



Spotlight on “Abusive” Practices—The CFPB’s Policy Statement and What It Means for Your Business

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On April 3, 2023, the Consumer Financial Protection Bureau issued a policy statement on “abusive” practices. While this is the second time the CFPB has issued a policy statement on abusiveness, the significance of this policy statement cannot be understated.

Per the policy, an “abusive” act or practice is one that:

1. materially interferes with the ability of the consumer to understand a term or condition of a consumer financial product or service; or
2. takes unreasonable advantage of:
 - (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - (b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
 - (c) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

That definition is about as clear as mud. The CFPB attempts to clarify the controversial standard through its policy statement on abusiveness.

First, the CFPB generally explains that any conduct that “obscur[es] important features of a product or service” or “leverag[es] certain circumstances to take an unreasonable advantage” (such as gaps in understanding, unequal bargaining power, and consumer reliance) is prohibited. No showing of substantial injury is required to establish liability under the abusive standard.

The CFPB then separately analyzes each element of the abusive standard while also giving specific examples of conduct it has previously found to be abusive. Based on the CFPB’s guidance, the following conduct can be abusive:

- **Acts that materially interfere with the ability of a consumer to understand a term or condition of a consumer financial product or service.** Material interference can include buried disclosures that could limit a consumer’s comprehension of a term or condition; physical conduct that impedes a consumer’s ability to see, hear, or understand the terms and conditions; and digital

interference such as manipulation of drop-down boxes, multiple click-throughs, or other actions that have the effect of making the terms or conditions less accessible.

- **Acts that take unreasonable advantage of a lack of understanding on the part of a consumer of the material risks, costs, or conditions of a consumer financial product or service (i.e., gaps in understanding).** A company may take unreasonable advantage of a lack of understanding on the part of a consumer when the consumer cannot fully understand the risks associated with loan costs or cannot compare a loan with loans from different companies. A company may also trigger this prong of the abusive standard when consumers are unaware that a company can collect fees because the company's explanations are too complex and counterintuitive.
- **Acts that take unreasonable advantage of the inability of a consumer to protect his or her own interests in selecting or using a consumer financial product or service (i.e., unequal bargaining power).** A company may take unreasonable advantage of the inability of a consumer to protect his or her own interests when it tells consumers they can change their allocated payments, but consumers are not able to reach a customer-service representative to do so. A bank was also found to have violated this prong when it opened credit cards, lines of credit, and deposit accounts without the consumers' knowledge or consent. The CFPB also noted that use of form contracts, where contractual provisions are not subject to consumer choice, can trigger this prong of the abusive standard.
- **Acts that take unreasonable advantage of the reasonable reliance by a consumer on a covered person to act in the consumer's interests (i.e., consumer reliance).** College financial aid advisors were deemed to have engaged in abusive conduct when they encouraged students to secure loans they could not afford because the advisors earned more revenue when students obtained more loans. Additionally, telemarketers who posed as student loan counselors and persuaded consumers to rely on them to act in their best interests while charging fees to enroll students in debt-relief plans for which they were ineligible were found to have triggered the abusive standard.

While the abusive standard is still far from crystal clear, the policy statement sets forth an explicit list of conduct the CFPB deems abusive. You should carefully review your existing policies, procedures, and practices in light of the policy statement. Specifically, you can prepare for future examinations and/or potential enforcement actions by:

- reassessing and evaluating your compliance policies, including buffing up existing policies and governance documents;
- reviewing and evaluating your company's advertising, including any language in disclaimers and any language that suggests the company puts consumers first; and
- evaluating any third-party risk. The policy statement explains that any advantage a business could gain from another's wrongdoing could create abusiveness risk. Thus, businesses that engage third parties should re-evaluate and assess any associated risks, including understanding

the interactions those third parties have with consumers and any language or relationship that does not allow choice on the part of the consumer.