July 3, 2023

Via electronic mail to: 2023- AbusivenessPolicyStatement@cfpb.gov

Comment Intake
Statement of Policy Regarding
Prohibition on Abusive Acts or Practices
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street, NW,
Washington, DC 20552

Re: Statement of Policy Regarding Prohibition on Abusive Acts or Practices (Docket No. CFPB–2023–0018]).

Dear Director Chopra:

The Bank Policy Institute, American Financial Services Association, Consumer Bankers Association, Credit Union National Association, Mortgage Bankers Association, and the U.S. Chamber of Commerce[1] are providing these comments in response to the Consumer Financial Protection Bureau's Statement of Policy Regarding the Prohibition on Abusive Acts or Practices (Docket No. CFPB–2023–0018).[2] The Bureau asserts that the Statement became effective on April 12, 2023, but that the Bureau is nevertheless soliciting comments on it.

We appreciate the Bureau's effort to communicate how it "analyzes the elements of abusiveness through relevant examples, with the goal of clarifying the scope and application of the prohibition in the CFPA on "abusive practices."[3] While policy statements and supervisory guidance cannot in and of themselves create binding, enforceable legal obligations, they can help industry gain a better

[1] See Appendix for association descriptions.

[2] 88 Fed. Reg. 21883 (April 12, 2023).

[3] *Id*.

understanding of how an agency may approach a particular requirement or prohibition.[4] We support the Bureau's solicitation of comments on the Statement and recommend that the Bureau seek comment on all proposed guidance and policy statements. However, the Bureau should seek comment or otherwise solicit public input on guidance and policy statements (such as through the issuance of a Request for Information) prior to their effective dates so that input from the public can be appropriately addressed and incorporated in the final document.

In this case, the Bureau issued the Statement ***prior to*** seeking comment, and, perhaps in part for that reason, the Statement raises as many questions as it answers. In particular, it fails to clarify the distinction between unfair and deceptive acts or practices, on the one hand, and abusive acts or practices on the other. The statute and rules of statutory construction dictate that abusiveness means something more egregious than something unfair or deceptive, but the Statement does not articulate this fact. The Statement indicates potential liability beyond the bounds set by Congress in the statutory language and also takes issue with standard and routine practices necessary to the functioning of markets for consumer financial products and services. Under the statute, whether acts or practices are potentially "abusive" will turn on whether they materially interfere with a consumer's understanding (beyond mere deception) or whether an institution has taken "unreasonable advantage." However, the Statement merely references the dictionary definitions of "reasonable" and "unreasonable" without providing guidance on factors that might render those acts or practices egregious and thus potentially unreasonable and abusive. In fact, there are several factors that emerge from the agency's enforcement history on abusive claims that help distinguish lawful from unlawful conduct, which the Statement fails to highlight. The Statement is too broad and general to provide guidance as to whether any specific market practice is "abusive." In accordance with the Fifth Amendment's guarantee of due process, the Bureau should provide fair notice of conduct that it regards as abusive before bringing an enforcement action.[5]

It does not appear that the Bureau consulted or coordinated with the prudential banking agencies in connection with developing the Statement. Given that the banking regulators have exclusive authority to enforce the abusiveness prohibition against smaller depository institutions, consultation and coordination would help ensure that the abusiveness prohibition is uniformly enforced regardless of a covered person's size or charter.

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[4] The prudential banking agencies have codified their policies concerning the use of supervisory guidance, as doing so strengthened the important and helpful role that supervisory guidance plays in the U.S. system of bank regulation and supervision. 12 C.F.R. part 262, App. A (Federal Reserve); 12 C.F.R. part 302, App. A (FDIC); 12 C.F.R. part 4, App. A to Subpart F (OCC) (hereinafter "final rule on supervisory guidance"). Consistent with the final rule on supervisory guidance, we recommend that the Bureau adopt similar policies with respect to guidance.

[5] See, *e.g., FCC v. Fox Television Stations, Inc.,* 132 S. Ct. 2307, 2317–18 (2012), in which the Supreme Court held that a "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required" and that the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." Moreover, a "conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement" (internal citations omitted).

Finally, additional guidance regarding how the Statement will be implemented in connection with the UDAAP examination manual would provide institutions with greater understanding of how the Statement will inform supervision and enforcement.

I. Executive summary

1. **Abusive acts or practices are distinct from unfair or deceptive acts or practices. Certain key factors are critical in distinguishing the two.**

2. **Material interference requires different—and more egregious—actions than deceptive acts or practices.**

    a) **A material interference claim should require proof of *actual* material interference and consumer harm.**

    b) **A material interference claim should allege knowledge and intent.**

    c) **Compliant and effective disclosures alone should not serve as the basis for a material interference claim.**

    d) **Complexity alone should not be a basis for a material interference allegation where the terms are properly disclosed.**

    e) **The Bureau should clarify how digital interference, including "dark patterns," may materially interfere with consumer understanding.**

3. **The Statement does not accord with the statutory language or fully account for the Bureau's prior rulemaking or enforcement history in distinguishing between a "reasonable advantage" and an "unreasonable advantage."**

    a) **The Statement takes an impermissibly expansive view of a "lack of understanding."**

    b) **The Statement establishes an impermissibly low standard for supporting an allegation of taking unreasonable advantage of consumers' lack of understanding.**

    c) **"Unequal bargaining power" is not *prima facie* evidence that consumers cannot protect their interests.**

    d) **The use of form contracts ensures equal treatment and should not create a presumption of unreasonable advantage-taking of consumers' inability to protect their interests.**

e) **"Outsized market power" should not create a presumption of unreasonable advantage-taking of consumers' inability to protect their interests.**

f) **Determining whether consumers would have "high transaction costs" to exit a relationship with a covered person requires a weighing of costs and benefits.**

g) **Reasonable consumer reliance must be based on explicit representations that a covered person is acting in consumers' interests. Serving consumers in the ordinary course is not sufficient to create reasonable reliance.**

II. Discussion

1. Abusive acts or practices are distinct from unfair or deceptive acts or practices. Certain key factors are critical in distinguishing the two.

In 2010, Congress passed the Consumer Financial Protection Act ("CFPA"), which, among other things, granted authority over unfair or deceptive acts or practices to the states, the federal banking agencies, and the CFPB. The FTC Act had long prohibited unfair or deceptive acts or practices.[6] The CFPA added a new category of prohibited actions – "abusive" acts or practices, granting the Bureau authority to determine whether an act or practice is abusive. That determination, however, was subject to some explicit limitations. Specifically, 12 USC § 1031(d) provides that:

> "The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the 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) 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."[7]

Since the CFPA's passage, there remain unresolved questions concerning how conduct that may be "abusive" relates to pre-existing "deception" and "unfairness" standards. Under a fundamental precept of statutory construction, the rule against superfluities, Congress would not have added "abusiveness" if

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[6] *See* 88 Fed. Reg. at 21883, notes 3 and 4, explaining that "[i]n 1914, Congress passed the FTC Act, which declared as unlawful "unfair methods of competition," and in 1938, Congress amended the FTC Act to declare as unlawful "unfair or deceptive acts or practices."

