

What CFPB Policy Shift Means For Scrutiny Of Abusive Acts

By **Brad Karp, Roberto Gonzalez and Hilary Oran** (March 25, 2021)

While Rohit Chopra awaits U.S. Senate confirmation to lead the Consumer Financial Protection Bureau, acting Director David Uejio has already commenced the shift to a CFPB that will more aggressively deploy its rulemaking, supervisory and enforcement authorities.[1]

As part of this shift, and as widely expected, he recently rescinded a policy statement — issued in January 2020 by then-Director Kathy Kraninger — that adopted restraint in the agency's enforcement of the abusive prohibition. Calling the policy statement flawed and self-defeating, Uejio announced the CFPB would enforce the abusive prohibition just like any other provision of law.

Going forward, we expect that CFPB examiners and enforcement attorneys will cite abusive violations with more frequency, as well as work to develop and expand the abusiveness standard.

This article describes the abusiveness policy statement, the reasons for its repeal and some of the contexts in which the CFPB might be expected to flex its abusiveness authority.

In light of this, regulated entities should consider refreshing their reviews of products, practices and disclosures to identify and mitigate their exposure to unfair, deceptive or abusive acts and practices risk.

The 2020 Policy Statement and Its Repeal

The Dodd-Frank Act prohibits any covered person or service provider from engaging in unfair, deceptive, or abusive acts or practices, or UDAAP.[2] Case law and guidance on unfairness and deception had been developed by the Federal Trade Commission under its Section 5 authority, but "abusive" was an innovation by Dodd-Frank. Under the statute, an act or practice is abusive if it:

- "[M]aterially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service"; or
- "[T]akes 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 its interests 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." [3]

On Jan. 24, 2020, Kraninger adopted a policy statement that signaled that the CFPB would take a restrained approach to enforcing the abusive prohibition in light of the "significant challenges" to regulated entities posed by uncertainty over the prohibition's scope.[4] The statement adopted three principles:



Brad Karp



Roberto Gonzalez



Hilary Oran

- The CFPB intended to focus on citing or challenging conduct as abusive if it "concludes that the harms to consumers from the conduct outweigh its benefits to the consumer."
- The CFPB would generally avoid challenging acts or practices as abusive if the agency was relying on the same underlying conduct and facts for an unfairness or deception claim.
- Absent unusual circumstances, the CFPB did not intend to seek civil penalties or disgorgement if a covered person made good faith efforts to comply with the abusiveness standard.

On March 11, 2021, Uejio rescinded the policy statement, finding that its principles were flawed and "do not actually deliver clarity to regulated entities." [5]

First, while the cost/benefit principle was intended to ensure that the agency appropriately allocated its resources to address consumer harm, the CFPB now determined that there is "no basis to treat application of the abusiveness standard differently from the normal considerations that guide the Bureau's general use of its enforcement and supervisory discretion."

Second, Uejio reasoned that the agency's prior commitment to not cite abusiveness when it was also citing deception or unfairness had the effect of slowing the CFPB's ability to clarify the abusiveness standard by articulating abusive claims, as well as having courts rule on such claims.

Third, he determined that protecting consumers and deterring abusive practices justified enforcing abusiveness violations just like any other violations. Going forward, the CFPB would consider "good faith, company size, and all other factors it typically considers as it uses its prosecutorial discretion," but it would no longer treat abusiveness differently. [6]

CFPB's Anticipated Use of the Abusiveness Authority

Regulated entities should expect that CFPB examiners and enforcement attorneys will develop and expand the abusiveness standard, and cite abusiveness with more frequency, even if deception and unfairness violations are also cited.

Unfortunately, there will be continuing uncertainty as to exactly how the CFPB will apply the abusiveness standard in a range of fact patterns, making it difficult to assess whether a given product or practice will be found to be in violation.

The CFPB has historically cited abusiveness violations in areas such as debt collection and student lending, among others, and this use is likely to expand given Uejio and Chopra's intense focus on protecting consumers from foreclosure and other financial hardship during the pandemic, particularly as forbearance periods and other accommodations begin to lapse.

Uejio has already instructed the CFPB's personnel to expedite enforcement investigations related to consumer hardship during the pandemic. [7] Chopra also mentioned during his confirmation hearing that he viewed it as "critical for CFPB to take a hard look at how big tech companies and others are entering financial services, the impact on our privacy and

our personal data." [8]

We would expect the new CFPB to take an assertive approach to using UDAAP, including abusiveness, to address these various areas of concern.

