CFPB's Hazy 'Abuse' Definition Creates Compliance Questions

By **Keith Bradley and David Coats** (April 26, 2023)

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The Consumer Financial Protection Bureau on April 3 alerted the consumer financial sector about the bureau's expanded understanding of the concept of "abusive acts and practices."

The new "Policy Statement on Abusive Acts and Practices,"[1] while it is evidently inspired by policy statements that the Federal Trade Commission issued decades ago about unfair and deceptive practices, marks a different chapter in federal regulation of consumer financial markets.

The bureau is warning providers in these markets to be proactive about assessing the quality and fairness — debatable as those concepts may be — of their consumer dealings.

Decades ago, as the FTC expanded its enforcement and rulemaking against unfair and deceptive practices, it faced criticism that these concepts were dangerously vague. Indeed, the Federal Trade Commission Act had not described or defined "unfair" or "deceptive."[2]

The FTC responded with two seminal policy statements. Its statement[3] about deceptive practices laid out basic principles of deceptive advertising practices, and those principles have remained the bedrock of deceptive practices law.

The policy statement[4] on unfair practices established a three-element test for unfairness, which Congress later incorporated into the bureau's organic statute.[5]

Congress created the bureau as part of the response to the 2008 financial crisis. The Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Act,[6] prohibits unfair and deceptive[7] practices by providers of consumer financial products and services.

It also empowers the bureau to write[8] rules to identify and prevent such practices and to take enforcement action against them. Congress also added a new prohibition against abusive practices.

The statute gives significant definition to that concept. There are four ways[9] a practice could be abusive:

- First, if it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service";

- Second, if it "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";

- Third, taking such advantage of "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service"; or

- Fourth, taking advantage of "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."

But these provisions still leave significant uncertainties.

For example, what is the difference between a consumer simply not understanding a consumer, and a company actually taking advantage of that lack of understanding? When does that advantage rise to the level of being unreasonable? What kinds of situations constitute a genuine inability of a consumer to protect the consumer's interests? When would it be reasonable for a consumer to rely on a product provider to act in the consumer's interests?

Compounding these uncertainties, in the bureau's first decade it issued relatively few decisions that were based solely on a practice's being abusive, as opposed to unfair.

Many financial companies had a decent understanding of the concept of unfairness from the FTC's policy statements and the law developed under them. The question constantly asked was "what is the additional content of the prohibition on abusive practices?"

In its recent Policy Statement on Abusive Acts and Practices, the bureau has provided some answers. They will not be comforting for anyone responsible for compliance.

One striking difference between the bureau's new policy statement and its FTC predecessors is that it does not signal any boundaries. The policy statement[10] on unfairness "delineate[d] the Commission's views of the boundaries of its consumer unfairness jurisdiction," and, accordingly, it gave some indications of what would not be considered unfair.

The bureau's policy statement does not take a similar approach. It describes situations that could be abusive, and repeatedly warns that other things could be abusive too. The policy statement is a warning about the bureau's enforcement intentions.

That said, it does stake out clear positions about the interpretation of key statutory phrases.

First, recall that one kind of abusive practice is "materially interfer[ing]" with a consumer's ability to understand a term or condition. One could read "interfering" to mean a deliberate activity, such that a company cannot be said to "interfere" unless it has some awareness that its actions will impede the consumer's understanding.

The bureau rejects that interpretation. "[E]vidence of intent would provide a basis for inferring material interference," it says, but "it is not a required element to show material interference."[11]

Second, the abusiveness prohibition appears to impose an affirmative obligation to communicate certain features of a product prominently. A company might state the basic

terms of a transaction accurately, and without deception. But "[c]ertain terms ... are so consequential" that if the company has not displayed them prominently enough, it can be deemed to have materially interfered with understanding.

Examples of those include limitations on the use of the product and "contractually specified consequences of default." Here, the bureau appears to be saying that beyond ensuring the product description is not deceptive, a company must give adequate exposure to certain terms that are particularly important for consumers to know about.

Third, some products may be inherently abusive because "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." Compliance officers will need to watch the development of this concept closely.

The bureau has not said what amount of explanation would be "sufficient," or how to know when the key information cannot be sufficiently explained. And many financial products have complications beyond the simple headline features.

With respect to the concept of "tak[ing] unreasonable advantage," the bureau has elaborated that the "advantage" involved could be monetary or nonmonetary. Beyond additional profit or revenue, it could be, for example, "reputational benefits" or "other operational benefits."

The policy statement does not identify any kind of benefit — economic or noneconomic, tangible or intangible — that would not qualify as an "advantage."

A company can be said to take advantage of a condition regardless of whether the company created the condition. And a company might also be deemed to take advantage if it attempts to obtain a benefit, even if that attempt did not succeed — "one can take advantage ... even if that benefit is not successfully realized."

Putting these concepts together, they present a significant compliance risk.

Any business is trying to obtain benefits from its market position and product relationships. If any of the adverse consumer conditions is present — lack of understanding of material risks or conditions, inability to protect the consumer's interests, or reasonable reliance on the provider — it would likely be hard to argue that a provider's business activities are not taking advantage of those conditions.

The bureau's expansive understanding of take advantage makes the word "unreasonable" even more important. That word is naturally hard to define. The bureau suggests it means "exceeding the bounds of reason or moderation," but the policy statement stresses that it does not necessarily matter whether the advantage-taking is "typical" in a given market.

The bureau then gives examples of circumstances that might be unreasonable. One is that a provider is "reaping more benefits as a consequence of the statutorily identified circumstances" — in other words "whether the benefit to the entity would have existed if the circumstance did not exist."

Since one could not take any advantage of a circumstance without its existence, the bureau's formulation comes close to writing "unreasonable" out of the provision. The bureau's second example is that a provider is "indifferent to ... negative consumer outcomes resulting from one of the circumstances."

The implications for compliance are significant.

It is conceivable that if a provider's customers do not fully understand all the material conditions of a product, even though the provider's actions did not contribute to that misunderstanding, and the provider "is indifferent" to the misunderstanding while gaining some intangible benefit from it, the bureau, under the policy statement, would regard the provider as taking unreasonable advantage of the misunderstanding.

In other words, companies may need to search for such adverse consumer situations and actively correct or mitigate them.

Compliance that focuses on a company's conduct may not be enough — it will be necessary to evaluate a product from the perspective of customers, with a holistic understanding of how they experience it in their circumstances.

The policy statement also emphasizes several kinds of market conduct that are enforcement priorities for the bureau. These include so-called digital dark patterns, i.e., website designs that trick consumers into agreeing to products they did not fully intend to purchase; businesses set up for their customers to fail; and market structures that reduce consumer choice.

The bureau's interest in those situations is not new. Its officials have spoken frequently about those concerns in the last year. But the policy statement's explanation about abusiveness is not limited to those three current priorities.

We will all — providers, compliance officers, consumers and the bar — have to see how the bureau applies its new understanding of abusiveness. At a minimum, it appears to be a major warning that there may be fewer limits to bureau enforcement.

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[1] https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/.

[2] https://www.law.cornell.edu/uscode/text/15/45.

[3] https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception.

[4] https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

[5] https://www.law.cornell.edu/uscode/text/12/5531.

[6] https://www.govinfo.gov/app/details/PLAW-111publ203.

[7] https://www.law.cornell.edu/uscode/text/12/5536.

[8] https://www.law.cornell.edu/uscode/text/12/5531.

[9] https://www.law.cornell.edu/uscode/text/12/5531.

[10] https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

[11] https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/.