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Title
Enforcing the Post-Financial Crisis Ban on Abusive Conduct

Permalink
https://escholarship.org/uc/item/14g0v3s0

Journal
UC Irvine Law Review , 14(2)

ISSN
2327-4514

Author
Chopra, Rohit

Publication Date
2024-05-01

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Enforcing the Post-Financial Crisis Ban on Abusive Conduct

Rohit Chopra*

Government enforcers have long contended with corporate misconduct, from the abuses of corporate power and monopolization of the late 19th and early 20th centuries to the set up to fail products and digital dark patterns of the 21st century. This Article explains the Consumer Financial Protection Bureau's (CFPB) Policy Statement on Abusive Acts or Practices, which is appended to this article, and its importance in protecting people from business excesses. The statutory prohibition on illegal abusive conduct was a response to the predatory mortgage lending practices that drove the 2007-2008 financial crisis and sought to reach conduct that might not be considered "unfair" or "deceptive." However, it is rooted in early 20th century attempts to regulate fair dealing. As government enforcers confront new challenges, they can look to a framework of consumer protection that is ingrained in the American tradition – one based on Congress' understanding of right and wrong and market reality, rather than theoretical economic models.

This Article places the prohibition on abusive conduct as part of a history dating back to the common law standards of fair dealing. Congress has long tailored federal prohibitions in response to changes to business practices and given government enforcers new tools to meet new challenges. The Article also discusses the key objectives of the statement, including providing a straight-forward and analytical framework to help enforcers evaluate wrongdoing and promote a visceral understanding of the prohibition. Finally, the Article closes by outlining some key aspects of the policy statement and the public policy concerns motivating them, including condemning conduct that tricks people or exploits unequal bargaining power.

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* Director, Consumer Financial Protection Bureau. The views expressed herein represent the views of the Director and do not necessarily represent the views of any other component of the Federal Reserve System. I want to thank Kiren Gopal, Brian Shearer, and Colin Wilson for their invaluable assistance in drafting and preparing this article.

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In 2010, Congress passed the Consumer Financial Protection Act of 2010 (CFPA) and created the prohibition on abusive conduct.[1] The creation of this ban was the most recent instance of congressional tailoring of the federal standards intended to regulate fair dealing in the United States.[2] Over the last century, Congress has acted in response to evolving norms, economic events, and judicial interpretations and guided federal agencies as they endeavor to enforce the law.

The Consumer Financial Protection Bureau (CFPB) has issued a policy statement that explains the prohibition on abusive practices.[3] This article places the prohibition on abusive acts or practices in a historical context and discusses key considerations of the policy statement. First, it will address the history of the standards of fair dealing leading up to the ban on abusive conduct, including how this development sought to reach conduct that might not otherwise be considered "unfair." Second, it will discuss the key objectives of the statement, including how it seeks to provide clear rules of the road for the market. Finally, it outlines some of the key aspects of the prohibition.

I. History of the Prohibition on Abusive Conduct

In the wake of the financial crisis in 2010, Congress passed the CFPB's authorizing statute the CFPA, which banned abusive conduct.[4] However, this prohibition did not appear out of nowhere. The abusive prohibition is rooted in a history that goes back over 100 years. Congress has long tailored federal prohibitions in response to changes in the market and economic turmoil.[5]

In the late nineteenth and early twentieth centuries, abuses of corporate power, monopolization, and all sorts of other unfair business practices became kitchen-table issues for many Americans. False advertising of shady cure-all "patent medicines" was also rampant.[6] Americans grew concerned as companies like

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1. Consumer Financial Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1955 (2010) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.); 12 U.S.C. § 5531 (prohibiting unfair, deceptive, or abusive practices).

2. *See generally* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L REV. 431 (2021).

3. CONSUMER FIN. PROT. BUREAU, POLICY STATEMENT ON ABUSIVE ACTS OR PRACTICES (Apr. 3, 2023) [hereinafter ABUSIVE ACTS OR PRACTICES POLICY STATEMENT], https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/ [https://perma.cc/UHN4-J3E5].

4. *See* 12 U.S.C. § 5531.

5. *See generally* Herrine, *supra* note 2; Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

6. Milton Handler, *False and Misleading Advertising*, 39 YALE L.J. 22, 22 (1929) (quoting

Standard Oil Trust, United States Steel, and American Tobacco Company became behemoths.[7] They bought their rivals, drove other competitors out of business, and swallowed up whole industries.[8]

This era of relatively lax business regulation and increasing consolidation meant that the control of economically and socially significant industries was placed in the hands of few, without many checks.[9] Unsurprisingly, this less competitive and less regulated environment led to harmful price fixing and market allocation schemes, resulting in higher prices for necessities and deceptive marketing for all sorts of goods.[10] It was a particularly low moment for American enterprise as small firms and honest players could not compete.

To promote fair competition and protect people from these business excesses, in 1914, Congress stepped in and codified and strengthened common law standards of fair dealing, which drew upon notions of fairness and a moral economic vision of competition by creating the Federal Trade Commission (FTC).[11] Congress tasked the new administrative agency with enforcing a broad ban on "[u]nfair methods of competition."[12] This pattern would be repeated.

A few decades later, Congress added more to the FTC's authority when the public demanded action from the government as the problem of false advertising worsened and fraudulent products, like miracle weight-loss drugs and sham tonics purporting to cure baldness and produce various illusory health benefits, continued to flood the market.[13]

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remarks given by then-FTC Chairman Humphrey in 1928 on how false and misleading advertisements harm consumers).

7. *See* Winerman, *supra* note 5, at 6–7 (describing the wave of industry consolidation that preceded the enactment of the FTC Act).

8. *Id.*

9. *See generally* RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895-1956, 33–70 (1959) (discussing the merger movement from 1895 through 1920).

10. *See* Ilene Knable Gotts, *Back to the Future: Should the "Consumer Welfare" Standard Be Replaced in U.S. M&A Antitrust Enforcement?*, 1 ANTITRUST REP. 1, 2–3 (2019) (discussing the political and social circumstances motivating the passage of the Sherman Act, including price setting and price fixing by trusts); *see also* 21 CONG. REC. 2457 (1890) (describing the harms posed by trusts, including the power to control the market, set prices, and throttle competition, and how "selfishness, uncontrolled by competition, compels [a] disregard [for] the interest of the consumer").

11. Federal Trade Commission Act, 15 U.S.C. §§ 41–58; *see* William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, 26 ANTITRUST 106, 109 (2011) (discussing the common law precedents undergirding the prohibition of unfair methods of competition in the FTC Act); Winerman, *supra* note 5, at 67 (outlining the fusion of morality and economics that underpinned the unfair competition standard in the FTC Act).

12. 15 U.S.C. § 45(a)(1).

13. *See* Herrine, *supra* note 2, at 466–70 (discussing the consumer mobilization movement in response to concerns over big businesses undermining consumer interests through manipulative and misleading advertisements); William T. Kelley & James W. Cassedy, *The Federal Trade Commission Act as Amended by the Wheeler-Lea Act*, 2 FOOD DRUG COSM. L.Q. 315, 324–25 (1947) (excerpting the legislative history of the Wheeler-Lea Act evincing Congress's intent to give the commission the power to "properly regulate the food, drug, device, and cosmetic industries, to prevent the dissemination of unlawful advertising, and protect the public"); Milton Handler, *The Control of False Advertising Under*

This time, Congress responded by passing the Wheeler-Lea Act and codifying a ban on "unfair or deceptive acts or practices."[14] Congress made clear that these standards of fair dealing applied not just between businesses but also between businesses and people.[15]

Decades later, federal regulators, still operating with the old unfairness and deception authorities codified in the FTC Act, would face an existential threat to the U.S. and world economy: by immediately selling mortgages on the secondary market, lenders were profiting on loans that set people up to fail because they could not repay.[16]

This recent history and its economic impact remain quite familiar to most Americans. When the housing market experienced a downturn, the bubble burst, and the losses in mortgages and mortgage-related securities reverberated throughout international markets, leading to a stock market crash and the Great Recession and relegating millions of Americans to a generation of lost economic potential.[17]

Predatory lending practices were all too common throughout the industry including

the Wheeler-Lea Act, 6 LAW AND CONTEMP. PROBS. 91, 96 (1939) (discussing how the Wheeler-Lea Act was intended to clarify the FTC's authority to regulate false advertising that is "unfair or deceptive to consumers" (internal citation omitted)).

14. Wheeler-Lea Act, ch. 49, sec. 3, § 5, 52 Stat. 111, 111–14 (1938).

15. *See* 83 Cong. Rec. 3255 (1938) (statement of Sen. Burton Wheeler) (stating that the purpose of the unfair and deceptive practices prohibition was to "make[] the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor").

16. *See* Amiyatosh Purnanandam, *Originate-to-Distribute Model and the Subprime Mortgage Crisis*, 2 (Fed. Deposit Ins. Corp. Ctr. for Fin. Rsch., Working Paper No. 2010-08, 2010), https://www.fdic.gov/analysis/cfr/2010/wp2010/2010-08.pdf [https://perma.cc/L44Q-4Y4J] (providing analysis supporting the hypothesis that "banks with aggressive involvement in the [Originate-to-Distribute mortgage] market" leading up the crisis originated "loans of inferior quality" and then quickly offloaded them to the secondary market, allowing them to "benefit from the origination fees without bearing the credit risk of the borrowers").