[7] 12 U.S.C. 5531(d).

the behavior it sought to address was already covered by longstanding deception or unfairness prohibitions.[8] Thus, the abusive prohibition must be intended to address conduct not otherwise captured by the existing standards. Moreover, Congress's very use of such a strong term, "abusive," indicates that the standard is intended to address more egregious conduct than unfair or deceptive conduct. Abusive is defined in relevant part as "involving bad or wrong use of something or treatment of someone, especially for your own advantage."[9] Many of the Bureau's prior allegations of abusive conduct have helpfully highlighted certain factors that have been important to the Bureau's allegations of abusiveness. Further discussion and emphasis on those factors in the Statement could help covered persons understand the difference between potentially abusive acts from conduct that is unfair or deceptive; but the Statement has not highlighted those factors. Providing further insight into what factors are important in determining whether acts or practices are egregious and vulnerable to an abusiveness claim should be the primary goal of the Statement. Doing so is critical to ensuring providers can offer products and services in a competitive marketplace without risk of inadvertently violating the prohibition.

Responsible providers already take steps to identify and avoid practices that may be unfair, deceptive or abusive, and federally regulated financial institutions have extensive compliance management systems specifically to monitor for such conduct. By identifying conduct that may be abusive because it is more egregious than conduct that is solely unfair or deceptive, the Bureau will enable institutions to better calibrate compliance systems, change practices, and better protect consumers.

Former Bureau Director Cordray provided helpful insight regarding the Bureau's view of abusive acts or practices during the first year of the Bureau's operation. In January 2012, he testified before Congress that "what's very clear in the [Dodd-Frank Act], even though a lot of the detail and definition is . . . less clear, is ***for something to be an abusive practice it would have to be a pretty outrageous practice***."[10] In other testimony, he also stated that institutions engaging in abusive conduct "know that what they are doing is probably wrong."[11] Unfortunately, the Statement does not reaffirm these sentiments that an abusive practice typically will be outrageous and done with the intent or at least reckless disregard for the fact that it will materially interfere with consumers' understanding or take unreasonable advantage of one of the statutory circumstances.

Unlike the Statement, both the statute and the former Director's prior articulation demonstrate that "abusive" was intended to capture only acts or practices that are egregious, outrageous, or

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[8] *See, e.g., Hibbs v. Winn*, 52 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....").

[9] Definition of "abusive" from the Cambridge Business English Dictionary, available at: ABUSIVE | definition in the Cambridge English Dictionary, accessed June 13, 2023.

[10] Transcript, House Committee on Oversight and Government Reform, Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs, "How Will the CFPB Function Under Richard Cordray," 112th Cong. at 71 (Jan. 24, 2012), *available at*: CHRG-112hhrg73165.pdf (congress.gov).

[11] Transcript, House Financial Services Committee, "The Semi-Annual Report of the Consumer Financial Protection Bureau," Testimony of CFPB Director Cordray, 112th Cong. (March 29, 2012), at 27, *available* at: CHRG-112hhrg75086.pdf (congress.gov).

unconscionable – beyond unfairness or deception, although elements of the latter may be present as well. Yet the Statement appears to indicate that unfair or deceptive acts or practices – ***without more*** – may also be abusive, contrary to the statutory language and rules of statutory construction.

As currently drafted, certain aspects of the Statement could chill the offering of consumer financial products and services, as providers may overcorrect and simply cease offering some existing products and decline to offer new, innovative products. This result likely would limit competition and potentially harm consumers. Heavily supervised financial institutions likely will shy away from products and services that might be interpreted as "abusive" under vaguely defined standards. Consumers may have to obtain these services from less closely regulated, supervised, and examined institutions.

To further its stated purpose to clarify the scope and application of the prohibition on "abusive acts or practices," the Bureau should distinguish between unfair and deceptive acts, on the one hand, and abusive acts, on the other, highlighting factors that make acts or practices more egregious than unfair or deceptive acts or practice and thus potentially abusive. This would allow the Bureau to further protect consumers while fostering competitive and innovative markets for financial products and services.

Certain of the Bureau's prior enforcement actions underscore important indicia of acts or practices that are outrageous or egregious and thus potentially abusive. For example, the Bureau has alleged knowledge and intent (or reckless disregard, at a minimum), whether explicitly or implicitly, in many of its abusiveness enforcement actions to date. In addition, some allegations have involved situations in which consumers were captive to a provider of products or services, under duress, or in particularly vulnerable circumstances that the provider knew, or should have known about, and exploited. Affirmation in the Statement of the heightened standard for abusiveness, and the key factors that serve as indicia of egregious or outrageous actions, is important to ensure consumers are protected from abusive acts or practices.

2. Material interference requires different—and more egregious—actions than deceptive acts or practices.

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."

As noted, the rules of statutory construction dictate that Congress must have intended "abusive" acts or practices to mean something different – and more egregious than – deception. The FTC's policy statement on deceptive conduct provides that "a representation, omission, act, or practice is deceptive when (1) the representation, omission, act, or practice misleads or is likely to mislead the consumer; (2) the consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) the misleading representation, omission, act, or practice is material."[12]

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[12] CFPB Examination Manual: Unfair, Deceptive, or Abusive Acts or Practices V.3 at 5 (March 2022), available at: cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures (consumerfinance.gov), *citing* FTC Policy Statement on Deception, available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm. The CFPB Examination Manual further provides that examiners "should be informed by the FTC's standard for deception." This standard is used by other agencies. For example, the FDIC has referred to the FTC's standard for deception in its compliance

However, the Statement articulates a very similar standard for ***material interference***, providing that it 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."[13] The Statement further provides that "[p]hysical 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."[14]

As noted above, the abusive prohibition appears to be intended to address conduct not otherwise captured by existing standards. Indeed, the material interference standard of liability would be more appropriately construed as similar to the standard for common law fraud, which includes, but goes beyond, mere false representation or deception. A common law fraud claim requires:

- a false representation of material fact;
- "scienter," that is, the defendant's knowledge of the falsity;
- an intent to induce the plaintiff to act in reliance upon the misrepresentation;
- justifiable or reasonable reliance on the representation by plaintiff; and
- damages proximately resulting from reliance on the misrepresentation.[15]

It would thus comport with the statute to construe material interference as including deceptive acts or practices ***and*** elements that go beyond deception, such as knowledge, intent, reasonable reliance, and consumer harm, making the conduct more egregious than simple deception.

However, the Bureau's assertions regarding material interference are exceptionally broad and simply assert factors that could constitute a deceptiveness claim but make no reference to factors that should play an important role in determining whether a covered person has "materially interfered" with consumers' ability to understand a term or condition beyond and more egregiously than actions that could be alleged to be deceptive. As discussed below, as in the case of common law fraud, actual interference, harm, intent, and knowledge are factors that should all be given substantial weight in the evaluation of whether material interference has occurred. In addition, consumers in captive or particularly vulnerable situations may be an important consideration in certain situations.

a) A material interference claim should require proof of *actual* material interference and consumer harm.

The Bureau asserts that 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

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manual. FDIC Consumer Compliance Examination Manual at VII-1.4, *citing* ".com Disclosures: How to Make Effective Disclosures in Digital Advertising," FTC (March 2013), available at: .com Disclosures: How to Make Effective Disclosures in Digital Advertising (ftc.gov).

[13] 88 Fed. Reg. at 21885.

[14] *Id*.

[15] *See, e.g.*, *Chedick v. Nash*, 151 F.3d 1077, 1081 (D.C. Cir. 1998).

consumers' ability to understand, ***or actually impedes understanding***."[16] The Statement cites ***no*** precedent or other authority for this assertion of broader liability for abusiveness that would not require establishing actual interference. Here, the Statement exceeds the bounds of liability drawn by Congress. The CFPA refers only to conduct that "materially interferes" with the ability of a consumer to understand, indicating that the act or practice must have ***actually interfered***. This is different from the deceptive standard, for example, which has been interpreted over many years of precedent to apply to an act or practice which "misleads ***or is likely to mislead."*** As noted, common law fraud claims require proof of actual reliance and harm, providing further support for a material interference claim to require a showing of actual interference and consumer harm.

