptive acts and practices); and [4] Understanding the interplay between unfair, deceptive, or abusive acts or practices and other consumer protection statutes." *Id.* at 1.

The manual first set out a comprehensive definition of what the Bureau asserted constituted "unfair" acts or practices. *Ibid.* This definition was "inform[ed]" by Federal Trade Commission (FTC) practice when applying a different statute but was otherwise provided without authority beyond the Dodd-Frank Act itself. *Id.* at 1 n. 2.

In this definition, the Bureau made several legal assertions that were not necessarily supported by the statute. For example, Section 1031 of the Act, 12 U.S.C. §§ 5531(a), (c)(1)(A), prohibits "unfair[]" "practices," which are those "likely to cause substantial injury to consumers." "Substantial injury" is a term the statute leaves undefined. In the enforcement guide, the Bureau asserted unequivocally that, while conduct could only be "unfair" if it was "likely to cause substantial injury to consumers," "[a]ctual injury is not required in every case," and, "emotional impacts may amount to … substantial injury." *UDAAPs*, at 2. But this interpretation of Dodd-Frank is not required by the statute, and it is far from the only possible reading of the statute. After all, even the FTC standard upon which this guide was allegedly based, requires a "large" and "real" injury, with "emotional distress [being] ordinarily insufficient." J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall and Resurrection*, May 30, 2003, *available at* https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection#N_40; *see also American Financial Services Ass'n v. F.T.C.*, 767 F.2d 957, 972-73 (D.C. Cir. 1985) ("in most cases substantial injury would involve monetary harm," and "ordinarily emotional impact and other more subjective types of harm would not make a practice unfair") (internal citations and quotation marks omitted). Notably, the FTC's historical use of unfairness standards have been criticized by courts as the product of inappropriate efforts "to test the limits" of its authority. *LabMD, Inc. v. Fed. Trade Comm'n*, --- F.3d ----, 2018 U.S. App. LEXIS 15229, at *12 (June 6, 2018) (quoting Beales, *The FTC's Use of Unfairness Authority*, *supra*).

The Bureau also purported to define "deceptive acts or practices" in great detail. *UDAAPs*, at 5. As with "unfair" practices, Dodd-Frank prohibited deception, but left the term entirely undefined. *See* 12 U.S.C. § 5536(a)(1)(B). The Bureau again set out comprehensive and unequivocal rules, consisting of a three-part test for deceptiveness that was borrowed from the FTC. *UDAAPs*, at 5. Once again, whether or not this is a plausible reading of the enabling statute, this multi-part test is far from the only possible reasonable interpretation of the statute.

Finally, the Bureau turned to "abusive" practices. *UDAAPs*, at 9. Unlike the concepts of unfair and deceptive practices which are borrowed from other laws, the prohibition of "abusive" practices is unique to Dodd-Frank. *See* 12 U.S.C. §§ 5531(d), 5536(a)(1)(B). And, as described by then-Director Richard Cordray in Congressional testimony from January of 2012, "the term abusive in the statute is … a little bit of a puzzle because it is a new term." *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs. & Bailouts of Pub. & Private Programs,* 112th Cong. 112-107, at 69 (2012). Director Cordray's testimony was a confession of ignorance: "In

terms of abusive specifically [], we have been looking at it, trying to understand it, and we have determined that that is going to have to be a fact[s] and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill[.]" *Ibid.* Adhering to that sentiment, the Bureau simply restated the statutory requirements directly without further explanation in the Supervision and Examination Manual. *UDAAPs*, at 9. The only advice remaining from the Bureau then, was Director Cordray's suggestion that if businesses "stay away from pretty outrageous practices, [they] should be pretty safe." Dir. Cordray Testimony, 112th Cong. 112-107, at 71.

While the UDAAP chapter did not directly allude to this disclaimer, the entire Examination Manual included a strategic disclaimer that it "provides internal guidance to our supervisory staff" and "does not bind the CFPB and does not create any rights, benefits, or defenses, substantive or procedural, that are enforceable by any party in any manner." CFPB Supervision and Examination Manual, *Disclaimer*, *available at* https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/.

