BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Statement of Policy Regarding Prohibition on Abusive Acts or Practices

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Policy Statement.

SUMMARY: Section 1031(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provides that the Bureau of Consumer Financial Protection (Bureau) may use its supervisory and enforcement authority, among other things, to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Section 1031(d) of the Dodd-Frank Act sets forth general standards for when the Bureau may declare that an act or practice is abusive for purposes of the Dodd-Frank Act.

Uncertainty remains as to the scope and meaning of abusiveness. This uncertainty creates challenges for covered persons in complying with the law. The Bureau wants to make sure that such uncertainty does not impede or deter the provision of otherwise lawful financial products or services that could be beneficial to consumers. To convey and foster greater certainty about the meaning of abusiveness, this general statement of policy (Policy Statement) provides a framework for the Bureau's exercise of its supervisory and enforcement authority to address abusive acts or practices.

DATES: This Policy Statement is applicable on January 24, 2020.

FOR FURTHER INFORMATION CONTACT: Colin Reardon, Division of Supervision, Enforcement, and Fair Lending, at (202) 435-9668. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1031(a) of the Dodd-Frank Act provides that the Bureau may use its supervisory and enforcement authority, among other things, to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[1] Since its inception, the Bureau has used its supervisory and enforcement authority to identify and seek relief where covered persons[2] engage in unfair, deceptive, or abusive acts or practices (UDAAPs).

The statutory standard for what the Bureau has authority to declare an "abusive act or practice" is set forth in section 1031(d) of the Dodd-Frank Act. Specifically, section 1031(d) states 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

[1] Pub. L. No. 111-203, Tit. X, sec. 1031(a), 124 Stat. 1376, 2005 (2010) (codified at 12 U.S.C. 5531(a)).
[2] The Bureau intends this Policy Statement to apply with respect to any person against whom the Bureau cites conduct as abusive in supervision or challenges conduct as abusive in enforcement, including, where applicable, covered persons, service providers, and persons that provide substantial assistance to abusive conduct by a covered person or service provider. *See* 12 U.S.C. 5514 through 5516, 5531, 5536. For brevity, this Policy Statement refers simply to "covered persons" throughout.

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.[3]

Through the language in section 1031(d), Congress defined the abusiveness standard in general terms and did not attempt to include a complete list of abusive practices. To demonstrate a violation of section 1031(d), the Bureau therefore must satisfy the specific elements of sections 1031(d)(1), 1031(d)(2)(A), 1031(d)(2)(B), or 1031(d)(2)(C). This Policy Statement refers to these provisions collectively as the "abusiveness standard."

The Dodd-Frank Act is the first Federal law to prohibit abusive acts or practices with respect to consumer financial products and services generally.[4] Although Congress, through the language in section 1031(d), provided some indication of the abusiveness standard, the Dodd-Frank Act does not further elaborate on the meaning of the terms used in section 1031(d), and there is relatively limited legislative history discussing the meaning of the language in section 1031(d) (including in distinguishing the abusiveness standard from the deception and unfairness standards).[5] Moreover, the abusiveness standard does not have the long and rich history of the deception and unfairness standards. The FTC has used its authority under the FTC Act to

---

[3] 12 U.S.C. 5531(d).

[4] Certain other Federal consumer financial laws, including the Fair Debt Collection Practices Act (FDCPA) and the Home Ownership and Equity Protection Act (HOEPA), reference either the term "abusive" or "abuse." *See* 15 U.S.C. 1692d (FDCPA), 12 U.S.C. 1639(p)(2)(B) (HOEPA). The Telemarketing and Consumer Fraud and Abuse Prevention Act also directed the Federal Trade Commission (FTC) to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." *See* 15 U.S.C. 6102(a)(1).

[5] *See, e.g.*, S. Rep. No. 111-176, at 172 (Apr. 30, 2010) ("Current law prohibits unfair or deceptive acts or practices. The addition of 'abusive' will ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers."); Pub. L. No. 111-203, pmbl. (listing, in the preamble to the Dodd-Frank Act, one of the purposes of the Act as "protect[ing] consumers from abusive financial services practices"); *see also* S. Rep. No. 111-176, at 9 n.19 ("Today's consumer protection regime . . . could not stem a plague of abusive and unaffordable mortgages."); *id.* at 11 ("This financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms."); H.R. Rep. No. 111-376, at 91 (Dec. 9, 2009) ("Th[e] disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis, such as subprime and nontraditional mortgages."); H.R. Rep. No. 111-517, at 876–77 (June 29, 2010) (Conf. Rep.) ("The Act also prohibits financial incentives . . . that may encourage mortgage originators . . . to steer consumers to higher-cost and more abusive mortgages.").

address unfair and deceptive acts or practices (UDAPs) for more than 80 years, over which time policy statements, administrative and judicial precedent, and statutory amendments have provided important clarifications about the meaning of unfairness and deception.[6] Federal prudential regulators have also enforced the UDAP prohibitions in the FTC Act since before the Bureau's existence.

