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CFPB Issues Policy Statement on CFPAs Prohibition on Abusive Conduct

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On April 3, 2023, the Consumer Financial Protection Bureau released a policy statement articulating a new framework for analyzing conduct that it considers "abusive" in violation of federal law. The CFPB until now has provided limited formal guidance on what constitutes "abusive" conduct under the Consumer Financial Protection Act (CFPA).

Consistent with the CFPB's recent statements, the new policy statement touches on concepts of fair dealing and proper market functions when explaining the CFPB's rationale. This includes references to prior concerns about competition where an entity has outsized market share or concentration, or when it otherwise participates in a market structure that disadvantages consumers. The CFPB also heavily focuses on congressional intent and commentary from the CFPA's enactment. It cites legislative history and House Committee on Financial Services testimony to show the necessity of prohibiting abusive conduct and why the policy statement's framework is consistent with the CFPA's legislative intent.

The policy statement offers numerous examples to flesh out each prong of the statutory abusive standard, and it articulates facts and circumstances the CFPB believes may be sufficient to support such a claim. Consistent with the CFPB's prior pronouncements and the CFPB Supervision and Examination Manual, the policy statement also reiterates that neither substantial injury nor harm to consumers is necessary to support a claim for abusive conduct.

Material interference with a consumer's ability to understand a term or condition of a product or service doesn't require a showing of intent or actual misunderstanding

The CFPA declares an act abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service. According to the CFPB, this prohibition applies to actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide information relevant to the ability of a consumer to understand terms and conditions.

Examples of this type of abusive behavior include:

- Buried disclosures, such as the use of fine print, complex language, jargon, or omitting material terms and conditions.
- Physical interference, like impeding a person's ability to see, hear, or understand terms and conditions, such as physically withholding or hiding notices.
- Digital interference, including the use of pop-up or drop-down boxes, multiple click-throughs, or other actions or "dark patterns," which would make terms and conditions materials less accessible or salient.
- Overshadowing, such as the prominent placement of certain content that interferes with the comprehension of other conduct.

The policy statement indicates that an intent to materially interfere with consumer understanding, or evidence of actual consumer misunderstanding, can help support a violation of the abusive standard. But they are not necessary to support liability. Instead, the CFPB says that it need only be shown that the natural consequence of the act or omission is to impede the consumer's ability to understand the product.

Taking unreasonable advantage of certain circumstances rises to the level of abusiveness even if, for example, the entity doesn't cause the lack of understanding of which it takes advantage

The CFPA also provides that an act is abusive if it takes unreasonable advantage of:

1. A lack of understanding on the part of consumers of the material risks, costs, or conditions of the product or service.
2. The consumers' inability to protect their own interests in selecting or using a consumer financial product or service.
3. The reasonable reliance by consumers on a covered person to act in the consumers' interests.

As explained below, the CFPB provides context and conduct supporting violations for each of these three circumstances defined as abusive by the CFPA.

Lack of understanding

This circumstance focuses on **gaps in understanding** that affect consumer decision-making. For purposes of establishing liability, the CFPB says it is enough to show that the consumer does not understand the consequences of defaulting on a loan, for example, or how to realize the benefits of the product. Whether the consumer's lack of understanding was reasonable is irrelevant, and there is no minimum threshold of impacted consumers, says the CFPB. It is not even necessary that the entity itself created the lack of understanding, as long as the entity takes unreasonable advantage of it.

Inability to protect interests

The CFPB here is focused on circumstances where a consumer has **unequal bargaining power**. Some of these circumstances are structural and tied to the nature of the relationship, according to the CFPB, such as where the consumer cannot select an alternative service provider. This occurs, for example, with credit reporting companies, debt collectors or servicing companies. The CFPB says it also will scrutinize under this circumstance the use of form contracts where the consumer is unable to bargain, as well as whether there are high transaction costs to exit a relationship.

Reasonable reliance

The CFPB says this circumstance focuses on situations where the consumer has a reasonable expectation that the institution will act in their interests or advise them on how to make a decision and acts in **reasonable reliance** on it. The CFPB provides two examples of ways in which it may establish reasonable reliance:

1. Where the entity communicates that it will act in the customer's best interests or holds itself out as doing so but falls short of that representation.
2. Where the entity assumes the role of acting on behalf of the consumer or helping them to select service providers in the market.

However, the CFPB notes that there are numerous ways to establish reasonable reliance.

What to expect

The CFPB's policy statement will serve as a formal reference point for future examinations and investigations by the CFPB and other regulators and government enforcers with authority to pursue abusiveness claims. It also will guide market participants as they examine their own policies and practices. As CFPB Director Rohit Chopra stated in remarks the same day the CFPB released the policy statement: "We wanted to assist our fellow government enforcers and the market more broadly by drawing out some of the key principles from our decade of enforcement work."

The policy statement follows a rise in recent actions and statements from the CFPB relying on the abusiveness prong of the CFPA to bring enforcement actions against potentially violative conduct. It also follows guidance released by the CFPB over the past couple of years that continues to define and expand the CFPB's authority to pursue unfair, deceptive, or abusive acts or practices (UDAAPs). For example, the CFPB announced in March 2022 that it intends to use its UDAAP authority to pursue discrimination claims in noncredit financial products, as we detailed in a client alert. With the new policy statement to fall back on, the CFPB is likely to continue to push the limits of its UDAAP authority and use its policy statement to identify abusive conduct and bring enforcement actions where appropriate.

The policy statement will be published in the Federal Register. Public comments are due by July 3, 2023.

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