

Consumer Financial Protection Bureau Doubles Down on Abusive Acts

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On April 3, 2023, the Consumer Financial Protection Bureau (CFPB) doubled down on its aggressive approach to bringing enforcement actions that challenge allegedly abusive acts and practices. <https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/>.

In a new policy statement (“the statement”), the bureau described an expansive view of its abusiveness authority and, using illustrative examples, provided a useful roadmap for enforcers and regulated entities alike.

Background

The Consumer Financial Protection Act of 2010 prohibits any covered person or service provider from engaging in any unfair, deceptive, or abusive act or practice (UDAAP) and empowers the CFPB with both rulemaking and enforcement authority to address UDAAPs.

An act or practice is “abusive” if it satisfies one of two prongs: 1) it materially interferes with consumers’ ability to understand a term or condition of a financial service or product; or 2) it takes unreasonable advantage of a consumer’s lack of understanding of a material risk, inability to protect the consumer’s interests in choosing a product or service, or reasonable reliance on the provider to act in the consumer’s interests.

The CFPB’s new statement unpacks both prongs, providing a detailed list of considerations and illustrative examples relevant to each prong. Importantly, the statement says that substantial injury is not required to establish liability. Instead, the standard aims at acts and practices that “Congress presumed to be harmful or distortionary to the proper functioning of the market.”

The statement explains that the “material interference” prong applies to “actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide” information



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relevant to consumers’ ability to understand terms or conditions.

Examples of material interference include “burying” disclosures, physically withholding or hiding notices, digitally obscuring notices, or overshadowing. The statement takes the position that the bureau need not prove actual material interference.

Instead, it can establish abusive conduct under this prong based on merely a covered person’s intent to interfere or if the “natural consequence” of the covered person’s actions or omissions is to impede consumers’ understanding.

The statement further explains that the “unreasonable advantage” prong concerns when a covered person takes unreasonable advantage of gaps in understanding, unequal bargaining power, or a consumer’s reliance.

According to the statement, this prong requires only that the covered person improperly benefited when a consumer lacked understanding (for whatever reason), had unequal bargaining power (e.g., due to a form contract or limited options), or relied on the covered person (whether because of the covered person’s own statements or its role).

Key Takeaways

1. In tone and approach, the new statement marks a significant departure from earlier policy statements. The CFPB’s 2020 Policy Statement on abusive acts

and practices cabined the Bureau's UDAAP authority by focusing on conduct whose harms outweighed its benefits, avoiding "double-charging" conduct under multiple prongs, and avoiding enforcement where there were good-faith compliance efforts: https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-enforcement-policy_statement.pdf. The new statement, in contrast, expresses a muscular and expansive view of the Bureau's authority, identifying a broad array of potential theories of "abusiveness."

Earlier guidance, including the Bureau's examination manual, also tended to focus only on high-level principles. See https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2023-01.pdf. The statement takes a strikingly different approach, extensively detailing a non-exhaustive laundry list of illustrative examples of allegedly abusive conduct. Notably, the statement includes no citations to the Bureau's examination manual.

2. The new statement tries to codify recent enforcement actions and Bureau policies, without engaging in formal rulemaking. Rather than announce new formal rules, the Bureau published its statement in the Federal Register and requested comments on the "considerations" it articulated as relevant to the abusiveness analysis.

By eschewing formal rulemaking, the Bureau looks to expedite its ability to impose this new framework while limiting the avenues for legal challenges. Whether this APA-avoiding strategy is successful remains to be seen. But what is clear is that the Bureau is seeking to codify previous consent orders and public speeches as the new law of the consumer land.

The statement frequently cites previous Bureau consent orders as authority for its new standards. For example, it cites the JPay consent order concerning prepaid debit cards issued to consumers upon release from correctional facilities as an example of "unequal bargaining power" involving a consumer's lack of choice. See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration/>.

Similarly, in stating that a disclosure's timing can cause it to be "buried," the statement cites TD Bank's 2020 consent order which found an abusive practice where the terms of optional overdraft service allegedly were disclosed only after consumers had already opted in. See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-settlement-td-bank-illegal-overdraft-practices/>.

Even without direct citation, the statement also frequently echoes earlier consent orders and Director Chopra's public speeches. For example, the statement's assertion that material interference can arise where the product or

service is "so complicated that material information about it cannot be sufficiently explained" is familiar from the overdraft space, where recent consent orders with Wells Fargo and Regions Bank essentially took the position that Authorized-Positive Overdraft Fees (a/k/a "surprise" overdraft fees) can never be sufficiently disclosed so that consumers can understand and avoid them. See <https://www.consumerfinance.gov/enforcement/actions/wells-fargo-bank-na-2022/>; <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/>.

Another familiar concept is the statement's discussion of "dark patterns," which Director Rohit Chopra and the bureau have previously described as potentially abusive as well as deceptive. See, e.g., <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-root-out-tactics-which-charge-people-fees-for-subscriptions-they-dont-want/>.