The CFPB could use the abusiveness standard to impose heightened disclosure obligations — and even duties inching toward fiduciary-like duties — in certain circumstances based on the nature of the customer relationship and/or the degree of the product or service's complexity.

For example, under former Director Richard Cordray's tenure, the CFPB in 2017 brought an enforcement action in the U.S. District Court for the Middle District of Pennsylvania claiming that the defendant student loan servicer, Navient Corp., engaged in abusive and unfair acts and practices by "steering" student borrowers into forbearance but failing to inform them — or informing them inadequately — about income-driven repayment plans, which the CFPB claims would have been financially beneficial for the borrowers. [9]

This conduct was deemed by the CFPB to be abusive because borrowers relied on the loan servicer "to act in their best interest in advising about options to address their financial situation," and such reliance was reasonable because both the loan servicer and the U.S. Department of Education encouraged borrowers to rely on the servicer to assist them.

And just recently, the CFPB cited abusiveness in its **novel enforcement action** in the U.S. District Court for the Western District of Virginia against Libre by Nexus Inc., a business that works with immigrants held in federal detention centers to secure their release on bond. The CFPB alleged that Libre used predominantly English-language agreements to enroll clients, while knowing that many of its clients and co-signers did not speak or read the language.

The bureau believed that misrepresenting, concealing or failing to explain material terms of the agreement in this manner was an abusive practice because it "materially interfered" with the consumer's ability to "understand a term or condition of a consumer financial product or service." [10]

Interestingly, the bureau did not simultaneously charge this conduct as deceptive or unfair. This may be a further signal that the agency intends to increasingly rely on the abusiveness standard.

The above examples give some indication as to how a CFPB in the Biden administration could frame abusiveness claims going forward. It is also important to remember that the deception and unfairness standards provide significant discretion in the hands of an aggressive CFPB.

For all these reasons, regulated entities should consider refreshing their reviews of products, practices and disclosures to identify and minimize UDAAP risk. To account for the uncertain boundaries of the UDAAP prohibition, some companies seek to identify UDAAP risk by testing against a series of more open-ended fairness standards.

In any event, careful and ongoing evaluation of UDAAP risk helps demonstrate good faith, which may be beneficial in the event of CFPB scrutiny.

Brad S. Karp is chairman, Roberto J. Gonzalez is a partner and Hilary J. Oran is an associate at Paul Weiss Rifkind Wharton & Garrison LLP.

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[1] See Paul Weiss, *The Coming Transformation of the CFPB in the Biden Administration: What to Expect and How to Prepare*, <https://www.paulweiss.com/practices/litigation/white-collar-regulatory-defense/publications/the-coming-transformation-of-the-cfpb-in-the-biden-administration-what-to-expect-and-how-to-prepare?id=39313> (Feb. 1, 2021).

[2] 12 U.S.C. § 5531.

[3] 12 U.S.C. § 5531(d).

[4] CFPB, *Statement of Policy Regarding Prohibition on Abusive Acts or Practices*, https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-enforcement-policy_statement.pdf (Jan. 24, 2020).

[5] CFPB, *Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Rescission*, https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-policy-statement-consolidated_2021-03.pdf (March 11, 2021).

[6] CFPB, *Press Release, Consumer Financial Protection Bureau Rescinds Abusiveness Policy Statement to Better Protect Consumers*, <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rescinds-abusiveness-policy-statement-to-better-protect-consumers/> (March 11, 2021).

[7] David Uejio, *The Bureau Is Taking Much-Needed Action to Protect Consumers, Particularly the Most Economically Vulnerable*, <https://www.consumerfinance.gov/about-us/blog/the-bureau-is-taking-much-needed-action-to-protect-consumersparticularly-the-most-economically-vulnerable/> (Jan. 28, 2021).

[8] Senate Banking, Housing and Urban Affairs Committee Holds Hearing on Pending Nominations (March 2, 2021).

[9] See *Consumer Financial Protection Bureau v. Navient Corp.*, No. 17-cv-00101, Dkt. 1 (M.D. Pa. Jan.18, 2017).

[10] *Consumer Financial Protection Bureau et al. v. Nexus Services, Inc. et al.*, 21-cv-00016, Dkt. 1 (W.D.Va. Feb. 22, 2021).