On July 10, 2013, the Bureau issued CFPB Bulletin 2013-07, entitled *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts*, *available at* https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf. This bulletin "describe[d] certain acts or practices related to the collection of consumer debt" that the Bureau believed could constitute acts "prohibited by the Dodd-Frank Act." *Id.* at 1. The Bulletin listed examples of conduct that it believed could constitute examples of unlawful conduct, which the Bureau said it would be "watching … closely." *Id.* at 5. While maintaining that the concepts of unfairness, deception and abusiveness were all distinct, the Bureau did not bother identifying which example related to which theory of liability. *See id.* at 5-6. To support some of these examples, the Bureau cited FTC enforcement actions, while still insisting that these very FTC precedents were "not binding upon the Bureau[.]" *Id.* at 1 n. 1. The Bureau also cited five examples of what it claimed was prohibited conduct without any authority for its view. *Id.* at 5-6. The Bureau only cited *one* enforcement action conducted by the Bureau itself to support its list of prohibitions. *Id.* at 5, nn. 29-30.

This Bulletin, which was not a formal rule (legislative or interpretive), did not contain a distinct disclaimer about its limitations as mere non-binding guidance. Instead the Bulletin claimed it only described "certain acts or practices related to the collection of consumer debt that could,

depending on the facts and circumstances, constitute UDAAPs prohibited by the Dodd-Frank Act[,]" and warned that such descriptions were "not exhaustive." *Id.* at 1. The Bulletin further warned that the Bureau would "review closely the practices of those engaged in" these "practices" for potential enforcement. *Id.* at 6. Finally, the Bulletin explained that its interpretations under the Bulletin might differ from the views of other agencies, such as the FTC, and nevertheless, the Bureau declared that it would not be bound by any contrary interpretation from outside of the Bureau. *Id.* at 1 n. 1.

To date, the Bureau has not issued final rules, even interpretive rules, about what constitutes UDAAPs under Dodd-Frank. "While both Congress and industry groups have called upon the bureau to clarify the scope and meaning of UDAAP through its rulemaking authority, the CFPB has declined to do so[.]" Joseph L. Barloon & Anand S. Raman, *CFPB Defines "Unfair," "Deceptive" and "Abusive" Practices Through Enforcement Activity*, at 1 (Jan. 2015), *available at* https://www.skadden.com/insights/publications/2015/01/cfpb-defines-unfair-deceptive-and-abusive-practice. Thus, the broad, coercive, and legally-questionable assertions found in these two informal guidance documents govern the industry.

And with "drastic" penalties of up to $1 million dollars *per day* for knowing violations of the UDAAP provision, industry groups reasonably feel significant pressure to comply regardless of the validity of the existing guidance. *Ibid.* Indeed, the Bureau has made good on its threats to aggressively police perceived violations of its ominous guidance. As of January 2015, half of the Bureau's public enforcement actions "alleged violations of the UDAAP provision of the Dodd-Frank Act[,]" resulting "in restitution to consumers totaling more than $1.7 billion, as well as civil money penalties totaling more than $142 million." *Ibid.*

C. The Bureau's Guidance Is Unlawful

The Bureau's guidance on UDAAPs is unlawful. This binding guidance collides with both the APA and the Constitution.

First, the Bureau has engaged in *de facto* rulemaking without following the legal requirements set out in the APA, and it thus has also acted without constitutional authority. *See La. Pub. Serv. Comm'n*, 476 U.S. at 374. The Bureau's guidance rejected even the pretense of notice-and-comment rulemaking as required by the statute. *See* 5 U.S.C. § 553. Indeed, neither the enforcement manual nor CFPB Bulletin 2013-07 underwent notice-and-comment procedures, and, accordingly, neither were based on input from the regulated entities or the consumers who were the purported

beneficiaries of the Bureau's enforcement actions. But the Bureau obviously *could* have gone through these formal processes, as the Bureau's last word on the issue was issued almost five years ago. To the extent that the Bureau might have thought it necessary to quickly set its policy in 2012 and 2013, the Bureau's subsequent inaction totally undermines any such temporary, emergency justification. NCLA submits that the clearest implication from this course of action is simply that it was much easier for the Bureau to coerce compliance with its informal guidelines, than to engage in formal agency action.