17. *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT, xvi (2011); *see also* CONSUMER FIN. PROT. BUREAU, BUILDING THE CFPB: A PROGRESS REPORT 8 (2011), https://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf [https://perma.cc/2WTX-UULN]; Edward J. Schoen, *The 2007-2009 Financial Crisis: An Erosion of Ethics: A Case Study*, 146 J. BUS. ETHICS 805, 806-07 (2016) (discussing the various impacts of the financial crisis including "long-lasting unemployment," "huge declines in gross domestic product," and a "mortgage foreclosure crisis"); John Weinberg, *The Great Recession and Its Aftermath*, (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath [https://perma.cc/T32V-WNQH] (discussing the rise and fall of the housing market in the early and mid-2000's as well as its impacts on the financial sector and the broader economy); DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD, 33 (2016) (discussing the collapse of the mortgage securitization market starting in 2006 as housing prices began to increase and foreclosures skyrocketed); ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD, 108–09 (2018) (discussing how the decline in home prices around the world sparked global economic distress and a recession that resulted in massive wealth loss that disproportionately affected low income and minority Americans); JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY, 27–30 (2010) (discussing the broader economic fallout experienced across the globe sparked by the mortgage market collapse).

at companies like Ameriquest Mortgage, which was the country's largest originator of subprime loans. Other companies like New Century illegally falsified borrowers' income documentation, a practice that was representative of the era.[18] In the aftermath of the mortgage crisis, over six million Americans lost their homes to foreclosure.[19]

As they did before in response to the threats of consolidation and false advertising, Congress once again tailored federal prohibitions to meet new challenges by adding the prohibition on abusive conduct to the federal standards of fair dealing in consumer financial services.[20]

With this evolution, in addition to unfairness and deception, government enforcers would have an additional tool to combat the changes to business practices, including the proliferation of set-up-to-fail products such as the mortgages that were the basis of the economic meltdown.[21] This was a key part of the public's efforts to fix the failures of the financial regulatory regime that contributed to the financial crisis.[22]

Even prior to the financial crisis, however, government officials called for a more administrable prohibition to address gaps and weaknesses in the regulatory system and to reach conduct that might not otherwise be considered "unfair" or "deceptive."[23] While unfairness and deception reach a broad set of problematic practices, misguided enforcement policies and interpretations by FTC Commissioners have, over time, undermined their effectiveness.[24]

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18. FIN. CRISIS INQUIRY COMM'N, *supra* note 17, at 12 (describing the fraudulent mortgage loan origination activities of Ameriquest), 89 (describing the originate-to-sell mortgage model relied upon heavily by New Century, which focused on originating a high volume of loans for immediate purchase by outside parties thereby eliminating incentives on behalf of the originator to ensure that the loans could be repaid).

19. Christos Makridis & Michael Ohlrogge, *Moving to Opportunity? The Geography of the Foreclosure Crisis and the Importance of Location*, 22 J. ECON. GEOGRAPHY, 159, n.1 (2021).

20. 12 U.S.C. § 5531 (prohibiting unfair, deceptive, or abusive practices).

21. *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 17, at 9–24 (discussing the growth of the subprime mortgage market driven by the proliferation of predatory loan products and how this market drove the financial crisis in 2008).

22. *See* DAYEN, *supra* note 17, at 28 (discussing legislation passed in the decades leading up to the financial crisis allowing for the preemption of state anti-usury caps, eliminating "mortgage down payment requirements for federally chartered banks," allowing "all lenders, federal or state, to offer adjustable-rate mortgages with steep resets where the interest rate went up sharply after the initial 'teaser' rate," and permitting negative amortization loans); *see also* STIGLITZ, *supra* note 17, at 147–48 (describing detrimental economic policy in the decades leading up to the financial crisis and ensuing economic collapse).

23. *See* Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's Abusive Standard*, 14 J. CONSUMER & COM. L. 118, 120 (2011).

24. *See* Rebecca Schonberg, *Introducing "Abusive": A New and Improved Standard for Consumer Protection*, 100 CALIF. L. REV. 1401, 1412–13 (2012) (describing how interpretations of unfairness articulated by the FTC in the 1980s established the "'consumer sovereignty'" approach to consumer protection that created self-imposed limitations on UDAP authority under the FTC Act and required a balancing of consumer harms against market benefits); *see also* FED. TRADE COMM'N, FTC POLICY STATEMENT ON UNFAIRNESS (Dec. 17, 1980) [hereinafter UNFAIRNESS POLICY STATEMENT], https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [https://perma.cc/6ZRZ-ADR2]

In 2007, then-Chair of the Federal Deposit Insurance Corporation Sheila Bair explained that where information is minimally disclosed, some courts have held that a practice might not be unfair because consumers can avoid injury by choosing another product or service.[25] She also explained that for the unfairness cost-benefit analysis, lenders often argue that providing credit is a benefit, even if questions can be raised about a borrower's long-term ability to repay.[26] To address some of these concerns, Bair suggested Congress add the term "abusive" to address new risks in the marketplace.[27]

The term, "abusive," itself was not a new concept. In fact, it existed in federal law and regulation, including in the Home Ownership and Equity Protection Act,[28] the Fair Debt Collection Practices Act,[29] and the Telemarketing and Consumer Fraud and Abuse Prevention Act.[30]

The addition of the abusive prohibition was also in some ways a return to the original framework of consumer protection ingrained in the American tradition.[31] By identifying certain categories of practices that distort the market, Congress's prohibition on abusive practices once again used the law to guide what is permitted based on Congress' understanding of fair dealing and market reality rather than theoretical economic models.

This history is pivotal to understanding how the prohibition on abusive conduct is rooted in early twentieth-century attempts to regulate fair dealing. It is also part of a long history of Congress granting additional tools to government enforcers to address market failures resulting from changes in business practices.

(articulating the FTC's policy of requiring substantial consumer harm without a countervailing benefit in brining unfairness actions); FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION, 2 (Oct. 14, 1983) [hereinafter DECEPTION POLICY STATEMENT], https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/9VMW-DM3C] (imposing a reasonableness standard on the agency's analysis in bringing deception claims); *see also* Adam Levitin, *"Abusive" Acts and Practices: Towards a Definition?*, CONSUMER FIN. PROT. BUREAU 11 (June 19, 2019), https://files.consumerfinance.gov/f/documents/cfpb_levitin-written-statement_symposium-abusive.pdf [https://perma.cc/Y3QS-4V5S] (asserting that the policy statements released by the FTC in the 1980s were "not the product of the FTC's organic thinking on the issues, but an attempt to mollify an angry Congress").

25. *Improving Federal Consumer Protection in Financial Services Before the House Comm. on Fin. Servs.*, 110th Cong. (2007) (prepared statement of Sheila C. Bair, Chairman of Fed. Deposit Ins. Corp.), https://fraser.stlouisfed.org/title/6963/item/629653 [https://perma.cc/Y42Z-P86Y].

26. *Id.*

27. *Improving Federal Consumer Protection in Financial Services Before the House Comm. on Fin. Servs.*, 110th Cong. (2007) (response of Sheila C. Bair, Chairman of Fed. Deposit Ins. Corp.), https://www.govinfo.gov/content/pkg/CHRG-110hhrg37556/html/CHRG-110hhrg37556.htm [https://perma.cc/S6TW-6CQL].

28. 15 U.S.C. § 1639(p)(2)(b).

29. *Id.* § 1692(d).

30. *Id.* § 6102.

31. *See* Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATHOLIC U. L. REV. 371, 378–79 (1997) (discussing the evolution of regulatory approaches to consumer protection).

II. OBJECTIVES OF THE NEW POLICY STATEMENT ON ABUSIVE CONDUCT

Since the passage of the CFPA and prohibition on abusive conduct, the CFPB has brought a number of enforcement actions against law-breaking companies.[32] By applying the prohibition to specific, real-world facts, the CFPB has sought to elucidate how enforcers evaluate potential wrongdoing.[33]

In addition to these efforts, the CFPB's policy statement on abusive acts or practices seeks to summarize the existing precedent, provide a practical analytical framework for identifying abusive conduct, and also offer some simple rules of thumb for market participants seeking to ensure their practices align with the law.[34] These objectives are critical because while bringing cases and taking companies that ignore the law to court can serve to condemn and deter abusive conduct, its explanatory potential has limits. The policy statement will assist other government enforcers and the market more broadly by drawing out some of the key principles from over a decade of enforcement work.

The CFPB's approach in issuing this policy statement is not new. Rather, it follows a rich tradition of federal consumer protection agencies issuing authoritative policy statements to help advance understanding of complex legal prohibitions.[35]

The policy statements issued by the FTC in the 1980s offer some instructive examples. In that decade, these policy statements helped set the tone for the application of unfairness and deception authority. In 1980, the FTC issued an Unfairness Policy Statement that included a cost-benefit test and de-emphasized focus on whether conduct is immoral.[36] Then in 1983, the FTC set out to similarly clarify its deception authority by setting forth certain presumptions, including that express claims are material, which were later adopted by courts.[37]

These documents proved to be immensely influential in providing guidance to courts and the market about how to enforce the bans on unfairness and deception. Setting aside the ideological assumptions they reflected, part of the reason why the policy statements proved successful and authoritative was because they were

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32. Since the passage of the CFPA through March 2024, the CFPB has brought forty-six public enforcement actions with abusive acts or practices claims, ranging from combating predatory student lending to protecting consumers from costly overdraft services. Of those cases, twenty-five have ended in an administrative order, stipulated judgment, or settlement.

33. *See* Levitin, *supra* note 24, at 11–12 (describing how developing abusive authority through the common law via enforcement actions allows for "on-going learning and tailoring of the doctrine" while ensuring that the doctrine is not "artificially constrained or prematurely petrified").

34. *See* ABUSIVE ACTS OR PRACTICES POLICY STATEMENT, *supra* note 3.

35. *See* UNFAIRNESS POLICY STATEMENT, *supra* note 24; DECEPTION POLICY STATEMENT, *supra* note 24; FED. TRADE COMM'N, FTC POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION (Nov. 23, 1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation [https://perma.cc/SA93-K3J3].

36. UNFAIRNESS POLICY STATEMENT, *supra* note 24 (articulating the FTC's policy of requiring substantial consumer harm without a countervailing benefit in brining unfairness actions).

37. DECEPTION POLICY STATEMENT*, supra* note 24, at 2 (imposing a reasonableness standard on the agency's analysis in bringing deception claims).

practical and because they created rules of thumb and presumptions about the law. In short, they were influential because they were helpful to practitioners, enforcers, and industry. In publishing its policy statement on abusive acts or practices, the CFPB aims to replicate those same benefits.

The policy statement will not only serve as a practical educational tool by summarizing the existing case law but also, more importantly, will provide a straightforward and analytical framework that helps promote a visceral understanding of the prohibition.

Producing clearer and simpler guidance is an important goal for the CFPB.[38] This philosophy is one that the agency tries to advance across all of its work. Clear communication of government enforcers' expectations helps strengthen the posture of all companies subject to those regulations, not just those with the most market power or resources.[39] Big and small firms can compete fairly when the rules of the road are clear. It also helps prevent strategic or intentional "misunderstanding" that some companies use to ignore the law, disadvantaging honest, law-abiding companies.[40]

III. KEY ASPECTS OF THE POLICY STATEMENT

The law often turns on technical readings of individual words or abstract concepts, but it is important not to lose sight of the fact that laws reflect the values of a society. There are four particular issues addressed in the policy statement that illustrate the contours of the abusive prohibition and the values it reflects.