The Bureau's abusiveness allegations also generally reflect that material interference must actually mislead consumers who actually relied to their detriment. For example, in its allegations against TCF for materially interfering with new customers' ability to understand the terms and conditions of an overdraft opt-in agreement, the Bureau alleged that TCF executed a "carefully orchestrated campaign to get its customers to [o]pt [i]n."[17] In other words, TCF knowingly implemented a plan intended to interfere with customers' understanding of the agreement and ***actually misled and harmed consumers by collecting fees as a result of TCF's material interference***: according to the Bureau's allegations, "TCF's strategy worked . . . the Bank persuaded approximately 66% of its customers to opt into overdraft service for debit card and ATM transactions and collected overdraft fees from hundreds of thousands of its customers. This Opt-In rate was more than triple the average Opt-In rate at other banks***.***"[18]

Similarly, the Bureau alleged actual material interference in its abusiveness allegation against Libre, which served as an intermediary between immigration detainees and the sureties and bond agents who post immigration bonds and misled those detainees and their families into thinking they were paying down their immigration bonds rather than renting a GPS monitor from Libre. The Bureau alleged that actual material interference was demonstrated by the fact that "[t]housands of consumers who signed the Original Agreement continue to wear the GPS and make monthly 'lease' payments under it," [wrongly] believing that those payments were for their immigration bond payments rather than lease payments for a GPS monitor.[19]

The Statement also provides that "[c]ertain 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 practices that materially interfere with consumers' ability to understand***."[20] This assertion, again, is much too broad in light of the statutory language, which requires actual interference and harm, and as such, creates an improper presumption of interference outside the Bureau's statutory authority.

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[16] 88 Fed. Reg. at 21885.

[17] *See CFPB v. TCF National Bank*, No. 17-cv-00166, First Amended Complaint at 8 (D. Minn. Mar. 1, 2017).

[18] *Id*. at 2.

[19] *CFPB v. Nexus*, No. 5:21-cv-00016, Complaint at 14 (W.D. Va. Feb. 21, 2021).

[20] 88 Fed. Reg. at 21885.

b) A material interference claim should allege knowledge and intent.

Consistent with Director Cordray's statement that institutions engaging in abusive conduct "know that what they are doing is probably wrong," an abusiveness claim should allege knowledge that they are misrepresenting or omitting a material fact and that the covered person intends to interfere with consumers' understanding of material terms, or, at a minimum, has recklessly disregarded the likelihood of materially interfering with that understanding.

Indeed, many of the Bureau's abusiveness allegations under the material interference prong have alleged knowledge that the conduct at issue would materially interfere with consumers' understanding and intent to do so (or, at a minimum, reckless disregard for that fact) rather than mere failure to clearly or conspicuously convey certain terms. For example, in the allegations against TCF, referenced above, the Bureau alleged that TCF implemented a "carefully orchestrated campaign to get its customers to [o]pt [i]n."[21] TCF thus ***knowingly*** implemented a plan ***intended to interfere*** with customers' understanding of an overdraft opt-in agreement.

To further support the necessity of establishing knowledge and intent, the Bureau's allegations of abusive acts and practices against Libre are instructive. Libre targeted "immigrants . . . who speak little or no English and are being held in federal detention centers, desperate to return to their families."[22] The Bureau alleged that Libre used "predominantly English-language agreements to enroll clients" when "Libre ***knew that many of its clients and co-signers did not understand English and that some were unable to read in any language.***"[23] The order further alleged that "Libre ***knows or should have known*** that consumers depend entirely on its oral representations for key agreement terms ***because Libre knows that the vast majority of co-signers and clients do not read or speak English*** and therefore cannot understand its Original Agreement that is almost entirely in English. Libre [also] ***understands that its prospective clients are in detention and that they and their family members are typically desperate for their release***."[24] The Bureau thus alleged that Libre materially interfered ***"with consumers' ability to understand the terms and conditions of Libre's offers of credit.***"[25]

Even when knowledge or intent is not explicitly stated in a Bureau allegation of abusive conduct, it is generally implied by the affirmative acts or practices in which the covered person is alleged to have

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[21] *CFPB v. TCF National Bank*, First Amended Complaint at 8.

[22] CFPB Press Release: "Consumer Financial Protection Bureau and Virginia, Massachusetts, and New York Attorneys General Sue Libre for Predatory Immigrant-Services Scam" (Feb. 21, 2021), available at: Consumer Financial Protection Bureau and Virginia, Massachusetts, and New York Attorneys General Sue Libre for Predatory Immigrant-Services Scam | Consumer Financial Protection Bureau (consumerfinance.gov).

[23] *CFPB v. Nexus*, Complaint at 32.

[24] *CFPB v. Nexus*, Complaint at 22 (emphasis added). This case also involved another factor that the Bureau has highlighted in certain abusive allegations, which can also serve as an important factor in making such allegations: a subset of consumers in captive or particularly vulnerable circumstances (non-English speakers held in immigration detention centers desperate to get out).

[25] *CFPB v. Nexus*, Complaint at 32 (emphasis added).

engaged. For example, in some cases the allegations involve training employees to materially interfere with consumers' ability to understand material terms and/or tying employee performance metrics to materially interfering with consumers' understanding. For example, in its complaint against Libre, the Bureau alleged that "Libre's incentive-compensation program rewards representatives for each new agreement signed or payment collected" and thereby provides incentives for them to rush through the intake process, to omit or misrepresent consumers' obligations when they sign up with Libre, or to make false threats to consumers to collect payments."[26] The design of this program thus reflects an intent to materially interfere with consumers' ability to understand the terms of Libre's offers of credit.

c) Compliant and effective disclosures alone should not serve as the basis for a material interference claim.

The Statement asserts that "[c]ertain 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 practices that materially interfere with consumers' ability to understand***."[27] This impermissibly creates a presumption of material interference, when the statute requires actual material interference.

Existing regulatory schemes identify certain terms and conditions that must be disclosed prominently (e.g., typical fees) and others that are sufficiently disclosed when accurately described in the contract (e.g., default might lead to paying collection costs). The Statement cannot modify such regimes. Where the disclosures for a certain product or service are governed by other regulations, and the entity has complied with those regulations,[28] those disclosures should presumptively prevent a claim that the covered person materially interfered with consumers' ability to understand, absent further indicia of material interference. For example, the FDIC has proposed requiring certain uninsured deposit disclosures to be provided via a pop-up window or other means requiring the consumer to take action to dismiss the information, while the Statement implies that the use of pop-up windows may be an indication of material interference.[29] Compliance with the FDIC's requirement (should it be finalized as proposed), absent further indicia of material interference, should not form the basis of a material interference allegation.

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[26] *CFPB v. Nexus*, Complaint at 18. *See also*, Bureau Consent Order with DCA, at 17, in which the Bureau alleged that "Respondent's managers instructed employees, for their oral presentation of DCA to new customers, to: (1) present DCA as a "free" service or benefit, while downplaying the fees and disclosures associated with the service; and (2) frame DCA as a "feature" or "package" that "comes with" all new consumer-checking accounts, rather than as an option that new customers must opt in to. In fact, (1) DCA is not a "free" service or benefit; and (2) DCA is not a "feature" of Respondent's checking accounts and does not "come with" all new consumer-checking accounts."

[27] 88 Fed. Reg. at 21885.

[28] The FDIC's proposed amendments to its advertising and signage rules would require institutions to display signage explaining the uninsured status of non-deposit products and that consumers would have to "take action to dismiss the notification before accessing the relevant page or screen . . . for example [by] using a "pop-up." *See* 87 Fed. Reg. 788017, 78022-78023 (Dec. 21, 2022).