Next, even though the enforcement manual and guidance have been published, the actual legal duties set out are so vague that regulated entities have no choice but to guess at how they should best attempt to comply with the Bureau's edicts. To be sure, the problem starts with the vague prohibitions in the enabling statute. *See* 12 U.S.C. § 5536(a)(1)(B) (prohibition on any "unfair, deceptive, or abusive act or practice"). However, the Bureau's guidance has done little to clarify the rules, as the Bureau has repeatedly emphasized that its examples of prohibited practice can only "provide insight into practices that have been alleged to be unfair by other regulators"—the clear implication being that they cannot be relied upon to determine the contours of the rules. *UDAAPs*, at 3. Examples from other agencies were both "not exhaustive" and potentially "not binding" on the Bureau, CFPB Bulletin 2013-07, 1, 1 n. 1, meaning that their legal significance is impossible to discern. Of course, the Bureau still warns that it will be "watching" certain behavior "closely." CFPB Bulletin 2013-07, at 5. The ultimate message for regulated parties, then, is that prior enforcement actions may, or may not, yield clues about what constitutes lawful conduct, but no course of conduct can really be deemed safe.

There is also good reason to think that the Bureau's aggressive stance on the interpretations of UDAAPs significantly exceeds the scope of the statute. For instance, in the 1970s the FTC's own expansive interpretation of the more limited concept of "unfairness" resulted in such widespread "public disapprov[al]," that it caused a showdown between the FTC and Congress. *LabMD, Inc.*, 2018 U.S. App. LEXIS 15229, at *13. After this "episode" the FTC was forced to walk back its prior interpretation. *Ibid.* Significantly, courts have recently suggested that the FTC's current view of unfairness is *still* broader than, and perhaps inconsistent with, the Commission's lawful authority *See id.* at *13 n. 24 (regardless of the FTC's prior views, an act or practice is not "unfair" unless it causes substantial injury "under a well-established legal standard, whether grounded in statute, the common law, or the Constitution").

The Bureau's stance on the scope of UDAAPs ignores this history and the consequences of the FTC's prior action, and it wanders even farther into unjustified territory. Bulletin 2013-07 makes very clear that the Bureau will adopt FTC interpretations when convenient, while still warning that it may take an even more expansive view of its authority whenever it deems it appropriate. Bulletin 2013-07, at 1 n. 1. To the extent that the FTC's formal views are themselves insupportable, the Bureau's informal and much broader interpretations can hardly be justified.

Regardless of whether the Bureau's interpretations of UDAAPs are correct, or even reasonable, regulated entities face overwhelming pressure to conform their behavior as best they can to the guidance. Caught between adherence to the Bureau's vague guidance statements and the threat of aggressive enforcement with company-destroying fines, regulated parties try to fall in line, but always must worry. The late Christopher Hitchens wrote: "The conventional word that is employed to describe tyranny is 'systematic.' The true essence of a dictatorship is in fact not its regularity but its unpredictability and caprice; those who live under it must never be able to relax, must never be quite sure if they have followed the rules correctly or not." Christopher Hitchens, *Hitch-22: A Memoir* 51 (2010). Whether or not this account offers a correct description of tyranny, it aptly summarizes life under the Bureau's guidance.

The Bureau's combination of ambiguous guidance and draconian penalties opens up vast opportunities for government "by raised eyebrow." With this combination of uncertainty and severity, the Bureau need only hint at what it wants from regulated parties, and they will ordinarily have no choice but to bow to what they think the Bureau desires. The result is more heavy handed and coercive than many criminal statutes—with none of the protections of criminal or even civil procedure—and thus represents the worst of administrative "extortion." Hamburger, *supra*, at 335. This deprives Americans of ordinary judicial process, including the due process of law. *Id.* at 353.

Finally, even if an entity has the means to resist the Bureau's coercive power, there is little it can do to invalidate the UDAAP guidance outside of defending itself in a direct enforcement action. Despite being the last word on this issue, both the Supervision and Examination Manual and Bulletin 2013-07 would likely escape review as "final" agency actions. *See Soundboard Ass'n*, 888 F.3d at 1271. And, even if they were final, the "dramatic impact" they have on the industry still may not bear enough formality for judicial intervention. *See id.* at 1272. An entity should not have to risk enforcement actions and ruinous fines in order to challenge an unlawful set of "rules," yet that is precisely the situation the industry faces under the Bureau's guidance.