First, one important way that Congress made a value judgment was by banning conduct that essentially tricks people. In doing so, they expressed the noncontroversial view that honest business conduct should not rely on trickery.[41] The CFPB's policy statement explains how companies are prohibited from manipulating people by "materially interfer[ing]" or, in other words, obscuring important features of a product or service.[42]

While trickery and manipulation can often run into the prohibitions on unfair or deceptive practices, an abusive practice will be situated in the context of the

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38. Rohit Chopra, *Rethinking the Approach to Regulations*, CONSUMER FIN. PROT. BUREAU (June 17, 2022), https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/ [https://perma.cc/CQF4-ZQ2C].

39. *Id.*

40. *See* Prasanna Gai, Malcom Kemp, Antonio Sanchez Serrano & Isabel Schnabel, *Reports of the Advisory Scientific Committee*: *Regulatory Complexity and the Quest for Robust Regulation*, EUR. SYSTEMIC RISK BD, No. 8 / June 2019, at 20 (2020) (noting that "complex frameworks may provide regulated entities with multiple opportunities to game the system and stronger incentives for regulatory arbitrage and for the transfer of activities beyond the regulated perimeter, potentially creating further systemic risks"); *see also* Larry D. Wall, *Simple Concept, Complex Regulation* (Jan. 2014), https://www.atlantafed.org/cenfis/publications/notesfromthevault/1401 [https://perma.cc/8NL7-KV46] (discussing the tendency for regulated entities to pursue profit opportunities by exploiting regulatory complexities).

41. *See* RESTATEMENT (SECOND) OF TORTS § 552 cmt. a ("[N]o interest of society is served by promoting the flow of information not genuinely believed by its maker to be true.").

42. 12 U.S.C. § 5531(d)(1).

transaction.[43] Did a human or digital interface engage in other ways to distract or shift the attention of the consumer to obscure key terms? Deception claims are more concerned with whether company communications create a misleading net impression.[44] The abusive prohibition is more of a bright line and is focused on company conduct that obstructs people's ability to digest information.[45] Where deception is more concerned with words, the abusive prohibition is focused on actions, although both are relevant to both prohibitions.

For example, one area of growing concern is companies' use of digital dark patterns. Dark patterns are design tricks and other psychological tactics used to confuse and manipulate people into making choices they otherwise would not have made.[46]

These sorts of tactics often manifest as prechecked boxes that default consumers into unwanted options, information hidden behind multiple links, and unnecessary obstacles imposed upon consumers making it difficult to cancel a subscription.[47] This kind of obscuring is not only annoying—as the policy statement describes—it can also be illegal depending on the circumstances.[48]

The prohibitions on unfair, deceptive, and abusive acts or practices were designed by Congress to address wrongful practices as business tactics and technology evolve.[49] Digital dark patterns are new in the sense that they leverage contemporary technology to confuse people, but ultimately, they involve the same type of obscuring that Congress has long been concerned about.

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43. *See* Levitin, *supra* note 24, at 10 (noting how the prohibition on abusive acts or practices may, in practice, often overlap with unfairness or deception).

44. *See* Schonberg, *supra* note 24, at 1410 (discussing the "deceptive" prohibition's emphasis on a "disclosure regime"); *see also* CONSUMER FIN. PROT. BUREAU, CFPB CONSUMER LAWS AND REGULATIONS: UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES 5, *in* CFPB SUPERVISION AND EXAMINATION MANUAL (Oct. 2012), https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures_2023-09.pdf [https://perma.cc/8QNK-HVBE] ("It is necessary to evaluate an individual statement, representation, or omission not in isolation, but rather in the context of the entire advertisement, transaction, or course of dealing, to determine whether the overall net impression is misleading or deceptive.").

45. *See* Schonberg, *supra* note 24, at 1411.

46. *See* CONSUMER FIN. PROT. BUREAU, *Consumer Financial Protection Circular 2023-01: Unlawful Negative Option Marketing Practices* (Jan. 19, 2023), https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/ [https://perma.cc/2YS7-D9BL] (describing digital dark patterns as "design features used to deceive, steer, or manipulate users into behavior that is profitable for a company, but often harmful to users or contrary to their intent"); *see also* FED. TRADE COMM'N, *Bringing Dark Patterns to Light*, 2 (Sept. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf [https://perma.cc/7CHV-8X85] (describing dark patterns as "practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm").

47. *See Bringing Dark Patterns to Light*, *supra* note 46, at 1.

48. *See* ABUSIVE ACTS OR PRACTICES POLICY STATEMENT, *supra* note 3.

49. Schonberg, *supra* note 24, at 1404 (noting that the "unfair" and "deceptive" prohibitions "have been in use since the Federal Trade Commission (FTC) Act was passed in 1914" but that the addition of the "abusive" prohibition "suggests innovative ways of thinking about interactions between consumers and lenders").

Second, when coming out of the financial crisis, Congress responded by prohibiting companies from setting people up to fail.[50] When enacting measures to prevent abusive practices, Congress banned companies from leveraging someone's lack of understanding or inability to protect themselves in order to take an unreasonable advantage.[51] In doing so, Congress recognized that gaps in understanding or unequal bargaining power were circumstances that law-breaking companies could exploit. Before the financial crisis, mortgage lenders profited by putting people into loans they could not repay.[52] Usually, lenders make money when people pay their bills. The incentives are aligned. But prior to the financial crisis, lenders using an originate-to-distribute business model immediately made money by selling loans on the secondary market to third parties.[53] This made lenders' balance sheets indifferent to consumer failure. Some lenders exploited that indifference by profiting handsomely off making loans to people who lacked understanding that they would not be able to make their payments or to people who were unable to protect their interests by paying the bill.[54]

Third, more broadly, Congress made the value judgment to prohibit entities from leveraging circumstances to limit or eliminate entirely consumer choice among service providers. In most markets, this can only happen when a firm has a monopoly; but in many consumer finance markets, it is embedded in the market structure.[55] For example, a consumer may be able to choose their lender, but the

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50. *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 17, at 9–24 (discussing how the proliferation of predatory loan products drove the financial crisis in 2008).

51. *See* 12 U.S.C. § 5531(d)(2); *see also* Randall Dodd & Paul Mills, *Outbreak: U.S. Subprime Contagion*, 45 FIN. & DEV. 2, 14-15 (2008) (discussing how, in the lead up to the financial crisis, lenders steered customers into loan products with low "teaser" interest rates to make them seem more affordable to borrowers, which set them up for financial hardship when economic conditions shifted).

52. *See* Martin Neil Baily, Robert E. Litan & Matthew S. Johnson, *The Origins of the Financial Crisis*, INITIATIVE ON BUS. AND PUB. POL'Y AT BROOKINGS, at 18 (Nov. 17, 2008), https://www.brookings.edu/wp-content/uploads/2016/06/11_origins_crisis_baily_litan.pdf [https://perma.cc/9U6Q-8RKD] (discussing "deceptive practices" by mortgage lenders who would suggest "places the borrower might change [application information]" allowing borrowers to obtain loans they could not afford); *see also* DAYEN, *supra* note 17, at 28-29 (discussing how investment banks and mortgage lenders incentivized and offered high-interest, risky mortgage products to poor Americans relying heavily on their lack of understanding of the risks associated with these products and the high potential for default).

53. *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 17, at 89 (describing the originate-to-distribute model in which mortgage lenders (particularly in the subprime market) would originate mortgages "for immediate sale to other firms in the chain" thereby relieving them of risk if the loan defaulted); *see also* DAYEN, *supra* note 17, at 30 (describing how mortgage loan securitization created misaligned incentives for lenders "because everyone passed the default risk up the chain").

54. *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 17, at 89; *see also* STIGLITZ, *supra* note 17, at 152 (describing how misaligned profit incentives extended to bank executives who prioritized short term profits and stock prices at the expense of long-term institutional stability).

55. *See New Era for Consumer Protection: The Consumer Financial Protection Bureau's Semi-Annual Report to Congress Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 117th Cong. 4 (2022) (statement of Rohit Chopra, Director, Consumer Financial Protection Bureau) ("Competition leads to innovation, attractive rates, quality service, and benefits that may be difficult to quantify. But when consumers do not get to select their provider or when switching is complex or difficult, it can lead to

lender chooses who services the loan. Sometimes the lender sells the loan to another loan holder or investment vehicle, allowing *that* entity to choose the servicer. This same absence of consumer choice occurs across several different markets, including those for debt collection and consumer reporting.[56]

Congress prohibited companies from leveraging unequal bargaining power,[57] including consumer reporting companies, servicers, and debt collectors. Companies that exert this type of leverage over consumers use the fact that their customers are captive to force people into less advantageous deals, extract excess profits, or reduce costs by providing worse service than they would provide if they were competing in an open market.[58]

In 2021, the CFPB charged JPay, a prison financial services company, with abusive conduct.[59] JPay had an exclusive contract to return funds on a prepaid card to people who were being released from jail or prison.[60] The CFPB alleged a violation of the abusive prohibition because it found that JPay was using the fact that people had no other options to charge fees.[61] In other words, consumers were captive to JPay, and JPay leveraged that captivity to gain an unreasonable advantage to extract fees from these individuals.

And fourth, Congress prohibited companies from leveraging consumers' reasonable reliance to their advantage.[62] In banning this type of conduct, Congress was likely thinking of the mortgage steering that occurred prior to the financial crisis, when brokers that people trusted would accept side payments to steer borrowers to more expensive loans when they actually qualified for a better deal.[63]

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stagnation, junk fees, and poor treatment. Indeed, in many markets for consumer financial products and services, like loan servicing and credit reporting, consumers have no choice of provider.").

56. *See Preserving the Right of Consumers to Access Personal Financial Data Before the Task Force on Fin. Tech. of the H. Comm. on Fin. Servs.*, 117th Cong. 91 (2022) (statement of Chi Chi Wu, Staff Attorney, National Consumer Law Center) ("There is a frequent refrain that the consumer is not the customer of the credit bureaus; instead, our data is their commodity. Our consent is never required to harvest our information and, until the advent of security freezes, we could not even prevent its dissemination. The credit reporting system is an oligopoly of three companies where market forces do not work and consumers have no choice but to be beholden to those companies.").

57. 12 U.S.C. § 5531(d)(2)(B).

58. *See In re* JPay, LLC, CFPB No. 2021-CFPB-0006, consent order (Oct. 19, 2021), https://files.consumerfinance.gov/f/documents/cfpb_jpay-llc_consent-order_2021-10.pdf [https://perma.cc/SX43-HMGU].