[29] 88 Fed. Reg. at 21885.

In addition, to the extent the Bureau believes existing regulations do not already require clear and prominent disclosure of key terms, it can amend those disclosures through a rulemaking or create new disclosure requirements through a rulemaking pursuant to section 1032 of the CFPA, which authorizes the Bureau to "prescribe rules to ensure that the features of any consumer financial product or service . . . are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service."[30] Alleging abusive acts or practices to address concerns with disclosures, rather than addressing those concerns through a more targeted rulemaking specifically addressing existing disclosure requirements or a lack thereof would be an oblique and (if done via enforcement or supervision) unfair way to address those concerns.

Further, even in the absence of any specific law, where covered persons have clearly and conspicuously disclosed material terms and conditions, there should be no grounds for an abusiveness claim premised on material interference without additional exacerbating factors.

d) Complexity alone should not be a basis for a material interference allegation where the terms are properly disclosed.

The Statement asserts that the "provision" of a product or service may be abusive if it "is so complicated that material information about it cannot be sufficiently explained."[31] This is too subjective and vague to provide meaningful notice to the industry. The CFPB fails to provide any examples in which the Bureau brought an abusiveness claim using this theory. The Bureau's assertion also appears to indicate that covered persons should offer only simple products, which could stifle innovation and competition. Financial institutions are continuously innovating to offer new and different products to meet customer demand. Consumers desire products that meet their specific needs and circumstances, some of which may be "complicated." Absent other indicia of abusiveness, the Bureau should not substitute its judgment for that of consumers solely because a product is "complex."

Moreover, this statement appears to suggest that some products or services may be inherently abusive, even if their terms are clearly and conspicuously disclosed. This conflicts with a fundamental principle on which financial markets operate: information that is clearly and conspicuously disclosed allows consumers to evaluate the product and make their own decisions about what products best suit their needs. We agree that consumers benefit from transparency, and laws and regulations administered by the CFPB comprise an extensive disclosure regime for virtually all consumer financial products and services, requiring lenders to disclose material terms before a consumer chooses a product or service.[32] Many of these disclosures have been subject to extensive consumer testing to ensure clarity

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[30] 12 U.S.C. 5532(a).

[31] 88 Fed. Reg. at 21885.

[32] For example, the Bureau administers numerous consumer fee disclosure statutes and regulations, including (i) the Truth in Lending Act ("TILA") and Regulation Z, 15 U.S.C. § 1601 *et seq.* and 12 CFR part 1026; (ii) the Real Estate Settlement Procedures Act ("RESPA") and Regulation X, 12 U.S.C. § 2601 *et seq.* and 12 CFR part 1024; (iii) the Electronic Fund Transfer Act ("EFTA") and Regulation E, 15 U.S.C. § 1693 *et seq.* and 12 CFR part 1005; (iv) the Truth in Savings Act ("TISA"), 12 U.S.C. § 4301 *et seq.* and 12 CFR part 1030; and (v) Consumer Leasing Act ("CLA") and Regulation M, 15 U.S.C. § 1667 *et seq.* and 12 CFR part 1013. TILA requires fee disclosures for all types of

and understanding.[33] For example, nearly all deposit account-related fees, including without limitation overdraft, returned item, and stop payment fees, must be disclosed before an account is opened or a service is provided, whichever is earlier, and upon consumer request.[34]

The Statement also provides no details about whether or how disclosures could be enhanced or improved. We would welcome the opportunity to work with the Bureau to address concerns about disclosures. However, where the disclosures for a certain product or service are governed by other regulations, and the entity has complied with those regulations, those disclosures themselves should not form the basis of a material interference claim. As referenced previously, even in the absence of any specific law, where covered persons have clearly and conspicuously disclosed material terms and conditions, there should be no grounds for an abusiveness claim premised on material interference without additional exacerbating factors.

e) The Bureau should clarify how digital interference, including "dark patterns," may materially interfere with consumer understanding.

The Bureau asserts in the Statement that "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."[35]

These assertions incorrectly assume that the manner in which content is presented through digital channels is the result of "manipulations" rather than merely the way in which content must be presented due to design constraints of a particular digital interface (e.g., the limited screen space on a smart mobile phone). Moreover, the assertion that the use of certain tools to convey information is

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consumer credit products including credit cards, mortgages, auto loans, and installment loans, while TILA and RESPA collectively require mortgage and mortgage closing disclosures. The EFTA and TISA collectively require fee disclosures related to deposit products, electronic fund transfers, overdrafts, remittance transfers, prepaid cards, and gift cards. The CLA requires fee disclosures related to consumer leases.

[33] *See, e.g.,* 81 Fed. Reg. 83,934, 83,954-56 (Nov. 22, 2016) (discussing extensive consumer testing of prepaid card disclosures "to gather in-depth information about how consumers shop for prepaid cards and the factors they consider when acquiring such products" and noting that "[g]enerally, participants were able to understand the basic fee information presented in all of the prototype disclosure forms."); 78 Fed. Reg. 79,730, 79,732 & n.26, 79,742, 79,746-50, 79,753, 79,756 (Dec. 31, 2013) (discussing extensive consumer testing conducted in developing the TILA-RESPA integrated disclosure forms); 77 Fed. Reg. 6194, 6200, 6227-28, 6230, 6232-33. 6269-70 & n.88 (Feb. 7, 2012) (discussing reliance on consumer testing in developing remittance transfer disclosures); 75 Fed. Reg. 7658, 7669, 7679-81, 7690, 7694, 7728, 7742, 7762, and 7769 (Feb. 22, 2010) (summarizing consumer testing conducted in developing credit card disclosures); 74 Fed. Reg. 59,033, 59,034-36, 59,039, 59,047-49 (Nov. 17, 2009) and 74 Fed. Reg. 5584, 5586-88 (Jan. 29, 2009) (discussing consumer testing for overdraft fee and opt-in disclosures).

[34] 12 CFR § 1030.4; 12 CFR § 1005.7(b)(5).

[35] 88 Fed. Reg. at 21885.

manipulative is not supported by any evidence or data. Indeed, other regulators have taken a different view of such tools and their usefulness in conveying important information. For example, in proposed amendments to rules governing FDIC signage and advertising, the FDIC proposed to require that certain disclosures related to deposit insurance status be provided via pop-up windows to ensure that consumers see them.[36] In addition, as noted previously, aggravating factors must be present to distinguish material interference from deceptive acts or practices.

With respect to "dark patterns," the Bureau should provide substantially more explanation of factors that convert unfair or deceptive "dark patterns" into abusive ones. The Bureau cites only the FTC's September 2022 Staff Report, "Bringing Dark Patterns to Light," which describes "design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm."[37] While this definition may provide guidance on practices which are unfair or deceptive, the FTC has no authority to allege "abusive" acts or practices. Its report therefore provides no guidance in that regard.

The Bureau issued a circular in early 2023, "Unlawful negative option marketing practices" – that is not mentioned in the Statement – that explained when negative option marketing practices may be unfair or deceptive.[38] That circular, however, did not discuss when they may be abusive. The circular states that "[r]ecently, the CFPB and FTC have taken action to combat the rise of digital dark patterns, which are design features used to deceive, steer, or manipulate users into behavior that is profitable for a company, but often harmful to users or contrary to their intent," citing to the Bureau's complaint against ACTIVE Network, which the Bureau alleged used "deceptive and abusive acts and practices to dupe [consumers] into . . . enrolling in ACTIVE's own discount club."[39] The complaint did not use the term "dark pattern," although the press release accompanying the complaint stated that "ACTIVE Network generated more than $300 million in membership fees using ***digital dark patterns and online***

[36] The FDIC's proposed amendments to its advertising and signage rules would require institutions to display signage explaining the uninsured status of non-deposit products and that consumers would have to "take action to dismiss the notification before accessing the relevant page or screen . . . for example [by] using a "pop-up." *See* 87 Fed. Reg. 788017, 78022-78023 (Dec. 21, 2022).