IV. NCLA'S SPECIFIC RECOMMENDATIONS

To combat the problems described above, the Bureau must reform its policies surrounding the issuance of guidance and adopt a formal rule prohibiting improper uses of Bureau guidance. Such a rule governing guidance should be in writing and adopted via notice-and-comment rulemaking, and ought to incorporate, at a minimum, the following restrictions.

The Bureau should first forbid the issuance of any guidance statement or document that purports to impose legally binding duties or prohibitions on regulated parties. This ban should extend to a prohibition on the issuance of binding standards by which the Bureau will determine compliance with existing statutory or regulatory requirements. The Bureau should also prohibit anyone within it from adopting a new position inconsistent with existing law in any matter or applying an interpretation of law that is not clearly and unequivocally justified by statutory language.

To better ensure compliance with this prohibition, the Bureau should also strictly limit the issuance of any guidance materials in several ways. First, all guidance should be issued formally, following notice-and-comment procedures, to allow full consideration of competing interests. Any proposed guidance should be published ahead of time in the Federal Register, be subject to a comment period, and only then should it be published as a final guidance document. To ensure the possibility of judicial review, these documents must also clearly state that they constitute final agency action pursuant to 5 U.S.C. § 704.

Next, all guidance should clearly set out its limitations. Guidance should identify itself as "guidance" or its functional equivalent and explicitly disclaim any force or effect of law. Guidance should further explain that it cannot impose new legal requirements, and that it cannot be used by the Bureau for purposes of coercing persons or entities outside the agency itself into taking any action or refraining from taking any action beyond what is already required by the terms of an applicable statute. To better empower regulated entities in dealing with enforcement agents in the field, such a disclaimer should appear prominently on the Bureau's website. The Bureau must also prohibit its employees from using a regulated entity's decision to disregard the Bureau's suggestions as any basis to institute an investigation or enforcement action or as evidence of any regulated entity's violation of law. In addition, the Bureau should prohibit its employees from applying or relying on improper guidance that was issued by an agency other than the Bureau.

Finally, the Bureau should review its past communications, including informal communications with regulated parties, and should revise or rescind prior communications that conflict with these new policies.

These restrictions would formalize limitations already embraced by other agencies. For example, in 2007 the Office of Management and Budget for the Executive Office of the President, addressed the ongoing problem caused by the issuance of "poorly designed or improperly implemented" "guidance documents" from administrative entities, and suggested that agencies explicitly disclaim any binding effects in guidance documents. Office of Mgmt. & Budget, Executive Office of the President, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3432, 3440 (Jan. 18, 2007). Additionally, in November of last year, the Attorney General issued a memorandum prohibiting all Department of Justice components from issuing agency guidance documents that "purport to create rights or obligations binding on persons or entities outside the Executive Branch." Memorandum from Attorney General Jefferson B. Sessions III, *Prohibition on Improper Guidance Documents*, at 1 (Nov. 16, 2017), *available at* https://www.justice.gov/opa/press-release/file/1012271/download. This memorandum also directed the Department's Regulatory Reform Task Force "to work with components to identify existing guidance documents that should be repealed, replaced, or modified in light of these principles." *Id.* at 2. The next month the Department repealed more than two dozen prior pieces of guidance. Press Release, *Attorney General Jeff Sessions Rescinds 25 Guidance Documents*, Department of Justice, Office of Public Affairs, Press Release No. 17-1469 (Dec. 21, 2017) *available at* https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents. And then on January 25, 2018, Associate Attorney General Rachel Brand, issued a memorandum entitled *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases*, at 2, *available at* https://www.justice.gov/file/1028756/download, which barred certain Department litigators from using "its enforcement authority to effectively convert agency guidance documents into binding rules." The Bureau should emulate these efforts, repeal past guidance that it has treated as binding on regulated entities, and institute the formal rule described above.

V. Conclusion

The Bureau has taken an important step toward remedying its abuse of informal guidance by issuing this RFI—and essentially admitting that it has a problem. The Bureau has improperly used guidance as a means of coercing the industry, and such misconduct must end. NCLA hopes that the Bureau will take this opportunity to recognize the full scope of its past transgressions, implement effective controls to prevent future abuses, and conduct a comprehensive review of past practices by adopting the recommendations outlined in these formal comments.

Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Caleb Kruckenberg, Litigation Counsel, at caleb.kruckenberg@ncla.legal.

Sincerely,

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