59. *See Id.*; CONSUMER FIN. PROT. BUREAU, *Statement of the CFPB Director Rohit Chopra on the JPay Enforcement Action*, (Oct. 19, 2021), https://files.consumerfinance.gov/f/documents/cfpb_jpay-llc_director-statement_2021-10.pdf [https://perma.cc/3UGW-MC6A].

60. *In re* JPay, LLC, CFPB No. 2021-CFPB-0006, consent order ¶¶ 17–19 (Oct. 19, 2021).

61. *Id.* at ¶¶ 41–42.

62. 12 U.S.C. § 5531(d)(2)(C).

63. *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 17, at 109 (discussing consumer experiences with inappropriate marketing and sale of adjustable rate mortgages (ARMs) including consumers who were "sold option ARM loans in their primary non-English language, only to be pressured to sign English-only documents with significantly worse terms" after being lied to by their brokers); Schoen, *supra* note 17, at 813 (discussing mortgage broker compensation schemes emblematic of the precrisis industry that incentivized brokers to steer borrowers into "more costly, riskier mortgages" in exchange

Intermediary relationships like these involving trusted advisors are important for helping people make difficult financial decisions.[64] In the modern economy where financial products are highly complex, this is more important than ever. For example, in 2014, the CFPB sued ITT Educational Services for violating the reasonable reliance prong of the ban on abusive practices.[65] ITT was a for-profit college chain that positioned its financial advisors as subject matter experts on how to finance college. In other words, they appeared to be a trusted advisor. In reality, the CFPB's investigation uncovered that ITT's financial aid advisors pushed students into unaffordable loans that simply served ITT's bottom line. Congress was aware of the risks these trusted advisors can pose to people and also banned companies that have generated consumers' trust from taking kickbacks or engaging in self-dealing.

The CFPB's policy statement spells out each of these concepts in more detail, synthesizing the agency's enforcement experience to date.[66]

Importantly, 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.[67] Congress also empowered the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Reserve Board of Governors to supervise depository institutions under ten billion dollars in assets for compliance with this prohibition and to bring enforcement actions where appropriate.[68]

The law specifies that the CFPB can also activate Federal Trade Commission enforcement over nonbanks and state attorney general enforcement over national banks by undertaking a rulemaking.[69]

There's been a great deal of ink spilled about the failure of federal financial regulators and enforcers to halt the widespread abuses that contributed to a devastating financial crisis nearly fifteen years ago. Not only did these regulatory failures harm individuals, families, and neighborhoods but they also hurt every

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for greater compensation via yield spread premiums); DAYEN, *supra* note 17, at 28 (discussing broker incentives to originate high-rate, risky mortgages and sell them to investment banks in exchange for yield spread premium bonus payments).

64. *See*, *e.g.*, U.S. DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, at 68 (June 2009), https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123 [https://perma.cc/KE8V-7DWF] ("[C]onsumers may reasonably but mistakenly rely on advice from conflicted intermediaries.").

65. Complaint, CFPB v. ITT Educ. Servs., Inc., No. 1:14-cv-292 (2014); Stipulated Final Judgment, CFPB v. ITT Educ. Servs., Inc., No. 1:14-cv-292 (Aug. 16, 2019).

66. *See* ABUSIVE ACTS OR PRACTICES POLICY STATEMENT, *supra* note 3.

67. 12 U.S.C. § 5552(a); *see also* CONSUMER FIN. PROT. BUREAU, *Authority of States to Enforce the Consumer Financial Protection Act*, 87 FR 31940, (May 26, 2022), https://www.federalregister.gov/documents/2022/05/26/2022-11356/authority-of-states-to-enforce-the-consumer-financial-protection-act-of-2010 [https://perma.cc/AX6B-6Y9J].

68. *See* 12 U.S.C. § 5516(a), (c), (d).

69. *See id.* at §§ 5514(c)(3), 5552(a)(2)(b).

business that engaged in fair and transparent dealing with prospective customers. As it has done numerous times in the past, Congress responded to these failures by providing government agencies with the tools necessary to prevent those same failures in the future.

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The following is a reprint of the Consumer Financial Protection Bureau's Policy Statement on Abusive Acts or Practices. The statement has not been edited by the UC Irvine Law Review *except for formatting.*

Policy Statement on Abusive Acts or Practices

April 3, 2023

Background

In 2010, Congress passed the Consumer Financial Protection Act of 2010 (CFPA) and banned abusive conduct.[1] The CFPA's prohibition on abusive conduct was the most recent instance of congressional tailoring of the Federal prohibitions intended to ensure fair dealing and protect consumers and market participants in the United States.[2]

Since the beginning of the 20th century, Congress has amended these prohibitions in response to evolving norms, economic events, and judicial interpretations, guiding those tasked with enforcing the law. Beginning with the creation of the Federal Trade Commission, and the development of the "unfair

1. CFPA section 1036(a)(1)(B), 12 U.S.C.5536(a)(1)(B). In CFPA section 1031, Congress prohibited covered persons and services providers from committing or engaging in unfair, deceptive, or abusive acts or practices in connection with the offering or provision of consumer financial products or services. CFPA section 1031(d) sets forth the general standard for determining whether an act or practice is abusive. *See* 12 U.S.C. 5531(d).

2. *See, e.g.*, *FTC v. Standard Educ. Soc'y*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd in part on other grounds*, 302 U.S. 112, 116 (1937) (describing the congressional prohibitions intended to regulate methods of fair dealing in the marketplace). Certain other Federal consumer financial laws, including the Fair Debt Collection Practices Act (FDCPA) and the Home Ownership and Equity Protection Act (HOEPA), reference either the term "abusive" or "abuse." See 15 U.S.C. 1692d (FDCPA), 15 U.S.C. 1639(p)(2)(B) (HOEPA). The Telemarketing and Consumer Fraud and Abuse Prevention Act also directed the Federal Trade Commission (FTC) to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. 6102(a)(1).

methods of competition"[3] and "unfair or deceptive acts or practices"[4] prohibitions, Congress has passed laws to regulate fair dealing, and the agencies tasked with administering those laws have issued policy statements to offer guidance on the agencies' approach to enforcing those prohibitions.[5]

For centuries, lenders and investors generally had an incentive to ensure that a borrower had the ability to repay a debt. But innovations in capital markets and fixed income instruments altered this alignment of incentives.[6] The advent of complex securitization led to lenders no longer bearing risk when a borrower defaulted because they had sold the underlying asset, and passed on the exposure to investors. Fair dealing laws in the U.S. have long sought to address the risks and harms from market failures.

The 2007-2008 financial crisis tested U.S. consumer protection laws, government watchdogs, and the ability of the existing authorities to address the predatory lending that was a root cause of the collapse.[7] The financial crisis was set in motion by a set of avoidable interlocking forces—but at its core were mortgage lenders profiting (by immediately selling on the secondary market) on loans that set

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3. In 1914, Congress passed the FTC Act, which declared as unlawful "unfair methods of competition" but did not define the term "unfair." Act of Sept. 26, 1914, ch. 311, sec. 5(a), 38 Stat. 717, 719 (codified at 15 U.S.C. 45(a)). Congress intended that this prohibition would capture conduct that caused competitive harm yet remain flexible enough to allow the law to develop and avoid circumvention. As the Supreme Court explained in 1934, "[n]either the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories," and Congress, in defining the powers of the FTC, "advisedly adopted a phrase which . . . does not admit of precise definition, but the meaning and application of which must be arrived at by . . . the gradual process of judicial inclusion and exclusion." *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 310, 312 (1934) (internal quotation marks omitted).

4. In 1938, in the Wheeler-Lea Act, Congress amended the FTC Act to declare as unlawful "unfair or deceptive acts or practices." Wheeler-Lea Act, ch. 49, sec. 3, 52 Stat. 111, 111-14 (1938); 15 U.S.C. 45(a). As it had done previously with "unfair methods of competition," Congress did not define this term, instead intending for it to be developed over time. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 978 (D.C. Cir. 1985) (AFSA) ("[N]either Congress nor the FTC has seen fit to delineate the specific 'kinds' of practices which will be deemed unfair . . . . Instead the FTC has adhered to its established convention, envisioned by Congress, of developing and refining its unfair practice criteria on a progressive, incremental basis.").

5. *See, e.g.*, Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Comm. on Commerce, Science and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984), https://www.ftc.gov/legal-library/browse/ftcpolicy-statement-unfairness (Policy Statement on Unfairness); Letter from the FTC to Hon. John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), *reprinted in Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174-84 (1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception (Policy Statement on Deception).

6. *See* Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report*, at 191-192 (2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (describing how synthetic collateralized debt obligations, which gained popularity in the mid-2000s, involved "two types of investors with opposing interests: those who would benefit if the assets performed, and those who would benefit if the mortgage borrowers stopped making payments and the assets failed to perform").

7. *See id.* at xvii, xxiii-xxiv.

people up to fail because they could not repay.[8] Millions of Americans saw their home values drop and their jobs eliminated as a result of forces largely out of their control.

In response, Congress concluded that the manner in which agencies had enforced the prohibitions on unfair and deceptive acts or practices was too limited to be effective at preventing the financial crisis, and once again amended existing law to better meet new challenges.[9] In the CFPA, Congress granted authority over unfair or deceptive acts or practices to the States, the Federal banking agencies, and the newly created Consumer Financial Protection Bureau (CFPB). Congress also added a prohibition on abusive acts or practices.[10]

Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. The CFPB is issuing this Policy Statement to summarize those actions and explain how the CFPB analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and to the market for how to identify violative acts or practices.[11]

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8. *See id.* at 104-111, 113-18; *see also* S. Rep. No. 111-176, at 11 (2010), https://www.congress.gov/congressional-report/111thcongress/senate-report/176/1 ("Th[e] financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms, followed by a broad fall in housing prices as those mortgages went into default and led to increasing foreclosures.").

9. For example, in 2007, Federal Deposit Insurance Corporation (FDIC) Chairwoman Sheila Bair explained in congressional testimony that unfairness "can be a restrictive legal standard" and proposed that Congress consider "adding the term 'abusive,'" which she noted existed in the Home Ownership and Equity Protection Act, and which "is a more flexible standard to address some of the practices that make us all uncomfortable." Sheila C. Bair, *Improving Federal Consumer Protection in Financial Services*, House Committee on Financial Services (June 13, 2007), https://www.govinfo.gov/content/pkg/CHRG-110hhrg37556/html/CHRG-110hhrg37556.htm.