[37] Bringing Dark Patterns to Light (ftc.gov).

[38] Consumer Financial Protection Circular 2023-01, "Unlawful negative option marketing practices" (Jan. 19, 2023), available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_unlawful-negative-option-marketing-practices-circular_2023-01.pdf.

[39] Circular 2023-01, at 4, note 17, which includes a cite to "Statement of CFPB Director Rohit Chopra on Complaint Against ACTIVE Network (Oct. 18, 2022)." Specifically, the CFPB's complaint against ACTIVE alleges that ACTIVE "presented an Active Advantage enrollment offer to consumers during, and in connection with, their online event registration and payment transactions during which ACTIVE stores and transmits payments" and that "ACTIVE interfered, at the time of the transaction, with consumers' ability to understand that by providing information on the enrollment page and clicking on the highlighted "Accept" call to action button, the consumers would be enrolled in the fee-based discount club, Active Advantage, with automatic withdrawal of a recurring annual membership fee. Therefore, the insertion of the Active Advantage enrollment offer page during consumers' event registration and payment transactions constitutes an abusive act or practice in violation of the CFPA."

trickery."[40] This allegation is not even referenced in the Statement, and substantially more explanation is needed on when the Bureau would be inclined to find that "dark patterns" materially interfered with a consumer's ability to understand.

3. The Statement does not accord with the statutory language or fully account for the Bureau's prior rulemaking or enforcement history in distinguishing between a "reasonable advantage" and an "unreasonable advantage."

The three remaining statutory prohibitions on abusive conduct all involve "taking unreasonable advantage" of certain circumstances. Specifically, the statute provides that the Bureau may find an act or practice to be abusive if it: "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."

The Bureau previously distinguished "reasonable" from "unreasonable" advantage taking in the context of the Payday Rule, which was based on a determination that certain activity in connection with payday loans was abusive.[41] In that rulemaking, the CFPB noted that the abusiveness standard ***"does not prohibit financial institutions from taking advantage of their superior knowledge or bargaining power to maximize profit.***" The Bureau noted that in market economies, participants generally pursue self-interest, but that, "[a]t some point, a financial institution's conduct in leveraging a consumer's lack of understanding or inability to protect their interests becomes unreasonable advantage-taking that is abusive."[42]

In the Statement, however, the Bureau does not reference this rulemaking or that standard. The Statement provides that "[t]he term "reasonable" means "[f]air, proper, or moderate under the circumstances,"[43] and conversely, "unreasonable" means "exceeding the bounds of reason or moderation."[44] Consistent with the assertion in the Payday Rulemaking, these statements seem to indicate that differences in bargaining power, information, knowledge, or understanding are generally expected, and are not *per se* indicative of abusiveness. This standard aligns with former Director Cordray's statement that abusive practices would generally be "outrageous."

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[40] CFPB Sues Payment Platform Used by YMCA Camps and Charity Race Organizers for Illegally Cramming Consumers With Junk Membership Fees | Consumer Financial Protection Bureau (consumerfinance.gov).

[41] *See generally,* 82 Fed. Reg. 54472 (Nov. 17, 2017). The Bureau partially repealed this rule in 2020, but applied the same analytic framework to "taking unreasonable advantage." *See* 85 Fed. Reg. 44382 (July 22, 2020).

[42] 82 Fed. Reg. at 54743.

[43] 88 Fed. Reg at 21886, *citing* Black's Law Dictionary (11th ed. 2019).

[44] *Id.*, *citing* Webster's Third New Int'l Dictionary 2507 (3d ed. 1993).

The Bureau further provides some helpful insight, noting that unreasonable advantage would be indicated when financial products and services are "set up to fail," which is consistent with several prior Bureau allegations of abusiveness and implies knowledge and intent, important factors in distinguishing between reasonable and unreasonable advantage, as discussed in greater detail below.[45] Relatedly, advantage-taking "may be unreasonable when an entity caused one of the circumstances described in CFPA section 1031(d)(2)."[46] This again implies knowledge and intent, or, at a minimum, reckless disregard for the statutory circumstances at issue in any particular case.

However, the Statement generally sets too low a bar in distinguishing between reasonable and unreasonable advantage-taking. For example, the Statement states generally that "[u]nreasonable advantage-taking includes using the statutory circumstances to acquire ***particular leverage*** over people or deprive consumers of legal rights," but provides no further details about what level of leverage would be unreasonable.[47] The Statement also provides that "[o]ne may also assess whether entities are obtaining an unreasonable advantage by considering whether they are reaping more benefits as a consequence of the statutorily identified circumstances, or whether the benefit to the entity would have existed if the circumstance did not exist. ***In other words, entities should not get a windfall due to a gap in understanding, unequal bargaining power, or consumer reliance***."[48] This bar is too low, as the definition of a "windfall" is "an unexpected, unearned, or sudden gain or advantage."[49] But an unreasonable advantage is more than simply an unexpected, unearned, or sudden gain or advantage. As noted, the mere fact of an advantage is not indicia of unreasonableness, as advantages by market participants is expected in the marketplace. Moreover, an unreasonable advantage would not be unexpected. As discussed in more detail below, unreasonable advantage-taking involves knowledge and intent to take advantage and thus any gain would be expected, or, at a minimum, desired. Indeed, exacerbating factors such as knowledge and intent must be present for the advantage to be unreasonable.

The Statement further lowers the standard for determining whether something constitutes an unreasonable advantage, noting that "[s]ection 1031(d)(2) does not require an investigative accounting of costs and benefits or other form of quantification to make a finding. Instead, one may rely on qualitative assessment to determine whether an entity takes an unreasonable advantage."[50] The Statement provides no further detail on what a qualitative assessment might entail. Muddling the message further, the Statement also asserts that "even a relatively small advantage may be abusive if it is unreasonable."[51] This standard arguably exceeds the previously provided definition for "unreasonable" (i.e., "exceeding the bounds of reason or moderation") and could inadvertently capture

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[45] 88 Fed. Reg. at 21886.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] "Windfall." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/windfall. Accessed 12 Jun. 2023.

[50] 88 Fed. Reg. at 21886.

[51] *Id*.

conduct that would be considered "reasonable" in many circumstances (i.e., fair, proper, or moderate under the circumstances"). This statement also conflicts with the Bureau's articulation of the abusiveness standard in the Payday Rulemaking, which asserted that the prohibition on abusiveness "does not prohibit financial institutions from taking advantage of their superior knowledge or bargaining power to ***maximize profit***."

Taken together, these statements create more confusion than clarity as to whether an entity has taken unreasonable advantage. In the Payday Lending Rule, the Bureau engaged in a cost-benefit analysis and concluded that the conduct addressed by the rule "generate[s] relatively small amounts of revenue for lenders as compared with the significant harms that consumers incur as a result of the practice," thus supporting the determination that the conduct was abusive.[52] While a precise cost/benefit analysis may not be practical or possible in all cases, an unreasonable advantage allegation should generally include an attempt to demonstrate that consumer harm significantly exceeds any benefit to the consumer or to the covered person.

