

Practice Update

CFPB Issues New Policy Statement on Abusive Acts or Practices

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On April 3rd, the Consumer Financial Protection Bureau issued a new [Policy Statement](#) (“Policy”) providing an analytical framework to identify “abusive” conduct.^[1] This is the second time the CFPB has issued a Policy Statement on abusive conduct – the agency previously issued one in 2020 under Director Kraninger and repealed it the following year under Acting Director Uejio.^[2] The new Policy draws on facts of prior cases to provide a roadmap of what the CFPB considers to be abusive conduct. The Policy signals the CFPB may be considering more enforcement cases alleging the existence of abusive conduct and that it wants to make it easier for other government enforcers to bring similar cases. The Policy is quite detailed and lists a variety of conduct that CFPB could deem abusive.

In the 1930s, Congress authorized the Federal Trade Commission to prohibit unfair or deceptive practices. In the 2010 Dodd-Frank Act, Congress expanded on that concept to also prohibit abusive conduct by providers of consumer financial products and create the CFPB to enforce that prohibition.^[3] Since that time, the CFPB has brought a number of enforcement actions against companies for engaging in abusive conduct, although usually alongside allegations of unfair or deceptive conduct.

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The new Policy summarizes the existing case law concerning abusive conduct, analyzes its elements, and provides a framework for identifying it. According to the CFPB, its goal in issuing the Policy is to assist government enforcers and the market with identifying abusive acts or practices.

The Dodd-Frank Act defines prohibited abusive conduct in two provisions. The first states an act or practice is abusive if it “**materially interferes**” with a consumer’s ability to understand a consumer financial product or service’s term or condition. The Policy explains this first prong in more general terms as meaning a company cannot obscure important features of its product or service.

The second abusiveness provision states an act or practice is abusive if it takes “**unreasonable advantage**” of a consumer’s lack of understanding regarding the material risks, costs, or conditions of the product or service; a consumer’s inability to protect their interests in selecting or using the product or service; or the consumer’s reasonable reliance on a covered person to act in the consumer’s interest.^[4] In more general terms, the CFPB explains this means a company cannot leverage gaps in understanding, bargaining power, or reliance to take unreasonable advantage of a consumer. We discuss each prong in more detail below.

I. Material Interference

The first type of abusive conduct is “material interference” or obscuring terms or important features of a product or service. The CFPB believes consumers are entitled to clearly understand material information concerning a product or service and are negatively affected if that information is too complicated or insufficiently explained. The Policy explains intent to interfere or obscure a consumer’s understanding is not necessary to establish this type of abusive conduct.

In the CFPB's view, abusiveness is different from a claim of deception because the latter is associated with words and the former is associated with actions. The Policy provides several examples of material interference: putting disclosures in fine print, using complex language or jargon to make terms confusing, and choosing to withhold information on terms and conditions until after receiving an oral-enrollment.[5]

Material interference includes both human and digital interference that distracts or shifts a consumer's attention in order to hide key terms. Human interference includes interference with a person's sight, hearing, or understanding and could take the form of physically hiding disclosures or physically blocking a consumer from seeing important notices.[6] Digital interference includes manipulations such as the use of pop-up or drop-down boxes, multiple click-throughs, or "dark patterns" that have the effect of making the terms and conditions materially less accessible or salient.

II. Unreasonable Advantage

The CFPB explains the second form of abusiveness occurs when entities take unreasonable advantage of consumers through gaps in understanding, unequal bargaining power, and reasonable reliance.[7] A company leverages a consumer's lack of understanding or inability to protect himself when the consumer does not understand the material risks, costs, or conditions of the product or service. Risks, costs, and conditions include, for example, consequences or likelihood of default and loss of future benefits, undisclosed fees, and reputational harm.