10. *See, e.g.*, S. Rep. No. 111-176, at 172 (Apr. 30, 2010), https://www.congress.gov/congressional-report/111thcongress/senate-report/176/1 ("Current law prohibits unfair or deceptive acts or practices. The addition of 'abusive' will ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers."); Pub. L. No. 111-203, pmbl. (listing, in the preamble to the Dodd-Frank Act, one of the purposes of the Act as "protect[ing] consumers from abusive financial services practices"); *see also* S. Rep. No. 111-176, at 9 n.19, https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1 ("Today's consumer protection regime. . . could not stem a plague of abusive and unaffordable mortgages."); id. at 11 ("This financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms."); H.R. Rep. No. 111-367, at 91 (Dec. 9, 2009) ("Th[e] disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis, such as subprime and nontraditional mortgages."); H.R. Rep. No. 111-517, at 876–77 (June 29, 2010), https://www.congress.gov/congressional-report/111thcongress/house-report/517 (Conf. Rep.) ("The Act also prohibits financial incentives . . . that may encourage mortgage originators . . . to steer consumers to higher-cost and more abusive mortgages.").

11. This Policy Statement is the CFPB's first formal issuance that summarizes precedent on abusive acts or practices and provides an analytical framework for identifying abusive acts or practices. The CFPB previously issued a Policy Statement on Abusive Acts or Practices in 2020, *see* 85 FR 6733 (Feb. 6, 2020) (2020 Policy Statement), *rescinded in* 86 FR 14808 (Mar. 19, 2021), https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-policy-statement-consolidated_2021-03.pdf. The 2020 Policy Statement communicated how the CFPB intended to exercise prosecutorial discretion regarding some

Analysis

Under the CFPA, there are two abusiveness prohibitions.[12] An abusive act or practice: (1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) Takes unreasonable advantage of:

- A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
- The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
- The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[13]

The statutory text of these two prohibitions can be summarized at a high level as: (1) obscuring important features of a product or service, or (2) leveraging certain circumstances to take an unreasonable advantage. The circumstances that Congress set forth, stated generally, concern *gaps in understanding, unequal bargaining power, and consumer reliance*.[14]

Unlike with unfairness but similar to deception, abusiveness requires no showing of substantial injury to establish liability, but is rather focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market. An act or practice need fall into only one of the categories above in order to be abusive, but an act or practice could fall into more than one category.[15]

Materially interfering with consumers' understanding of terms and conditions

The first abusiveness prohibition concerns situations where an entity[16] "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service."[17] Material interference can

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issues related to abusiveness. However, the 2020 Policy Statement did not summarize existing precedent on abusive acts or practices or provide an analytical framework for identifying abusive acts or practices.

12. The second of the two prohibitions has three independent disjunctive grounds for finding abusiveness.

13. CFPA section 1031(d), 12 U.S.C. 5531(d).

14. This Policy Statement uses the phrases "gaps in understanding," "unequal bargaining power," and "consumer reliance" as shorthand descriptors of the inquiries required under the three subparagraphs of CFPA section 1031(d)(2). The CFPB does not intend its use of these shorthand phrases to limit in any way the scope of section 1031(d)(2)'s text.

15. The conduct that underlies an abusiveness determination may also be found to be unfair or deceptive, depending on the circumstances.

16. This Policy Statement refers to covered persons, service providers, and persons that provide substantial assistance to abusive conduct by a covered person or service provider as "entity" or "entities."

17. CFPA section 1031(d)(1), 12 U.S.C. 5531(d)(1).

be shown when an act or omission is intended to impede consumers' ability to understand terms or conditions, has the natural consequence of impeding consumers' ability to understand, or actually impedes understanding.

Acts or omissions

Material interference may include 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. Interference can take numerous forms, such as buried disclosures, physical or digital interference, overshadowing, and various other means of manipulating consumers' understanding.

Buried disclosures include disclosures that limit people's comprehension of a term or condition, including but not limited to, through the use of fine print, complex language, jargon, or the timing of the disclosure.[18] Entities can also interfere with understanding by omitting material terms or conditions.[19]

Physical interference can include any physical conduct that impedes a person's ability to see, hear, or understand the terms and conditions, including but not limited to physically hiding or withholding notices.[20]

Digital interference can include impediments to a person's ability to see, hear, or understand the terms and conditions when they are presented to someone in electronic or virtual format. This form of interference includes but is not limited to user interface and user experience manipulations such as the use of pop-up or drop-down boxes, multiple click-throughs, or other actions or "dark patterns"[21] that have the effect of making the terms and conditions materially less accessible or salient.

Overshadowing includes the prominent placement of certain content that interferes with the comprehension of other content, including terms and conditions.[22]

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18. *See, e.g., TD Bank, N.A.*, File No. 2020-BCFP-0007, at 16-20 (Aug. 20, 2020) (bank materially interfered with consumers' ability to understand terms and conditions of overdraft-protection service by withholding any written notice regarding those terms and conditions until after eliciting an oral-enrollment decision that followed a misleading or incomplete oral presentation regarding the service).

19. *See, e.g., TMX Finance LLC*, File No. 2016-CFPB-0022, at 6 (Sept. 26, 2016) (lender's sales pitch and Payback Guide materially interfered with consumers' ability to understand that the consumer received a 30-day transaction, that the Payback Guide was not an actual repayment plan, that the terms of the 30-day transaction were not affected by the Payback Guide, and that renewing the transaction over an extended period would substantially affect the overall cost of the transaction, as well as several other aspects of the process, by omitting those terms and conditions).

20. *See, e.g.*, Complaint at 6, 18-19, *CFPB v. All American Check Cashing, Inc.*, No. 3:16-cv-00356 (S.D. Miss. May 11, 2016) (check cashing company materially interfered with consumers' ability to understand a term or condition by requiring employees to block consumers' view of check cashing fees by counting money over the receipt or to quickly remove the receipt).

21. *See* FTC Staff Report, *Bringing Dark Patterns to Light* (Sept. 2022), https://www.ftc.gov/reports/bringing-dark-patternslight.

22. *See, e.g.*, First Amended Complaint at 12-13, 26-27, *CFPB v. TCF National Bank*, No. 17-cv-00166 (D. Minn. Mar. 1, 2017) (bank chose to use "an account opening process that interfered with customers' ability to consider the contents of the Notice when they made their Opt-In decision" by presenting consumers with the choice to select overdraft service during a time when they were not looking at the

Material interference

There are a number of methods to prove material interference with a consumers' ability to understand terms or conditions, including but not limited to those described below. First, while intent is not a required element to show material interference, it is reasonable to infer that an act or omission materially interferes with consumers' ability to understand a term or condition when the entity intends it to interfere.[23] Second, material interference can be established with evidence that the natural consequence of the act or omission would be to impede consumers' ability to understand. And third, material interference can also be shown with evidence that the act or omission did in fact impede consumers' actual understanding. While evidence of intent would provide a basis for inferring material interference under the first method, it is not a required element to show material interference.

Certain terms of a transaction are so consequential that when they are not conveyed to people prominently or clearly, it may be reasonable to presume that the entity engaged in acts or omissions that materially interfere with consumers' ability to understand. That information includes, but is not limited to, pricing or costs, limitations on the person's ability to use or benefit from the product or service, and contractually specified consequences of default.

Additionally, an entity's provision of a product or service may interfere with consumers' ability to understand if the product or service is so complicated that material information about it cannot be sufficiently explained or if the entity's business model functions in a manner that is inconsistent with its product's or service's apparent terms.

Taking unreasonable advantage

The second form of "abusiveness" under the CFPA prohibits entities from taking unreasonable advantage of certain circumstances.[24] Congress determined that it is an abusive act or practice when an entity takes unreasonable advantage of three particular circumstances.[25]

The circumstances are:

> (1) A "lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."[26] This circumstance concerns gaps in understanding affecting consumer decision-making.

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explanatory notice relating to their opt-in rights); *see also CFPB v. TCF Nat'l Bank*, No. 17-cv-00166, 2017 WL 6211033, at *2-3 (D. Minn. Sept. 8, 2017) (denying bank's motion to dismiss abusiveness claim).

23. *Cf.* Policy Statement on Deception at 5, Federal Trade Commission ("When evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.").

24. CFPA section 1031(d)(2), 12 U.S.C. 5531(d)(2).

25. *See supra note* 14.

26. CFPA section 1031(d)(2)(A), 12 U.S.C. 5531(d)(2)(A).

> (2) The "inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[27] This circumstance concerns unequal bargaining power where, for example, consumers lack the practical ability to switch providers, seek more favorable terms, or make other decisions to protect their interests.
>
> (3) The "reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[28] This circumstance concerns consumer reliance on an entity, including when consumers reasonably rely on an entity to make a decision for them or advise them on how to make a decision.

Under the CFPA, it is illegal for an entity to take unreasonable advantage of one of these three circumstances, even if the condition was not created by the entity.[29]

The ordinary meaning of the phrase "take advantage of" is generally "to make use of for one's own benefit."[30] An advantage can include a variety of monetary and non-monetary benefits to the entity or its affiliates or partners, including but not limited to increased market share, revenue, cost savings, profits,[31] reputational benefits, and other operational benefits to the entity.

The CFPA prohibits taking "unreasonable" advantage of the specified statutory circumstances. The term "reasonable" means "[f]air, proper, or moderate under the circumstances,"[32] and conversely, "unreasonable" means "exceeding the bounds of reason or moderation."[33]

In crafting the abusiveness prohibition, Congress identified categories of practices that distort the market and ultimately harm consumers. Therefore, unlike unfairness, government enforcers do not need to independently prove that an act or practice caused substantial injury in order to establish liability under the

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27. CFPA section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B).

28. CFPA section 1031(d)(2)(C), 12 U.S.C. 5531(d)(2)(C).

29. *See* CFPA section 1031(d)(2), 12 U.S.C. 5531(d)(2).

30. *E.g.*, *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 918 (S.D. Ind. 2015) (quoting this as one of the definitions from *Webster's Third New Int'l Dictionary* 2331 (3d ed.1993)).

31. Advantage-taking may occur when an entity pursues the prospect of monetary gain, even if ultimately it does not accrue a profit. In ordinary usage, one can take advantage of one of the specified statutory circumstances, even if that benefit is not successfully realized. The CFPA's legislative history provides an example of this situation, when discussing abuses in the subprime mortgage industry. The legislative history notes that some "abusive practices may well be profitable in the short term, but are ticking time bombs waiting to explode" upon banks. S. Rep. No. 111-176, at 17 (2010) (internal quotation marks omitted). Thus, abusive acts or practices may not ultimately be profitable for the covered party. If an abusive act or practice takes advantage of one of the specified statutory circumstances but fails to turn a profit, for example due to incompetence in carrying out the scheme, it would be in line with congressional intent and the ordinary usage of the phrase "takes unreasonable advantage of" to consider the act or practice to be eligible for an abusiveness finding on that basis.

