

April 12, 2023

# CFPB Issues Policy Statement Taking Expansive View of “Abusive” Practices

On April 3, 2023, the Consumer Financial Protection Bureau (“CFPB”) released a policy statement (the “Policy Statement”) outlining its broad interpretation of the “abusive” component of the prohibition on unfair, deceptive, or abusive acts and practices (“UDAAP”).<sup>1</sup> The Policy Statement replaces a prior statement that adopted a restrained posture towards enforcing the prohibition on abusive acts and practices, which the CFPB rescinded in March 2021.<sup>2</sup>

In public remarks accompanying the release, CFPB Director Rohit Chopra explained that the Policy Statement aims to “provide a practical analytical framework for identifying abusive conduct, and also to offer some simple rules of thumb.”<sup>3</sup> In this regard, the Policy Statement seeks to summarize over a decade of enforcement precedent and explains that abusive conduct generally entails: (1) obfuscating important features of a product or service; or (2) leveraging circumstances to take unreasonable advantage of consumers.<sup>4</sup> The CFPB has invited public comments on the Policy Statement by July 3, 2023.

Below, we provide an overview of the Policy Statement with an assessment of its implications.

## Overview

In 2010, Congress adopted the “abusive” prohibition in the CFPB’s enabling legislation, the Consumer Financial Protection Act (“CFPA”), which was Title X of the Dodd-Frank Act. The law authorized the newly constituted CFPB to enforce the prohibition across the range of bank and non-bank consumer financial service providers for which it had enforcement authority. Since the CFPA’s enactment, the CFPB has brought dozens of actions to enforce the abusive conduct prohibition, targeting conduct ranging from overdraft fees to student-lending practices. The CFPA also grants the federal banking agencies and state authorities the authority to enforce the “abusive” prohibition in certain circumstances.

The CFPA defines abusive conduct as an act or practice that either:

- materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

<sup>1</sup> CFPB, Policy Statement on Abuse Acts or Practices (April 3, 2023), <https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/#34>.

<sup>2</sup> See Paul Weiss Client Memorandum CFPB Rescinds Policy of Restraint on Enforcing “Abusive” Prohibition (March 12, 2021), <https://www.paulweiss.com/practices/litigation/white-collar-regulatory-defense/publications/cfpb-rescinds-policy-of-restraint-on-enforcing-abusive-prohibition?id=39555>

<sup>3</sup> CFPB, Rohit Chopra Prepared Remarks at the University of California Irvine Law School (April 3, 2023), <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/>.

<sup>4</sup> CFPB, CFPB Issues Guidance to Address Abusive Conduct in Consumer Financial Markets (April 3, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-address-abusive-conduct-in-consumer-financial-markets/#:~:text=In%20this%20policy%20statement%2C%20the,relia%20nce%20to%20take%20unreasonable%20advantage.>

- takes unreasonable advantage of: (a) the consumer’s lack of understanding 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 consumer’s reasonable reliance on a covered person to act in the interests of the consumer.

The Policy Statement summarizes these two prohibitions, respectively, as obscuring important features of a product or service, or leveraging certain circumstances to take an unreasonable advantage.

According to the Policy Statement, a showing of substantial injury is not required to establish liability for abusiveness. Rather, the statutory framework is focused on the types of conduct that Congress presumed to be harmful or distortionary to the market. An act or practice could fall into more than one of the categories above but need only fall into one category.

### **Material Interference**

According to the CFPB, an act or omission can materially interfere with the ability of a consumer to understand a term or condition of a product or service if it obscures, withholds, or de-emphasizes information relevant to the consumer’s understanding of those terms or conditions. The Policy Statement notes that the categories of relevant terms for this prohibition include, but are 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.

Recognizing that a variety of acts and practices can run afoul of this prohibition, the Policy Statement lists several categories of conduct that have denied material information to consumers or presented that information in a manner that a consumer cannot understand:

- *Buried Disclosures* are disclosures that limit a consumer’s comprehension of a term or condition. The Policy Statement notes that buried disclosures can arise through the use of fine print, complex language, jargon, the timing of the disclosure, and the omission of a material term or condition.
- *Physical Interference* describes conduct that physically impedes a person’s ability to see, hear, or understand the terms and conditions, including, but not limited to, physically hiding or withholding notices. In digital form, interference can involve the use of “dark patterns”—for example, pop-ups, drop-downs, pre-checked boxes for default options, and hiding important information—that can prevent a consumer from fully understanding a product or service.
- *Overshadowing* includes the prominent placement of certain content that interferes with the consumer’s understanding of the terms and conditions.

As noted, the Policy Statement reaffirms that intent is not a required element to establish material interference. It is sufficient to show that the natural consequence of the act or omission would impede a consumer’s ability to understand or that the act or omission did impede a consumer’s actual understanding. Notably, the Policy Statement asserts, without reference to any prior enforcement action, that 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.

### **Unreasonable Advantage**

According to the Policy Statement, the unreasonable advantage prohibition generally concerns gaps in understanding, unequal bargaining power, and consumer reliance. To that end, the prohibition bars covered entities from taking unreasonable advantage of: (a) a consumer’s lack of understanding; (b) the inability, due to unequal bargaining power, of a consumer to protect the consumer’s interests; or (c) the consumer’s reasonable reliance.