The statement likewise continues to emphasize the Bureau's recent interest in "set up to fail products." Detailing the origins of the bureau's authority in the 2008 financial crisis in which mortgage lenders "set people up to fail," the statement indicates that where the incentives of consumers and providers are not aligned, and the provider benefits at the consumer's expense, that will support a finding of abusiveness.

This approach closely tracks both Director Chopra's speech, which described abusiveness authority as a tool for addressing "set up to fail products," and recent Bureau enforcement actions.

One salient example is the enforcement action filed in January against Credit Assurance Corporation (CAC), alleging that CAC used "a lending model that [was] indifferent to whether consumers [were] able to repay their loans," while also taking steps to "ensure that, even when consumers defaulted, it could still profit." <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-sue-credit-acceptance-for-hiding-auto-loan-costs-setting-borrowers-up-to-fail/>.

3. The new statement dramatically expands the scope of "abusiveness." While attempting to codify prior Bureau pronouncements regarding abusive acts and practices, the statement also takes broad new positions on that subject.

As noted above, the statement claims that proving abusive acts and practices does not require substantial injury, and that material interference does not require a showing of any actual material interference.

Even beyond these startling positions, however, the statement significantly expands the scope of "abusive"

practices both by adding qualitatively new concepts and by importing concepts from other UDAAP prongs.

For example, the statement seems to announce for the first time that providers of financial products and services can engage in abusive conduct by inflicting reputational harms or inconvenience.

In discussing unreasonable advantage based on consumers' inability to protect their own interests, the statement specifically identifies the relevant "interests" as including "property, privacy, or reputational interests," as well as "limiting the amount of time or effort necessary to obtain [or remedy problems with] consumer financial products or services."

While the statement here cites to the 2016 Wells Fargo consent order and the 2015 enforcement action against PayPal, neither action focused on reputational interests. And although the PayPal complaint alleges that consumers had trouble reaching the customer service department, it asserts that such difficulties contributed to consumers' inability to protect their interests—not that prompt access to customer service is itself an "interest" protected by the CFP Act.

The new statement also imports into the abusiveness prong considerations derived from other UDAAP prongs. For example, the statement expressly borrows its new focus on an entity's intent to interfere from the elements of a traditional *deception* analysis—and even cites FTC guidance on deception for this point. See Statement n.23 (citing FTC 1983 Policy Statement on Deception ("When evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.")); https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

And while the statement provides no citation for its new principle on material interference that "certain terms of a transaction are so consequential that" material interference can be presumed if they are not conveyed "prominently or clearly," that principle seems plucked out of the discussion of deception in the CFPB's examination manual: "In general, information about the central characteristics of a product or service—such as costs, benefits, or restrictions on the use or availability—is presumed to be material." [//files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2023-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2023-01.pdf) at UDAAP 7.

Finally, the statement's new assertion that consumers may be unable to protect their own interests if doing so would be too onerous or costly seems derived from Bureau

guidance concerning *unfairness*. See CFPB Bulletin 2013-07 at 3, https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf (injury is not reasonably avoidable if avoiding it requires "spending large amounts of money or other significant resources").

Importantly, although a cost-benefit analysis is not required under the new statement, it may still be useful in some "unfair advantage" cases. The statement expressly provides that the analysis of whether a provider of financial products or services has benefited from an unfair advantage does not require "an investigative accounting of costs and benefits or other form of quantification," but instead "may rely on qualitative assessment."

But it is unclear whether a provider who obtained no net benefit from any alleged advantage (*i.e.*, gap in understanding, unequal bargaining power, or consumer reliance) would still be liable for engaging in abusive acts or practices. There may yet be a role for cost-benefit analysis.

4. The statement invites states regulators to enforce the abusiveness prong. Significantly, the statement declares the bureau's position that *other* regulators should also enforce the abusiveness prong of UDAAP. The statement's express goal is to "provid[e] an analytical framework to fellow government enforcers and to the market for how to identify violative acts or practices."

Director Chopra similarly noted in his remarks introducing the statement that "the CFPB does not have a monopoly when it comes to policing against abusive conduct. State attorneys general and state regulators can bring actions and seek relief for illegal abusive conduct, independently or in concert with the CFPB." <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/>.

We have already seen indications of the bureau's interest in seeing other regulators pursue abusive conduct. One recent example, again, is the CAC case filed in January, in which the New York Attorney General joined in charging CAC with abusive acts and practices in violation of the CFPB.

The CFPB has put down a significant marker as to the breadth of its UDAAP authority. Financial institutions, FinTechs, and other consumer-facing businesses would be well-advised to study the CFPB's new statement as a roadmap for where the bureau's regulatory scrutiny and future enforcement efforts will likely be concentrated.

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