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Update
COMPLIANCE

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CFPB-POLICY STATEMENT ON ABUSIVE ACTS OR PRACTICES

I. BACKGROUND

In 2010, Congress passed the Consumer Financial Protection Act of 2010 (CFPA) and banned abusive conduct. 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.

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.

Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. The CFPB has issued its 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.

II. ANALYSIS

Under the CFPA, there are two abusiveness prohibitions. 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.

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*. 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.

A. Materially interfering with consumers' understanding of terms and conditions

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

1. 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. Entities can also interfere with understanding by omitting material terms or conditions.

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.

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" 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.

2. 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. 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 products or service's apparent terms.

B. Taking Unreasonable Advantage

The second form of "abusiveness" under the CFPA prohibits entities from taking unreasonable advantage of certain circumstances. Congress determined that it is an abusive act or practice when an entity takes unreasonable advantage of three particular circumstances. 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." This circumstance concerns *gaps in understanding* affecting consumer decision-making.

2. The "inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." 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.” 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.

The ordinary meaning of the phrase “take advantage of” is generally “to make use of for one’s own benefit.” 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, 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,” and conversely, “unreasonable” means “exceeding the bounds of reason or moderation.”

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 abusiveness prohibition.

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. Such an evaluation does not require an inquiry into whether advantage-taking is typical or not. And even a relatively small advantage may be abusive if it is unreasonable.

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 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.” Unreasonable advantage-taking includes using the statutory circumstances to acquire particular leverage over people or deprive consumers of legal rights.

1. 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.”

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 likelihood of default and the loss of future benefits. 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. And gaps in understanding with respect to "conditions" include any circumstance, context, or attribute of a product or service, whether express or implicit. For example, "conditions" could include the length of time it would take a person to realize the benefits of a financial product or service, the relationship between the entity and the consumer's creditors, the fact a debt is not legally enforceable, or the processes that determine when fees will be assessed.

While acts or omissions by an entity can be relevant in determining whether people lack understanding, 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. 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.

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

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. 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. 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.

2. 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." When people are unable to protect their interests in selecting 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. 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. 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.

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. For example, when the steps a person would need to take to protect their interests are unknown to the person or are especially onerous they are likely unable to protect their interest. Furthermore, people who do not have monetary means may be unable to protect their interests if the only practical method for doing so requires payment of money. 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.

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. In addition, entities may not take unreasonable advantage of the fact that they are the only source for important information or services.

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. 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.

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."

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.

3. 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." 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. 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. In these 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. In both circumstances, entities that engage in certain forms of steering or self-dealing may be taking unreasonable advantage of the consumers' reasonable reliance.