Certain key factors have been important in some prior Bureau allegations of unreasonable advantage-taking. Indeed, the Bureau has in some cases highlighted these factors in distinguishing between "unreasonable" and "reasonable" advantage, on which a claim under this standard must turn. Consistent with the statute and the Bureau's prior allegations, the following factors have been critical to such analyses:

- the covered person's intent
- the covered person's knowledge
- consumer harm
- product value to consumers
- captive targets and/or consumers with particular vulnerabilities or in specific circumstances

Affirmation about the importance of these factors (and any others that may be relevant) in distinguishing "unreasonable" from "reasonable" advantage would provide greater clarity regarding potentially abusive acts or practices.

a) The Statement takes an impermissibly expansive view of a "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." The Statement provides that "[g]aps 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."[53] First, the Statement has impermissibly changed a "lack of understanding" to "gaps in understanding." There will always be gaps in understanding between designer and user of any product or service. Covered persons, as designers of the products and services, will necessarily have greater knowledge of those products and services. Thus, the existence of a gap in understanding should

[52] 82 Fed. Reg. at 54744.

[53] 88 Fed. Reg. at 21887.

not be sufficient to allege a lack of understanding, which implies a much lower level of understanding than simply having less understanding than the covered person as provider of a product or service.

Furthermore, the definition of "costs" is overly broad and potentially opens the door to all manner of speculative damages. At a minimum, gaps related to "costs" should be alleged with specificity, rather than supported solely by vague or broad statements (such as general "reputational harm").

The Statement also provides that "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."[54] This sweeping definition of "conditions" renders it virtually impossible for covered persons to reasonably anticipate whether a consumer may be deemed to lack understanding of any aspect of a product or service. Moreover, the CFPA's definition, which stipulates that the consumer's lack of understanding must concern "material risks, costs, or conditions of the product or service," mandates that the Bureau specify that only material conditions with respect to which a misunderstanding could harm the consumer are relevant to determining whether a covered entity has taken unreasonable advantage.

b) The Statement establishes an impermissibly low standard for supporting an allegation of taking unreasonable advantage of consumers' lack of understanding.

According to the CFPB, the statute allows for the following interpretations regarding an "unreasonable advantage" of a lack of consumers' understanding:

- 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 taking unreasonable advantage.
- The consumer's lack of understanding does not have to be reasonable.
- The prohibition does not require proof that some threshold number of people lacked understanding.

These assertions suggest that a single consumer's lack of understanding could establish liability, even if that lack of understanding was not reasonable, regardless of either the underlying cause or the entity's knowledge of such lack of understanding. Requiring entities to determine on a consumer-by-consumer basis whether certain acts or practices could interfere with consumer understanding would be unworkable in practice. Financial institutions should be able to rely on the presumption that consumers generally are reasonable and act reasonably.[55] To the extent the Bureau believes there are exceptions to this rule, the Bureau should articulate and enumerate those.

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[54] 88 Fed. Reg. at 21887.

[55] For example, the comment to 12 CFR 1026.5 of the Bureau's Regulation Z entitled "General Disclosure Requirements" for open-end credit provides that the "'clear and conspicuous'" disclosure standard "generally requires that disclosures be in a reasonably understandable form." In other words, a reasonable consumer should be able to understand them. *See* Comment for 1026.5 - General Disclosure Requirements.

Yet, the Bureau is inappropriately attempting to implement a presumption that consumers need not act reasonably. This standard would be a stark departure from the generally accepted legal presumption that consumers are reasonable and act reasonably.

Moreover, virtually all of the Bureau's prior allegations of abusiveness under this prong have alleged that the unreasonable advantage ***was caused by an alleged misrepresentation or omission of the defendant***, reflecting both knowledge and intent to take advantage. The Bureau should clarify that where the defendant did not engage in conduct that caused the lack of understanding, the defendant must have known about the lack of understanding and intended to take advantage of that lack of understanding – or at least acted with reckless disregard with respect to the lack of understanding – in a way that caused substantial harm. This standard would be consistent with prior Bureau enforcement actions, such as the Bureau's allegations of abusive acts or practices against T3, which purchases consumer information ("leads") from lead generators and sells the leads to lenders and other lead purchasers.[56] While T3 did not itself make the misrepresentations that misled consumers, the Bureau nevertheless alleged that T3 "knows or should know that its process results in many, if not most, leads being steered to lenders that make loans to consumers that do not comport with express or implied representations made on lead-generator websites" and that "T3's conduct takes advantage of consumers' lack of understanding of the material risks, costs, or conditions of the products for which they apply and constitutes an abusive act or practice."[57] In addition, the Bureau should provide additional details and examples of scenarios and circumstances that meet this standard.

The Statement also states that a lack of understanding can be demonstrated 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***."[58] This assertion impermissibly creates a presumption not supported by the statute. Both the consumer's lack of understanding and the entity's taking unreasonable advantage must be demonstrated by more than mere speculation. The analysis must be founded on specific facts and circumstances such as the covered person's intent to take advantage, the covered person's knowledge of the consumer's lack of understanding, consumers in particularly vulnerable or dire circumstances, and overall egregiousness.

c) "Unequal bargaining power" is not *prima facie* evidence that consumers cannot 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." The Statement impermissibly expands on the statutory text, providing that "[w]hen people are unable to protect their interests in selecting or using a consumer

[56] *CFPB v. D and D Marketing*, Inc., *d/b/a T3Leads, Grigor Demirchyan, and Marina Demirchyan*, Case No. 2:15-cv-9692, Complaint at 2 (Cent. Dist. Ca Dec. 17, 2015).

[57] *CFPB v. T3Leads*, Complaint at 11.

[58] 88 Fed. Reg. at 21888 (emphasis added).

financial product or service . . . there is a risk that entities will take unreasonable advantage of the unequal bargaining power."[59] This statement implicitly equates "the inability of the consumer to protect their interests" to "unequal bargaining power," which is a much broader and less egregious circumstance. Indeed, bargaining power may generally be unequal: covered persons, as providers of the products and services, will necessarily have greater knowledge of those products and services. Covered persons are simply unable to negotiate every single term of every single contract or agreement with consumers, which could be construed as "unequal bargaining power." Thus, this statement could be read to apply to virtually all transactions, which would be both nonsensical and impossible to implement. Indeed, standardization of certain contracts and agreements is important for numerous reasons in the markets for consumer financial products and services, as discussed further below in section II.3.d. For example, almost all mortgages in the United States are written on uniform instruments for saleability, to facilitate liquidity in the mortgage market.

The Bureau explains in a footnote that "[c]onsumers may also be unable to protect their interests when the inequality in bargaining power flows from circumstances or vulnerabilities that are present for individual or particular groups of consumers."[60] As noted, an individual consumer's experience, or the experience of only a very small number of consumers, would not be sufficient to support an abusiveness claim. However, the Bureau's precedent demonstrates that groups of consumers in particularly vulnerable or captive situations or consumers under duress may be unable to protect their interests. Whether the relevant consumers are in particularly vulnerable situations, such as non-English speakers being held in ICE custody seeking release, for example, should be an important factor for the Bureau to consider in determining whether to allege abusive practices.

d) The use of form contracts ensures equal treatment and should not create a presumption of unreasonable advantage-taking of consumers' inability to protect their interests.

The Statement asserts that "[c]onsumers 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."[61] The Statement also provides that "where the person is unable to bargain over a clause because it is nonnegotiable, they may be deprived of the ability to protect their interests."[62]

These statements are exceedingly broad and troubling given the necessity in the marketplace for standard agreements, terms, and conditions. We are concerned that this position, absent one or more of the factors that we have highlighted as providing indicia of unreasonable advantage-taking, creates a presumption that standard form contracts will be *prima facie* evidence of taking unreasonable advantage. Such a view is unfounded. Standard forms, disclosures, and agreements in many ways protect consumers who (1) lack bargaining power compared to other consumers and thus may be

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[59] 88 Fed. Reg. at 21888.