32. Reasonable, Black's Law Dictionary (11th ed. 2019).

33. Unreasonable, Webster's Third New Int'l Dictionary 2507 (3d ed. 1993).

abusiveness prohibition.[34]

Evaluating unreasonable advantage involves an evaluation of the facts and circumstances that may affect the nature of the advantage and the question of whether the advantage-taking was unreasonable under the circumstances.[35] Such an evaluation does not require an inquiry into whether advantage-taking is typical or not.[36] And even a relatively small advantage may be abusive if it is unreasonable. There are also a number of analytical methods, including but not limited to those described below, that can be used to evaluate unreasonable advantage taking.

First, when Congress formulated the CFPA, one of its main concerns was financial products and services that may be "set up to fail." Before the 2007-2008 financial crisis, mortgage lenders were willing to make loans on terms that people could not afford in part due to the ability to off-load default risk into the secondary market. This led to significant harm to the household sector, which was ultimately transmitted to the broader financial system.

The CFPA's legislative history explains that, had the CFPB existed, "the CFPB would have been able to see and take action against the proliferation of poorly underwritten mortgages with abusive terms."[37] Partly in response to the financial crisis, Congress prohibited certain abusive business models and other acts or practices that—contrary to many consumer finance relationships where the company benefits from consumer success—misalign incentives and generate benefit for a company when people are harmed.[38] In many circumstances, it is unreasonable for an entity to benefit from, or be indifferent to, negative consumer outcomes resulting from one of the circumstances identified by Congress.

Second, the CFPA's legislative history emphasized that, as a result of CFPB oversight, "a consumer can shop and compare products based on quality, price, and convenience without having to worry about getting trapped by fine print into an abusive deal."[39] Unreasonable advantage-taking includes using the statutory circumstances to acquire particular leverage over people or deprive consumers of

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34. *See* CFPA section 1031(c)(1)(A), 12 U.S.C. 5531(c)(1)(A). The amount of harm is relevant, however, to crafting remedies. Also, harm in some cases may bolster a determination that an entity is taking unreasonable advantage of consumers within the meaning of CFPA section 1031(d)(2).

35. *Cf., e.g.*, *Swift & Co. v. Wallace*, 105 F.2d 848, 854–55 (7th Cir. 1939) ("'[U]nreasonable' is not a word of fixed content and whether preferences or advantages are unreasonable must be determined by an evaluation of all cognizable factors which determine the scope and nature of the preference or advantage.").

36. While evidence of large or atypical advantage-taking is not required under the reasonableness inquiry, it may nonetheless be relevant.

37. S. Rep. No. 111-176, at 229 (2010), https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1.

38. *See, e.g.*, Complaint at 26-29, *CFPB v. Aequitas Capital Management*, Inc., No. 3:17-cv-01278 (D. Or. Aug. 17, 2017) (action against lender to students at for-profit schools that reaped revenue despite the high default rate of the loans that the students were induced to take out).

39. S. Rep. No. 111-176, at 229 (2010), https://www.congress.gov/congressional-report/111thcongress/senate-report/176/1.

legal rights.[40] Relatedly, advantage-taking may be unreasonable when an entity caused one of the circumstances described in CFPA section 1031(d)(2).[41]

One may also assess whether entities are obtaining an unreasonable advantage by considering whether they are reaping more benefits as a consequence of the statutorily identified circumstances, or whether the benefit to the entity would have existed if the circumstance did not exist.[42] In other words, entities should not get a windfall due to a gap in understanding, unequal bargaining power, or consumer reliance. Having said that, section 1031(d)(2) does not require an investigative accounting of costs and benefits or other form of quantification to make a finding. Instead, one may rely on qualitative assessment to determine whether an entity takes an unreasonable advantage.

Lack of Understanding

The first circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."[43] When there are gaps in understanding regarding the material risks, costs, or conditions of the entity's product or service, entities may not take unreasonable advantage of that gap. Such gaps could include those between an entity and a consumer. Certain types of gaps in understanding can create circumstances where transactions are exploitative.

Gaps in understanding as to "risks" encompass a wide range of potential consumer harms. "Risks" include but are not limited to the consequences or

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40. *E.g.*, First Amended Complaint at 40-41, *CFPB v. Think Finance, LLC*, No. 4:17-cv-00127 (D. Mont. Mar. 28, 2018) (It was abusive for a company to attempt to collect loans that, unbeknownst to the consumers, could not lawfully be collected because they were void.).

41. *See, e.g.*, Complaint at 9-10, *CFPB v. SettleIT, Inc.*, No. 8:21-cv-00674 (C.D. Cal. Apr. 13, 2021) (A debt-settlement company took unreasonable advantage of consumers' reasonable reliance when it "told consumers that it would work in their interests only," thus inducing consumers to rely on the company, but actually prioritized the settlement of debts owed to lenders with which it was affiliated.).

42. *See, e.g.*, CFPB, *Supervisory Highlights: Issue 28, Fall 2022*, at 22 (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf (mortgage servicers took unreasonable advantage of consumers' lack of understanding when they profited from insufficiently disclosed phone-payment fees that were materially greater than the cost of other payment options). In *JPay, LLC*, File No. 2021-CFPB0006 (Oct. 19, 2021), the CFPB found an abusive practice where a firm leveraged an exclusive contract to charge fees on prepaid cards used to provide money to individuals being released from prison or jail. The prepaid cards replaced the feeless option of receiving such money as cash or by check that previously had been offered by prisons and jails. Under these circumstances, the entire fee accruing to JPay was considered an "unreasonable advantage."

43. CFPA section 1031(d)(2)(A), 12 U.S.C. 5531(d)(2)(A).

likelihood of default[44] and the loss of future benefits.[45] Gaps in understanding related to "costs" include any monetary charge to a person as well as non-monetary costs such as lost time, loss of use, or reputational harm.[46] And gaps in understanding with respect to "conditions" include any circumstance, context, or attribute of a product or service, whether express or implicit.[47] For example, "conditions" could include the length of time it would take a person to realize the benefits of a financial product or service,[48] the relationship between the entity and

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44. *See, e.g.*, Complaint at 13-14, 18, *CFPB v. Pension Funding LLC*, No. 8:15-cv-01329 (C.D. Cal. Aug. 20, 2015) (explaining that because pension advance companies "obscured the true nature of the transactions, failed to disclose and misrepresented the costs of the loans, and gave consumers misleading advice, consumers could not clearly understand the risks or costs of the loans or effectively compare the loans to potential less costly alternatives," and describing how companies aggressively pursued consumers who defaulted).

45. *See, e.g.*, Amended Complaint at 6, *CFPB v. Access Funding*, No. 1-16-cv-03759-JFM (D. Md. Dec. 13, 2017) ("Consumers received a steeply discounted lump sum in return for signing away their future payment streams. The lump sums Access Funding provided consumers typically represented only about 30% of the present value of those future payments.").

46. *See, e.g.*, *Fort Knox Nat'l Co.*, File No. 2015-CFPB-0008, at 8 (Apr. 20, 2015) (entities took unreasonable advantage of consumers' lack of understanding by charging fees that they "did not adequately disclose"); CFPB, *Supervisory Highlights: Issue 28, Fall 2022*, at 22 (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervisoryhighlights_issue-28_2022-11.pdf (mortgage servicers took unreasonable advantage of consumers' lack of understanding when they profited from insufficiently disclosed phone-payment fees that were materially greater than the cost of other payment options); First Amended Complaint at 14, *CFPB v. Freedom Debt Relief, LLC*, No. 3:17-c v-06484 (N.D. Cal. June 1, 2018) ("Freedom did not disclose to consumers before they enrolled in its program that they might be required to negotiate with creditors on their own, including by deceiving their creditors, in order to settle their debts.").

47. *See, e.g.*, First Amended Complaint at 40-41, *CFPB v. Think Finance, LLC*, No. 4:17-cv-00 127-BMM (D. Mont. Mar. 28, 2018) (consumers' "legal obligation to repay is a material term, cost, or condition of a loan," and online lenders "took unreasonable advantage of consumers' lack of understanding regarding the voidness of [their] loans" under State usury or licensing laws to charge higher, illegal interest rates); *Zero Parallel, LLC*, File No. 2017-CFPB-0017, at 6 (Sept. 6, 2017) ("Zero Parallel's sale of Leads resulting in, or likely to result in, loans that are void in whole or in part under the laws of the consumer's state of residence based on state-licensing requirements or interest-rate limits takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, and conditions of the loans."); *see also CFPB v. Think Finance, LLC*, No. CV-17-127-GF-B MM, 2018 WL 3707911, at *8 (D. Mont. Aug. 3, 2018) (denying *Think Finance* defendants' motion to dismiss abusiveness claim).

48. *See, e.g.*, *CFPB v. American Debt Settlement Solutions*, No. 9:13-ev-80548-DMM, at 8 (S.D. Fla. June 6, 2013) (Stipulated Final Judgment and Order) ("ADSS's acts or practices are abusive . . . because . . . ADSS has knowingly enrolled in its debt-relief programs consumers whose financial conditions make it highly unlikely that they can complete the programs, and ADSS has nonetheless collected fees from consumers who had inadequate income to complete their debt settlement programs."); Complaint at 15, *CFPB v. American Debt Settlement Solutions*, No. 9:13-cv-80548-DMM (S.D. Fla., May 30, 2013) ("This practice takes unreasonable advantage of consumers' lack of understanding of how long it will take ADSS to settle their debts and therefore how much money they will spend before realizing any benefits from enrolling in ADSS's debt-relief program.").

the consumer's creditors,[49] the fact a debt is not legally enforceable,[50] or the processes that determine when fees will be assessed.[51]

While acts or omissions by an entity can be relevant in determining whether people lack understanding,[52] the prohibition in section 1031(d)(2)(A) does not require that the entity caused the person's lack of understanding through untruthful statements or other actions or omissions.[53] Under the text of section 1031(d)(2)(A), the consumer's lack of understanding, regardless of how it arose, is sufficient. If people lack understanding, entities may not take unreasonable advantage of that lack of understanding. The lack of understanding can be caused by third parties and can exist even when there is no contractual relationship between the person and the entity that takes unreasonable advantage of the person's lack of understanding.[54]

The statutory text of the prohibition does not require that the consumer's lack of understanding was reasonable to demonstrate abusive conduct.[55] Similarly, the prohibition does not require proof that some threshold number of people lacked understanding to establish that an act or practice was abusive.