The Bureau has applied the abusiveness standard since it commenced operation in 2011. The Bureau has brought 32 enforcement actions that included an abusiveness claim, including as recently as fall 2019. But 30 of those 32 enforcement actions had both an abusiveness and an unfairness or deception claim (*i.e.*, only two enforcement actions contained just an abusiveness claim). And in many of those 30 actions, the abusiveness claim arose from the same course of conduct as the unfairness or deception claim. It is difficult to discern from those actions unique fact patterns to which only the abusiveness standard would apply. Given the prevalence of dual-pleading, along with the relatively nascent nature of this legal authority (and of the Bureau itself) and the number of matters the Bureau has resolved via settlement agreement, this enforcement activity has resulted in few reported judicial or Bureau administrative decisions that address the contours of the abusiveness standard.[7] Regarding supervision, the Bureau's UDAAP examination procedures largely restate the language of the Dodd-Frank Act. And although the Bureau has issued 18 editions of Supervisory Highlights since 2012, these documents only rarely

[6] *See, e.g.*, Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Comm. on Commerce, Science and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984); Letter from the FTC to Hon. John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983) (FTC policy statement on deception), *reprinted in In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984); *Int'l Harvester Co.*, 104 F.T.C. at 949; *Am. Fin. Servs. Ass'n* v. *FTC*, 767 F.2d 957 (D.C. Cir. 1985); section 5(n) of the FTC Act, 15 U.S.C. 45(n), as enacted by Congress in the Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, sec. 9, 108 Stat. 1691, 1695.

[7] These few reported decisions are all from Federal district courts. *See, e.g.*, *CFPB* v. *ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015).

have described citations of abusive acts or practices in a manner that would provide guidance as to how the Bureau concluded the statutory language used in section 1031(d) applied to the conduct at issue. Additionally, the Bureau has mentioned the risk of abusive acts or practices in non-binding guidance documents but has not set forth a detailed explication of the abusiveness standard in such documents.[8]

The Bureau's 2017 Final Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans (2017 Final Rule) included identification of two abusive practices: the first with respect to making a covered loan without determining a consumer's ability to repay (remedied by stringent underwriting requirements prescribed by the Bureau), and the second with respect to making repeated failed attempts to debit a consumer's account to collect payment on a covered loan.[9] In the 2017 Final Rule, the Bureau identified the same two practices as unfair practices. The Bureau has proposed to rescind the ability-to-repay provisions of the 2017 Final Rule and the identification of the abusive and unfair practice on which those provisions are based (2019 Rescission Proposal).[10] One of the Bureau's rationales for the 2019 Rescission Proposal was its preliminary conclusion that legal grounds do not sustain the 2017 Final Rule's identification as an abusive practice the making of a covered loan without determining the consumer's ability to repay (remedied by stringent underwriting requirements prescribed by the Bureau).

Substantial concerns have been raised about the uncertain meaning of the abusiveness standard. For example, in response to the Bureau's Spring 2018 Call for Evidence, the Bureau

---

[8] *See, e.g.*, CFPB Bulletin 2014-02, *Marketing of Credit Card Promotional APR Offers* (Sept. 3, 2014), https://files.consumerfinance.gov/f/201409_cfpb_bulletin_marketing-credit-card-promotional-apr-offers.pdf (describing "risk of engaging in an abusive practice").
[9] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 FR 54472 (Nov. 17, 2017).
[10] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 FR 4252, 4276 (Feb. 14, 2019).

received comments from stakeholders about these concerns.[11] Many commentators and other stakeholders have raised similar concerns dating back to the early years of the Bureau,[12] although the viewpoints have not been uniform.[13]