Examples of CFPB enforcement actions against entities for leveraging gaps in understanding include:

- When the consumer could not fully understand the risks associated with loan costs or could not

compare a loan with loans from different pension advance companies;[8]

- When a debt relief company continued to collect fees while knowing it was highly unlikely the consumer would be able to complete its debt settlement program because the consumer had inadequate income;[9]
- When a loan servicing company's actions led a consumer to believe it was taking the consumer's interests into account in terms of repaying past debts without telling the consumer the loans were void and could not be lawfully collected;[10] and
- When consumers were unaware a bank could collect fees because the bank's explanations were too complex and counterintuitive.[11]

The second type of “unreasonable advantage” that can amount to abusive conduct is where consumers and the company providing them a product or service have unequal bargaining power. The Policy explains this type of unreasonable advantage occurs when a company forces consumers into less advantageous deals, extracts excess profits or provides worse service to reduce the company's costs.

Examples of CFPB enforcement actions for leveraging unequal bargaining power include:

- When a financial technology company told consumers they could change their allocated payments but consumers were never able reach a customer-service representative to do so;[12]
- When a bank opened credit cards, lines of credit and accounts without the consumers knowledge or consent;[13] and
- When a financial services company charged prisoners extra fees knowing they had no other service options.[14]

The third type of “unreasonable advantage” described in the Policy is when a company realizes a

consumer will reasonably rely on the company to act in the consumer's best interests and the company fails to do so. The Policy explains that a company abuses a consumer's reasonable reliance when it manipulates, steers, or engages in self-dealing.

Examples of CFPB enforcement actions for leveraging reasonable reliance include:

- When college financial aid advisors encouraged students to secure loans they could not afford because the advisors earned more revenue when students took more loans;^[15]
- When telemarketers posed as student loan counselors and persuaded consumers to rely on them to act in their best interests while charging fees to enroll students in debt-relief plans for which they were ineligible;^[16] and
- When an advance company told consumers they should seek advice from an intermediary and directed them to an attorney who had, and failed to disclose, ties to the company.^[17]

* * *

While the Policy is immediately effective upon publication in the *Federal Register* (which is imminent), CFPB is seeking public comment through July 3, 2023. It may take comments into account in future revisions to the Policy. We advise clients to consider your products and services carefully in light of the Policy's examples of abusive conduct.

Please reach out to the CFS+ Team if we can assist you in evaluating the application of the Policy to your current or future products and services.

Citations

[1] Consumer Financial Protection Bureau, Policy Statement (2023),

https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf.

[2] Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 FR 6733 (Feb. 6, 2020).

The 2020 statement did not discuss existing precedent or provide a framework identifying abusive acts or practices as this one does.

[3] 12 U.S.C. § 5531(a).

[4] 12 U.S.C. § 5331(d).

[5] *TD Bank, N.A.*, File No. 2020-BCFP-0007, at 16-20 (Aug. 20, 2020).

[6] *CFPB v. All Am. Check Cashing, Inc.*, No. 3:16-cv-00356 (S.D. Miss. May 11, 2016).

[7] 12 U.S.C. § 5531(d).

[8] *CFPB v. Pension Funding LLC*, No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015).

[9] *CFPB v. Am. Debt Settlement Sols.*, No. 9:13-cv-80548-DMM (S.D. Fla. June 6, 2013).

[10] *CFPB v. Think Fin., LLC*, No. 4:17-cv-00127 (D. Mont. Mar. 28, 2018).

[11] *Regions Bank*, File No. 2022-CFPB-0008 (Sept. 28, 2022).

[12] *CFPB v. PayPal, Inc.*, No. 1:15-cv-01426-PDB (D. Md. May 19, 2015).

[13] *U.S. Bank, N.A.*, File No. 2022-CFPB-0006 (July 28, 2022).

[14] *JPay, LLC*, File No. 2021-CFPB-0006 (Oct. 19, 2021).

[15] *CFPB v. ITT Educ. Servs.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015).

[16] *CFPB v. College Educ. Servs., LLC*, No. 8:14-cv-3078-T-36EAJ (M.D. Fla. Dec. 11, 2014).

[17] *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759 (D. Md. Dec. 13, 2017).

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