[60] *Id*., note 60.

[61] 88 Fed. Reg. at 21889.

[62] *Id*.

relatively worse off with negotiated terms, and (2) may have historically been discriminated against in availability or terms when bespoke agreements could favor certain individuals over others. Standard forms and contracts in financial services also generally result in lower transaction costs, and, for certain products, such as mortgages, facilitate securitization of those contracts, which provides liquidity for the markets for those products, thus benefiting consumers.

It is infeasible to individually negotiate every single product or service and their related terms. The marketplace could not function if the use of standard contracts and terms were deemed abusive. The Bureau should amend the Statement to clarify that additional indicia of unreasonable advantage taking are required in order to support an abusiveness allegation. Such indicia might include, for example, contracts that include unconscionable terms or provisions that have been shown by evidence to harm consumers with particular vulnerabilities rendering them less able to protect their interests. The mere fact that a covered person uses a standard or form contract should not, without these additional factors, serve as the basis of an abusiveness claim.

e) "Outsized market power" should not create a presumption of unreasonable advantage-taking of consumers' inability to protect their interests.

The Statement asserts that 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.'"[63] As an initial matter, we note that the Bureau does not have authority to enforce any antitrust laws and thus any antitrust concerns should be referred to the appropriate government agencies. Although one of the Bureau's purposes is to implement and enforce Federal consumer financial law consistently to ensure that markets for consumer financial products and services are fair, transparent, and competitive, the Bureau does not have authority to enforce the antitrust laws generally.[64] For example, the Bureau does not have the authority to enforce generally applicable antitrust laws such as the Sherman Antitrust Act and the Clayton Antitrust Act. Nor did Congress transfer the federal banking agencies' authorities to review mergers under the Bank Merger Act or Bank Holding Company Act.[65]

In support of the broad assertion in the Statement regarding "outsized market power," the Bureau cites its case against JPay, LLC, a prison financial services company.[66] The Bureau alleged that JPay took unreasonable advantage of a market structure allowing it to charge fees even if consumers did not want to do business with the company.[67] Because JPay was the single-source government contractor for the

[63] *Id*.

[64] 12 U.S.C. § 5511(a).

[65] 12 U.S.C. § 5581.

[66] *JPay, LLC*, File No. 2021–CFPB–0006 (Oct. 19, 2021).

[67] *Id*. at 15-16.

prepaid cards used to return incarcerated individuals' funds upon release, consumers were denied any choice in this regard.[68]

The specific, unique facts of this allegation, however, do not support the broad generalizations the Bureau makes in the Statement.[69] As the Bureau highlighted in its allegations against JPay, in the relevant circumstances, consumers were particularly vulnerable, as they were exiting incarceration with no access to funds other than those provided via the prepaid cards. Because JPay was the sole authorized card provider, these consumers were thus both financially vulnerable and captive to JPay. In this case, it would therefore seem reasonable that JPay's "outsized market power" was an important consideration since it was the ***only provider of the relevant service***. The fact that the relevant consumers were captive and financially vulnerable was a further key consideration.

However, in the Statement, the Bureau provides no additional explanation of what it believes to be "outsized market power," what specifically constitutes "concentration in a market," and what factors are relevant in considering whether the "market structure prevents people from protecting their interests." The Bureau cites consumer relationships "with credit reporting companies, debt collectors, and third-party loan servicers" as 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)."[70] Beyond these examples, the Bureau provides no additional guidance or clarity about what constitutes "outsized market power." Nor does the Bureau acknowledge that an abusiveness allegation based on this standard must demonstrate more than merely "outsized market power." Given the statute and the Bureau's precedent, an abusiveness claim must allege that the covered person took unreasonable advantage of an exceptional or unique position of market power (like JPay's) that rendered consumers unable to protect their interests.

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[68] *Id*. at 10.

[69] In the case of JPay, the Bureau alleged that: Numerous consumers were unable to protect their interests in the selection or use of the Debit Release Cards because they were required to receive the money owed to them at the time of their release from a prison or jail on a Debit Release Card, and because there was no reasonably available mechanism by which consumers could close their card account and obtain the balance of their cards without paying a fee; JPay played a key role in depriving consumers of the ability to select another means to access and use their money. In numerous instances, JPay caused fees to be collected from these consumers; By causing fees to be charged to these vulnerable consumers who were deprived of the ability to select another means to access and use their money at the time of release, JPay took unreasonable advantage of their inability to protect their interests in selecting or using a consumer financial product or service; JPay designed and implemented the Debit Release Card product to eliminate cash or check options previously offered by Departments of Correction; and JPay also took unreasonable advantage of consumers' inability to protect their interests in selecting or using a consumer financial product or service by entering into contracts with DOCs for the Debit Release Card— thereby enabling the DOCs to eliminate cash or check options they previously offered. *JPay* at 15-16.

[70] 88 Fed. Reg. at 21888-21889.

f) Determining whether consumers would have "high transaction costs" to exit a relationship with a covered person requires a weighing of costs and benefits.

The Bureau asserts that "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."[71] The Bureau provides no citations and no additional explanation. The Bureau should provide much greater detail about what would constitute "high transaction costs," which should be exceedingly burdensome or difficult, and well beyond typical procedural steps associated with exiting or changing relationships in the ordinary course, such as communicating with a covered person via phone or electronically.

Additionally, an argument based on high-transaction costs warrants a cost-benefit analysis that demonstrates that the time, effort, costs, or risks associated with exiting the relationship are ***so onerous*** to consumers that they are not outweighed by the countervailing consumer benefits or business reasons for imposing them. With respect to consumers, there may be certain steps consumers are required to take to exit a relationship with a financial institution to protect consumers from fraud. For example, a fraudster may attempt to close consumers' accounts to obtain the consumers' funds held in that account. Requiring multiple steps to close an account and verify a consumer's identity, for example, would help prevent such consumer harm.

g) Reasonable consumer reliance must be based on explicit representations that a covered person is acting in consumers' interests. Serving consumers in the ordinary course is not sufficient to create reasonable reliance.

The third circumstance of which entities cannot take "unreasonable advantage" concerns "reasonable reliance by the consumer on a covered person to act in the interests of the consumer." The Statement provides 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," which "presents the potential for betrayal or exploitation of the person's trust."[72]

The Statement provides further that "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."[73] The Statement also explains that 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."[74]

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[71] 88 Fed. Reg. at 21889.

[72] *Id*.

[73] *Id*.

[74] *Id*.

The Statement also asserts that reasonable reliance may exist when entities:

- "assume the role of acting on behalf of people as their agents or representatives; and
- "act as intermediaries to help people navigate marketplaces for consumer financial products or services" such as acting "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."[75]

The Statement further provides that in these circumstances "entities that engage in certain forms of steering or self-dealing may be taking unreasonable advantage of the consumers' reasonable reliance."[76]

Once again, far more explanation and details are needed for this guidance to be helpful. In particular, the Bureau should provide substantially more information about the circumstances under which it is reasonable for consumers to rely on a company to act in the consumer's interest, beyond instances in which the entity explicitly represents that it will do so. The majority of the Bureau's allegations of abusiveness under this standard have alleged that defendants took affirmative steps to induce reliance. Indeed, two of the cases cited in the Statement involve explicit representations.