In these circumstances, an unreasonable advantage can confer various financial and non-pecuniary benefits to the entity, its affiliates, or partners, including, but not limited to, increased market share, revenue, cost savings, profits, reputational benefits, and other operational benefits to the entity. The Policy Statement also notes that an entity can be held liable for taking

unreasonable advantage of consumers even where the entity did not create the condition underlying these three circumstances. Moreover, in contrast to conduct that the CFPB deems “unfair,” the Policy Statement clarifies that government enforcers do not need to independently prove that an act or practice caused substantial injury to establish liability under the abusiveness prohibition benefits to the entity.

- *Lack of Understanding.* The Policy Statement provides that covered entities may not take unreasonable advantage of gaps in a consumer’s understanding of material risks, costs, or conditions of a product or service. Referencing the statutory text, it emphasizes that there is no requirement to show that a consumer’s lack of understanding was reasonable, or that it arose through the covered entity’s use of untruthful statements to demonstrate abusive conduct. The Policy Statement further notes the prohibition does not require proof that a sufficient number of people lacked understanding to establish that an act or practice was abusive.
- *Inability to Protect Interests.* The Policy Statement explains that violations of this variety arise where, due to unequal bargaining power, consumers lack the practical ability to choose or switch providers, seek more favorable terms, or make other decisions to protect their interests. As a general matter, it notes that consumers may be less likely to protect their interests in circumstances in which they cannot exercise meaningful choice in the selection or use of any particular entity as a provider, including credit reporting companies, debt collectors, and third-party loan servicers. Although the Policy Statement makes clear that such relations are not inherently abusive, it states that entities may not take unreasonable advantage of consumers’ lack of choice when entering those relationships.
- *Reasonable Reliance.* The Policy Statement provides that covered entities can take unreasonable advantage of a consumer’s reasonable reliance in circumstances where consumers rely on an entity to make a decision for them or to advise them on how to select a particular product or service. The Policy Statement notes two scenarios where it is reasonable for consumers to rely on an entity to act in their best interest. The first scenario includes circumstances where an entity communicates that it will act in its customers’ best interest; the second scenario arises where an entity assumes the role of trusted source, acting on behalf of consumers or helping them select financial products or services provided by third parties. Under either scenario, certain forms of steering or self-dealing can indicate that an entity is taking unreasonable advantage of consumers’ reasonable reliance.

## Implications

While the CFPB’s guidance will be useful to regulated entities in some respects, the Policy Statement takes an aggressive view of the “abusive” prohibition and maintains—rather than resolves—uncertainty by providing examples of what counts as abusive conduct, rather than defining its parameters. And because the CFPB’s analysis draws largely from its own complaints and consent orders—rather than court decisions—it is unclear whether courts or other regulators will adopt the Policy Statement’s views. Banks and other consumer financial service providers should consider incorporating the Policy Statement’s guidance into their procedures and checklists for reviewing products, practices, and disclosures for UDAAP risk. If a product or practice appears to run afoul of an aspect of the Policy Statement, a company can then perform a more in depth legal and risk analysis. For example, in consideration of the Policy Statement’s note that a product or service can be sufficiently complicated as to violate the unreasonable advantage prohibition, heightened disclosures may be warranted for particularly complex products or services. In addition, covered entities should examine aspects of their business that rely on customers’ interactions with third parties in light of the Policy Statement’s views regarding the scope of abusiveness liability in connection with a third party’s conduct.

Besides the regulated community, the Policy Statement’s target audience also included state regulators, in particular state attorneys general. In May 2022, the CFPB released an interpretive rule reaffirming that states can independently enforce any provision of the CFPA, including section 1036(a)(1)(A), a provision that makes it unlawful for covered persons or entities to

violate the Federal consumer financial laws.<sup>5</sup> Building off that announcement, the Policy Statement provides state regulators with a roadmap to pursue abusiveness claims under the CFPB. Indeed, Director Chopra concluded his public remarks announcing the Policy Statement by noting that “CFPB does not have a monopoly when it comes to policing against abusive conduct.”<sup>6</sup>

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<sup>5</sup> CFPB, Authority of States to Enforce the Consumer Financial Protection Act of 2020 (May 19, 2022), <https://www.consumerfinance.gov/rules-policy/final-rules/authority-of-states-to-enforce-the-consumer-financial-protection-act-of-2010/>

<sup>6</sup> CFPB, Rohit Chopra Prepared Remarks at the University of California Irvine Law School (April 3, 2023), <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/>

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

**Susanna M. Buerge**  
+1-212-373-3553  
[sbuerge@paulweiss.com](mailto:sbuerge@paulweiss.com)

**Roberto J. Gonzalez**  
+1-202-223-7316  
[rgonzalez@paulweiss.com](mailto:rgonzalez@paulweiss.com)

**Brad S. Karp**  
+1-212-373-3316  
[bkarp@paulweiss.com](mailto:bkarp@paulweiss.com)

**Loretta E. Lynch**  
+1-212-373-3000

**Elizabeth M. Sacksteder**  
+1-212-373-3505  
[esacksteder@paulweiss.com](mailto:esacksteder@paulweiss.com)

**Kannon K. Shanmugam**  
+1-202-223-7325  
[kshanmugam@paulweiss.com](mailto:kshanmugam@paulweiss.com)

*Associates Alex Beer and O’Ryan Moore contributed to this Client Memorandum.*