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49. *See, e.g.*, Amended Complaint at 14, *CFPB v. Access Funding*, No. 1-16-cv-03759-JFM (D. Md. Dec. 13, 2017) ("Consumers did not understand that Smith was not providing independent professional advice or that he did not take their individual circumstances or interests into account. They also did not understand that their interests would likely be better served by a truly independent advisor.").

50. *See* First Amended Complaint at 40-41, *CFPB v. Think Finance, LLC*, No. 4:17-cv-00127 (D. Mont. Mar. 28, 2018) (It was abusive for a company to attempt to collect loans that, unbeknownst to the consumers, could not lawfully be collected because they were void.); *Colfax Capital Corp.*, File No. 2014-CFPB-0009, at 11-12 (July 29, 2014) (it was abusive for company to service and collect on consumer financing agreements that State laws redered void or limited the consumer's obligation to repay).

51. *See, e.g.*, *Regions Bank*, File No. 2022-CFPB-0008, at 15 (Sept. 28, 2022) ("Due to [the bank's] counter-intuitive, complex transaction processing, many consumers did not understand [the bank's] overdraft practices or expect Authorized-Positive Overdraft Fees. [The bank] took unreasonable advantage of this lack of understanding by assessing at least $141 million in Authorized-Positive Overdraft fees during the Relevant Period.").

52. *See, e.g.*, Amended Complaint at 15-16, *Bureau of Consumer Fin. Prot. v. Certified Forensic Loan Auditors, LLC*, No. 2:19- cv-07722 (C.D. Cal. Nov. 13, 2019) (entities took unreasonable advantage of consumers' lack of understanding regarding the residential-mortgage industry and foreclosure-defense law by making misrepresentations and concealing material facts regarding the mortgage-relief services they offered); *see also Bureau of Consumer Fin. Prot. v. Certified Forensic Loan Auditors, LLC*, No. 2:19-cv-07722-ODW, 2020 WL 2556417, at *4 (C.D. Cal. May 20, 2020) (denying *Certified Forensic Loan Auditors* defendants' motion to dismiss abusiveness claim).

53. *See, e.g.*, *Zero Parallel, LLC*, File No. 2017-CFPB-0017, at 6 (Sept. 6, 2017) (it was abusive to sell leads resulting or likely to result in loans that were void in whole or in part under the laws of the consumer's State of residence).

54. *See, e.g.*, Am. Complaint at 2, *CFPB v. D & D Marketing Inc.*, No. 2:15-cv-09692 (C.D. Cal. June 30, 2016) (lead aggregator "failed to vet or monitor its lead generators and lead purchasers, exposing consumers to the risk of having their information purchased by actors who would use it for illegal purposes," "allowed its lead generators to attract consumers with misleading statements," and "took unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of the loan products for which they apply").

55. Although establishing that a reasonable consumer would lack understanding of the material risks, costs, or conditions of a product or service is not a prerequisite to establishing liability under CFPA section 1031(d)(2)(A), government enforcers or supervisory agencies may rely on the fact that a reasonable consumer would lack such understanding to establish that consumers did not understand.

A person may lack understanding of risks, costs, or conditions, even if they have an awareness that it is in the realm of possibility that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product or service.[56] But consumers generally do not expect companies to benefit from or be indifferent to certain negative consequences, including but not limited to default. Moreover, consumers may not understand that a risk is very likely to happen or that—though relatively rare—the impact of a particular risk would be severe.[57] The inquiry under section 1031(d)(2)(A) is whether some consumers in question have a lack of understanding, not all consumers or even most consumers. Since there can be differences among consumers in the risks, costs, and conditions they face and in their understanding of them, there may be a violation with respect to some consumers even if other consumers do not lack understanding.

Lastly, one can demonstrate a person's lack of understanding in a number of ways. For example, direct evidence of lack of understanding, including but not limited to complaints and consumer testimony, can suffice. Evidence or analysis showing that reasonable consumers were not likely to understand can likewise be used to establish lack of understanding. One can also demonstrate lack of understanding by considering course of conduct and likely consequences. For example, if a transaction would entail material risks or costs and people would likely derive minimal or no benefit from the transaction, it is generally reasonable to infer that people who nonetheless went ahead with the transaction did not understand those material risks or costs.[58]

Inability of Consumers to Protect their Interests

The second circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[59] When people are unable to protect their interests in selecting

56. 82 FR 54472, 54740 (Nov. 17, 2017) ("2017 Payday Rule"), *ratified by* 85 FR 41905 (July 13, 2020), *upheld in Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 558 F. Supp. 3d 350, 362 (W.D. Tex. 2021), *aff'd in relevant part*, 51 F.4th 616 (5th Cir. 2022). The CFPB explained in the preamble to a rule rescinding part of the 2017 Payday Rule that "[t]he [rescission] rulemaking addresse[d] the legal and evidentiary bases for particular rule provisions identified in this final rule. It d[id] not prevent the Bureau from exercising tool choices, such as appropriate exercise of supervision and enforcement tools, consistent with the Dodd-Frank Act and other applicable laws and regulations. It also d[id] not prevent the Bureau from exercising its judgment in light of factual, legal, and policy factors in particular circumstances as to whether an act or practice meets the standards for abusiveness under section 1031 of the Dodd-Frank Act." 85 FR 44382, 44415 n.286 (July 22, 2020).

57. 82 FR at 54740.

58. *See* CFPB, *Supervisory Highlights: Issue 19, Summer 2019*, at 3 (Sept. 2019), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf ("By purchasing a product [guaranteed asset protection] they would not benefit from [because of the low loan-to-value ratio of their auto loans], consumers demonstrated that they lacked an understanding of a material aspect of the product.").

59. CFPA section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B).

or using a consumer financial product or service, they can lack autonomy. In these situations, there is a risk that entities will take unreasonable advantage of the unequal bargaining power.[60] Thus, Congress has outlawed taking unreasonable advantage of circumstances where people lack sufficient bargaining power to protect their interests. Such circumstances may occur at the time of, or prior to, the person selecting the product or service, during their use of the product or service, or both.

The consumer "interests" contemplated in section 1031(d)(2)(B) include monetary and non-monetary interests, including but not limited to property, privacy, or reputational interests.[61] People also have interests in limiting the amount of time or effort necessary to obtain consumer financial products or services or remedy problems related to those products or services. This includes, but is not limited to, the time spent trying to obtain customer support assistance.[62]

A consumer's "inability" to protect their interests includes situations when it is impractical for them to protect their interests in selecting or using a consumer financial product or service.[63] For example, when the steps a person would need to take to protect their interests are unknown to the person[64] or are especially onerous,[65] they are likely unable to protect their interest. Furthermore, people who

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60. Consumers may also be unable to protect their interests when the inequality in bargaining power flows from circumstances or vulnerabilities that are present for individual or particular groups of consumers.

61. *See, e.g.*, *Wells Fargo Bank*, N.A., File No. 2016-CFPB-0015, at 6-7 (Sept. 8, 2016) (noting that respondent's "acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability to protect their interests . . . in having an account opened only after affirmative agreement[] [and] protecting themselves from security and other risks").

62. *See, e.g.*, Complaint at 15, *CFPB v. PayPal, Inc.*, No. 1:15-cv-01426-PDB (D. Md. May 19, 2015) (consumers unable to protect their interests where "Defendants purported to allow consumers to control the allocation of payments by requesting that their payments be allocated to specific balances, but consumers seeking to make such requests often could not reach a customer-service representative").

63. 82 FR at 54743 ("The Bureau also rejects the interpretation, presented by commenters, that the prong of 'inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service' can be met only when it is literally impossible for consumers to take action to protect their interests. . . . [T]he Bureau believes the clause 'inability of the consumer to protect' is . . . reasonably interpreted to mean that consumers are unable to protect their interests when it is impracticable for them to do so in light of the circumstances."); *see also ITT Educ. Servs.*, 219 F. Supp. 3d at 919 (holding that the phrase "inability . . . to protect the interests of the consumer" does not refer merely to "the theoretical power [of consumers] to defend their interests"; it also encompasses circumstances where "a consumer is unable to protect herself not in absolute terms, but relative to the excessively stronger position of the defendant").

64. *See, e.g.*, *Wells Fargo Bank*, N.A., File No. 2016-CFPB-0015, at 6-7 (Sept. 8, 2016) (Bank's "acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability to protect their interests in selecting or using consumer financial products or services, including [their] interests in having an account opened only after affirmative agreement, protecting themselves from security and other risks, and avoiding associated fees."); *U.S. Bank, N.A.*, File No. 2022-CFPB-0006, at 10 (July 28, 2022) (Bank's "conduct violated the CFPA prohibition against abusive acts or practices because [the bank] took unreasonable advantage of the consumers' inability to protect their interests in selecting or using a product or service by opening credit cards, lines of credit, and deposit accounts without consumers' knowledge and consent.").

65. *See, e.g.*, Complaint at 15-16, *CFPB v. Freedom Stores Inc.*, 2:14-cv-00643 (E.D. Va. Dec. 18, 2014) (consumers were unable to bargain for the removal of a venue-selection clause that designated

do not have monetary means may be unable to protect their interests if the only practical method for doing so requires payment of money.[66] Of course, merely serving people without monetary means is not abusive. However, it may be abusive to take unreasonable advantage of a person's lack of monetary means to protect their interests.[67]

The nature of the customer relationship may also render consumers unable to protect their interests in selecting or using a consumer financial product or service. People are often unable to protect their interests when they do not elect to enter into a relationship with an entity and cannot elect to instead enter into a relationship with a competitor. These consumer relationships, including but not limited to those with credit reporting companies, debt collectors, and third-party loan servicers, are generally structured such that people cannot exercise meaningful choice in the selection or use of any particular entity as a provider. In these circumstances, people cannot protect their interests by choosing an alternative provider either upfront (i.e., they have no ability to select the provider to begin with) or during the course of the customer relationship (i.e., they have no competitive recourse if they encounter difficulty with the entity while using the product or service). Obviously, such relationships are not per se abusive; however, entities may not take unreasonable advantage of the absence of choice in these types of relationships.[68] In addition, entities may not take unreasonable advantage of the fact that they are the only source for important information or services.[69]

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the State or Federal courts of Virginia, and which "was almost certain to produce default judgments and lead to garnishments against consumers who were unable to appear and assert a defense").