The Statement cites the Bureau's allegations against Access Funding and an affiliated attorney in which the attorney "held himself out as providing independent professional advice" such that consumers "reasonably relied on the attorney to provide independent professional advice that took their best interests into account."[77] Although not mentioned in the Statement, "[m]any of the consumers from whom Access Funding purchased settlements were lead poisoning victims with cognitive impairments," reflecting the important additional factor of a uniquely vulnerable consumer population.[78]

The Statement also cites the Bureau's complaint against SettleIT, in which the Bureau alleged that "SettleIt told consumers that it would work in their interests only, and consumers reasonably relied on SettleIt to protect their interests in negotiating their debts."[79] However, SettleIt had financial connections to two companies that were creditors for some consumers' debt and lenders for some consumers' new loans, yet SettleIt told consumers it was not owned or operated by any of consumers' creditors.[80] SettleIt prioritized the settlement of debts owed to its affiliated companies over debts owed to unaffiliated creditors to collect fees for those settlements and offered consumers new loans from its

[75] 88 Fed. Reg. at 21889-21890.

[76] 88 Fed. Reg. at 21890.

[77] *CFPB v. Access Funding, LLC, et al.*, Complaint at 12 (D. Md. Nov. 11, 2016). However, he "was not independent" and "was paid by Access Funding for the IPA services he provided to Access Funding consumers. Consumers did not understand that [the attorney] was not providing independent professional advice or that he did not take their individual circumstances or interests into account. They also did not understand that their interests would likely be better served by a truly independent advisor." *CFPB v. Access Funding, LLC, et al.*, Complaint at 12-13.

[78] *CFPB v. Access Funding, LLC, et al.*, Complaint at 7.

[79] *CFPB v. SettleIT, Inc.*, Complaint at 9 (C.D. Cal April 13, 2021).

[80] *Id*.

affiliated entities, the proceeds from which consumers used to pay SettleIt's fees.[81] Thus, the Bureau alleged that SettleIT "took unreasonable advantage of consumers' reasonable reliance that SettleIT would protect their interests."[82]

The final citation the Bureau provides in the Statement is the Bureau's complaint against American Debt Settlement Solutions, in which the Bureau alleged that ADSS made explicit representations to consumers that it would "renegotiate, settle, reduce, or otherwise alter the terms of debts that consumers enroll in its program."[83] However, "ADSS has failed to renegotiate, settle, reduce, or otherwise alter the terms of a single debt for approximately 89 percent of the consumers who enrolled in its debt-relief programs."[84] Instead of negotiating any debts with creditors during the first three to six months of a consumer's enrollment – as it represents to consumers that it will – ADSS collects its "enrollment" fees during this period. As a result, consumers with inadequate income to complete the program drop out after paying significant fees and without receiving any benefit.[85] The complaint therefore alleges that consumers "reasonably rely on ADSS to act in their interest by enrolling them in a debt-relief program that they can be reasonably expected to complete, and which will therefore result in the negotiation, settlement, reduction, or alteration of the terms of their debts" and "reasonably rely on ADSS to act in their interest by settling their debts as soon as possible and, in particular, within three to six months of enrollment as represented by ADSS," and thus, "ADSS's acts or practices . . . are abusive."[86]

These allegations involve explicit representations to consumers about acting in their interests to perform an agreed upon service. The Statement does not cite enforcement actions or factors that would help illuminate when a covered person has held itself out as acting in consumers' best interest absent explicit representations to that effect.

In certain respects, this lack of clarity could be interpreted as effectively placing fiduciary-like responsibilities on covered entities, suggesting that a suitability determination must be made before offering a financial product or service to any consumer, akin to that required of investment advisors to their clients. However, requiring such a standard under UDAAP would be gross overreach, as those standards are neither permissible under the statute nor justified in the marketplace.

In addition, further clarity is needed about the line between providing customers with information about a covered person's products and services, on the one hand, and creating a reasonable belief that the covered person is acting in consumers' interest, on the other hand. Financial institutions strive to provide outstanding customer service and expertise about how products and services can assist consumers with their needs and goals. An expansive interpretation that seemingly puts no limits around

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[81] *CFPB v. SettleIT, Inc.,* Complaint at 10.

[82] *Id*.

[83] *CFPB v. American Debt Settlement Solutions, Inc., et al.*, Complaint at 6 (S.D. FL May 30, 2013).

[84] *Id*. at 7.

[85] *Id*. at 14-15.

[86] *Id*. at 15.

when financial institutions induce a belief that they are acting in consumers' interest could harm consumers by causing those institutions to simply decline providing information that their customers seek.

Financial institutions should be able to provide outstanding service and assistance without inadvertently triggering reasonable reliance that the entity will act in the consumer's interest. For example, home loan officers provide good-faith information to consumers throughout the homebuying or refinancing process in a manner that complies with consumer protections such as specific disclosure requirements and prohibitions on steering and misrepresentation. These officers do not state or suggest that they act in any fiduciary or advisory capacity, but rather provide customers with options, explanations of features and terms, and other assistance. The decision of which lender, product, or pricing to choose is up to the customer. The Bureau should provide clarity that serving customers in a way that helps them meet their financial needs will not trigger heightened risk of reliance, absent further indicia that such reliance was reasonable.

Furthermore, the Bureau should provide guidance regarding the factors that can affect whether reliance is reasonable, such as statements made in advertising, certain customer vulnerabilities, a covered person's intent, and disclosures and disclaimers. As noted previously, financial institutions are required to disclose certain information about financial products and services. The Bureau should clarify that where mandated disclosures, advertising, or other actions comply with the relevant statutes and regulations, those disclosures and advertising should be presumed to ***not induce*** "reasonable reliance" by consumers on the covered person to act in the consumers' interest. Should the Bureau believe that certain disclosures or advertising could induce reliance inadvertently, the Bureau should address those concerns through the appropriate regulations and/or with other relevant agencies or Congress. It should not use UDAAP to penalize covered persons for statements or practices that comply with the specific requirements to which they are subject.

III. Conclusion

We appreciate the Bureau's effort to articulate what acts or practices it may view as abusive. However, the Statement is too broad to provide guidance as to whether any specific practice is abusive, and, as currently drafted, positions standard and routine practices necessary to the functioning of markets for consumer financial products and services as potentially abusive. Under the statute, whether acts or practices may be "abusive" will turn on whether they materially interfere with a consumer's understanding (beyond mere deception) or whether an institution has taken "unreasonable advantage" of (i) consumers' lack of understanding of the material risks, costs, or conditions of the product or service; (ii) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (iii) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer. However, the Statement does not articulate factors that might render those acts or practices egregious and thus potentially unreasonable and abusive. Specifying certain key factors, such as those reflected in certain allegations in the Bureau's enforcement history on abusive claims, would help distinguish lawful from unlawful conduct.

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If you have any questions, please contact Paige Pidano Paridon by phone at 703-887-5229 or email at paige.paridon@bpi.com.

Respectfully submitted,

Bank Policy Institute
American Financial Services Association
Center for Capital Markets Competitiveness,
U.S. Chamber of Commerce
Consumer Bankers Association
Credit Union National Association
Mortgage Bankers Association

Appendix

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's bank-originated small business loans, and are an engine for financial innovation and economic growth.

Founded in 1916, the American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

The Center for Capital Markets Competitiveness's (CCMC) mission is to advance America's global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets allowing businesses—from the local flower shop to a multinational manufacturer—to mitigate risks, manage liquidity, access credit, and raise capital.

The Credit Union National Association (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,000 federal and state credit unions, which collectively serve more than 135 million members nationwide.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 330,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 1,700 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.