66. *See, e.g.*, *Ace Cash Express Inc.*, File No. 2014-CFPB-0008, at 10-11 (July 10, 2014) (payday loan provider "leveraged an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loan to take out a new . . . loan with accompanying fees"); *see also* Complaint at 14, CFPB v. S/W Tax Loans, Inc., No. 1:15-cv-00299- JB-WPL (D.N.M. Apr. 14, 2015) ("By failing to disclose their financial interests in the high-cost loan products to which they were steering their *cash-strapped and vulnerable customers*, Thomas and the Tax Franchise took unreasonable advantage of their tax clients' inability to protect their own interests . . . ." (emphasis added)); Credit Practices Rule, 49 FR 7740, 7747 (Mar. 1, 1984) (The results of leading studies indicate "that the precipitating cause of default is usually a circumstance or event beyond the debtor's immediate control. When such events occur, default is generally an involuntary response."); *AFSA*, 767 F.2d at 976 (upholding the Credit Practices Rule, including the finding that "default is ordinarily the product of forces beyond a debtor's control").

67. *ITT Educ. Servs.*, 219 F. Supp. 3d at 887-89, 919-20 (for-profit college took unreasonable advantage of students' inability to protect their interests by first guiding its students into temporary loans that they could not repay and then, once those became due, coercing them into taking out financially irresponsible longer-term loans); Complaint at 26-29, *CFPB v. Aequitas Capital Management, Inc.*, No. 3:17-cv-01278 (D. Or. Aug. 17, 2017) (lender to students at for-profit schools reaped revenue despite the high default rate of the loans that the schools induced students to take out).

68. *See, e.g.*, *JPay, LLC*, File No. 2021-CFPB-0006 (Oct. 19, 2021) (prison financial services company took unreasonable advantage of its status as a single-source government contractor for prepaid cards; the company charged fees even if consumers did not want to do business with the company).

69. *See* CFPB, *Supervisory Highlights: Issue 27, Fall 2022*, at 8-9 (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlightsspecialdition_report_2022-09.pdf ("Examiners found that institutions engaged in abusive acts or practices by withholding

Consumers may also lack power to protect their interests in selecting or using a consumer financial product or service when entities use form contracts, where contractual provisions are not subject to a consumer choice.[70] Similarly, where the person is unable to bargain over a clause because it is non-negotiable, they may be deprived of the ability to protect their interests.[71]

Consumers are often unable to protect their interests in selecting or using a consumer financial product or service where companies have outsized market power. When an entity's market share, the concentration in a market more broadly, or the market structure prevents people from protecting their interests by choosing an entity that offers competitive pricing, entities may not use their market power to their "unreasonable advantage."[72]

In addition, people are often unable to protect their interests in using a product or service if they face high transaction costs to exit the relationship. For example, the time, effort, cost, or risks associated with extricating oneself from a relationship with entities may effectively lock people into the relationship.

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official transcripts as a blanket policy in conjunction with the extension of credit. These schools did not release official transcripts to consumers that were delinquent or in default on their debts to the school …. Th[e] heightened pressure to produce transcripts leaves consumers with little-to-no bargaining power while academic achievement and professional advancements depend on the actions of a single academic institution."); *Bank of America, N.A.*, File No. 2022-CFPB0004, at 18 (July 14, 2022) (bank reversed permanent credits for consumers' unemployment insurance prepaid debit cards, and cardholders were "unable to protect their interests because they could not control how and when [the bank] would investigate and resolve their notices of error").

70. *See, e.g.*, Complaint at 15-16, *CFPB v. Freedom Stores Inc.*, 2:14-cv-00643 (E.D. Va. Dec. 18, 2014) (consumers were unable to bargain for the removal of a venue-selection clause that designated the State or Federal courts of Virginia, and which "was almost certain to produce default judgments and lead to garnishments against consumers who were unable to appear and assert a defense").

71. *See, e.g.*, Complaint at 4, 7, *CFPB v. Sec. Nat'l Auto. Acceptance Co.*, No. 1:15-cv-401 (S.D. Ohio June 17, 2015) (alleging, in support of abusiveness claim under CFPA section 1031(d)(2)(B), that consumers "had no opportunity to bargain for [the] removal" of contractual language purporting to authorize lender to contact commanding officers of military servicemembers who defaulted on their loans); Credit Practices Rule, 49 FR 7740, 7745-47 (Mar. 1, 1984). In *AFSA*, the D.C. Circuit upheld the FTC's Credit Practices Rule against challenge to FTC's exercise of its unfairness authority in promulgating the rule. The D.C. Circuit noted: "The Commission further found . . . that due to certain characteristics of the consumer credit market, it could not reasonably conclude that the mix of remedies included in the contracts reflects consumer preferences. Whereas consumers may bargain over terms such as interest rates, and the amount or number of payments, their ability and incentive to bargain over the boilerplate remedial provisions is substantially limited. Several aspects of the credit transaction combine to prevent consumers from making meaningful efforts to search, compare, and bargain over remedial provisions. As noted, standard form contracts are presented on a take it or leave it basis…. Given the substantial similarity of contracts, consumers have little ability or incentive to shop for a better contract." 767 F.2d at 976-77 (citations omitted).

72. *See, e.g.*, *JPay, LLC*, File No. 2021-CFPB-0006 (Oct. 19, 2021) (prison financial services company took unreasonable advantage of the market structure which allowed it, as a single-source government contractor for prepaid cards, to charge fees even if consumers did not want to do business with the company because consumers were denied a choice on how their money would be given to them upon release from incarceration).

Reasonable Reliance

The third circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[73] This basis for finding abusiveness recognizes that sometimes people are in a position in which they have a reasonable expectation that an entity will act in their interest to make decisions for them, or to advise them on how to make a decision. Where people reasonably expect that a covered entity will make decisions or provide advice in the person's interest, there is potential for betrayal or exploitation of the person's trust. Therefore, Congress prohibited taking unreasonable advantage of reasonable consumer reliance. There are a number of ways to establish reasonable reliance, including but not limited to the two described below.

First, reasonable reliance may exist where an entity communicates to a person or the public that it will act in its customers' best interest, or otherwise holds itself out as acting in the person's best interest. Where an entity communicates to people that it will act in their best interest, or otherwise holds itself out as doing so, including through statements, advertising, or any other means, it is generally reasonable for people to rely on the entity's explicit or implicit representations to that effect.[74] People reasonably assume entities are telling the truth. The entity in these situations creates an expectation of trust and the conditions for people to rely on the entity to act in their best interest.

Second, reasonable reliance may also exist where an entity assumes the role of acting on behalf of consumers or helping them to select providers in the market. In certain circumstances entities assume the role of acting on behalf of people as their agents or representatives, and people should be able to rely on those entities to act on their behalf. In other circumstances entities often act as intermediaries to help people navigate marketplaces for consumer financial products or services.[75] In these

73. CFPA section 1031(d)(2)(C), 12 U.S.C. 5531(d)(2)(C).

74. *See, e.g.*, *ITT Educ. Servs.*, 219 F. Supp. 3d at 920-21 (denying motion to dismiss abusiveness claim under CFPA section 1031(d)(2)(C) where students reasonably relied on for-profit college's financial-aid staff to act in their interests in signing them up for loans); *see also* CFPB, *Supervisory Highlights: Issue 27, Summer/Fall 2022*, at 14-15 (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-specialedition_report_2022-09.pdf ("A servicer . . . engaged in an abusive act or practice by denying [Teacher Loan Forgiveness (TLF)] applications where consumers used a [nonstandard] format for their employment dates. . . . Consumers reasonably rely on servicers to act in their interests, and this servicer encouraged consumers to consult with their representatives to assist in managing their accounts, including on its websites where it provided information about TLF. Further, it was reasonable for consumers who are applying for TLF to rely on their servicers to act in the consumers' best interests because processing forgiveness applications is a core function for student loan servicers, and they are entirely in control of the evaluation policies and procedures.").

75. *See, e.g.*, Complaint at 15-16, *CFPB v. College Educ. Servs. LLC*, 8:14-cv-3078-T-36EAJ (M.D. Fla. Dec. 11, 2014) (College Education Services' (CES) "telemarketers held themselves out as loan counselors and advisors with the expertise to establish custom-tailored programs to address each student-loan debtor's specific needs. CES created the illusion of expertise and individualized advice to

situations, the entity, acting as an intermediary, can function as a broker or other trusted source that the person uses in selecting, negotiating for, or otherwise facilitating the procurement of consumer financial products or services provided by third parties. Where the entity's role in the marketplace is to perform these kinds of intermediary functions, people should be able to rely on the entity to do so in a manner that is free of manipulation.[76] In both circumstances, entities that engage in certain forms of steering or self-dealing may be taking unreasonable advantage of the consumers' reasonable reliance.[77]

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induce consumers to reasonably rely on the company to act in their interests in seeking and selecting student loan debt-relief plans. . . . CES took unreasonable advantage of the reasonable reliance of consumers by enrolling and taking fees from consumers whose loans were ineligible for consolidation . . . . CES also took upfront fees to enroll some consumers in income-based repayment plans or loan forgiveness programs for which they were not eligible. In addition, CES placed some consumers in repayment plans that increased their monthly student-loan payments, leaving those consumers in a more financially precarious position than before.").

76. *See, e.g.*, U.S. Department of Treasury, *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation* 68 (June 2009), https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123 ("[C]onsumers may reasonably but mistakenly rely on advice from conflicted intermediaries.").

77. *See, e.g.*, Amended Complaint at 13-15, *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759 (D. Md. Dec. 13, 2017) (consumers seeking structured settlement advances were told by the advance company that they needed independent advice and were directed to an attorney who, though he held himself out as providing professional, independent advice, was not independent and failed to disclose ties to the company); *see also, e.g.*, Complaint at 9-10, *CFPB v. SettleIT, Inc.*, No. 8:21-cv-00674 (C.D. Cal. Apr. 13, 2021) (consumers seeking debt-settlement services relied on the company to negotiate for debt reductions because the company told consumers that it would work in their interests only, but the company failed to disclose its financial connections to consumers' creditors); Complaint at 15, *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 9:13-cv-80548 (S.D. Fla. May 30, 2013) (consumers reasonably relied on debt-settlement company to act in their interest by settling their debts expeditiously).