---

[11] In response to the Bureau's Requests for Information on the Bureau's Adopted Regulations and New Rulemaking Authorities and the Bureau's Inherited Regulations and Inherited Rulemaking Authorities, the Bureau received approximately 15 comments that addressed the Bureau's UDAAP authorities (nearly all from trade associations or other industry stakeholders). *See generally* Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities, Mar. 21, 2018, Docket CFPB-2018-0011, https://www.regulations.gov/docket?D=CFPB-2018-0011, and Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities, Mar. 26, 2018, Docket CFPB-2018-0012, https://www.regulations.gov/docket?D=CFPB-2018-0012. The most common UDAAP-related issue identified by these commenters was the lack of clarity presented by the abusiveness standard. For example, a credit card issuer commented that the unclear statutory definition of "abusive" practices combined with a lack of Bureau guidance on the standard "creates uncertainty, chills beneficial innovation, and leads to unnecessary compliance burdens for institutions trying in good faith to comply with the law." A trade association representing credit unions wrote that "[c]onsumers and industry need more certainty about exactly what the rules and requirements are and how the Bureau plans to engage in enforcement actions surrounding them." A policy and research organization commented that the abusiveness standard leaves financial institutions "mired in confusion" and that "[a]n ambiguous abusive standard is not conducive to a well-functioning financial market or regulatory system." Note that some stakeholders raised these concerns in response to other Spring 2018 Call for Evidence dockets. For example, a trade association commented in response to the Request for Information Regarding Bureau Enforcement Processes that the Bureau should address the "great deal of uncertainty" around the abusiveness standard "by describing in rulemaking or public guidance the circumstances under which the Bureau will bring 'abusive' cases under its UDAAP authority." *See generally* Request for Information Regarding Bureau Enforcement Processes, Feb. 12, 2018, CFPB-2018-0003, https://www.regulations.gov/docket?D=CFPB-2018-0003.

[12] *See, e.g.*, Joshua L. Roquemore, *The CFPB's Ambiguous "Abusive" Standard*, 22 N.C. Banking Inst. 191, 196 (2018) ("While there may be benefits to greater regulatory oversight, there are also risks associated with vague and arbitrary legal standards, and this is even more pronounced in the highly regulated consumer finance industry. One factor that has fueled uncertainty surrounding the new standard is the CFPB's tendency to allege two or more standards for the same act or practice, thus blurring any lines of distinction between the terms."); Patrick M. Corrigan, *"Abusive" Acts and Practices: Dodd-Frank's Behaviorally Informed Authority Over Consumer Credit Markets and its Application to Teaser Rates*, 18 N.Y.U. J. Legis. & Pub. Policy 125, 151 (2015) (noting that "the CFPB has yet to demonstrate a coherent and consistent understanding of its own abuse authority" which has led to "conceptual confusion" and resulted in "an articulation of the abuse standard that blurs into the deception and unfairness standards"); Rob Blackwell, *U.S. Chamber Pressures CFPB to Define "Abusive,"* Am. Banker (July 3, 2012), https://www.americanbanker.com/news/us-chamber-pressures-cfpb-to-define-quot-abusive-quot (describing a letter from the president and chief executive of the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness to former Bureau Director Richard Cordray asserting that a "policy statement defining the term . . . will help prevent divergent interpretations of the 'abusive' standard); Joshua Wright, *Dodd-Frank's Abusive Standard: A Call for Certainty*, 8 Berkeley Bus. L.J. 164, 169 (2011) (asserting that unless the Bureau clarifies its enforcement intentions and creates regulatory safe harbors regarding the abusiveness standard, "[b]anks may begin to limit themselves to 'plain vanilla' products and services to avoid scrutiny by the Bureau and the risk that explanations of more complex products will not be adequate under the new standards of the Act").

[13] *See, e.g.*, Stephen J. Canzona, *I'll Know It When I See It: Defending the Consumer Financial Protection Bureau's Approach of Interpreting the Scope of Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP") through Enforcement Actions*, 45 J. Legis. 60, 61, 79 (2018) (arguing that "the CFPB's practice of interpreting UDAAP standards through enforcement actions strikes the proper balance between safeguarding the interests of consumers and responsible providers of financial services" and that to date the Bureau has applied its UDAAP enforcement authority to a "narrow range of conduct that . . . is clearly proscribed by the plain meaning of the terms 'unfair,'

To obtain further information about these concerns, in June 2019 the Bureau held a Symposium on Abusive Acts or Practices (Symposium).[14] At the Symposium, eight academics and practitioners with expertise in UDAAP issues engaged in dialogue on a number of topics, including the necessity of clarifying the abusiveness standard (and if so, whether rulemaking or another tool should be used), the degree of uncertainty posed by the statutory language, the particular aspects of the standard most in need of clarification, the practical consequences of this uncertainty on consumer financial markets, and how the Bureau should enforce the abusiveness standard. These experts also submitted written statements as part of their participation in the Symposium.[15]

The Symposium participants provided a variety of perspectives. Most urged the Bureau to take action to clarify the abusiveness standard to help entities comply with the law.[16] Others

---

'deceptive,' and 'abusive' . . . [and] does not present meaningful due process concerns to responsible financial services providers"); Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 Tul. L. Rev. 1057, 1100-01 (2016) (characterizing the Bureau's approach toward the abusiveness standard as "cautiously incremental, focused on peripheral companies with highly offensive practices, oriented toward protecting vulnerable consumers, largely concomitant with traditional deception or unfairness claims, and entirely advanced through either negotiated settlements or under the adjudication of federal judges").

[14] https://www.consumerfinance.gov/about-us/events/archive-past-events/cfpb-symposium-abusive-acts-or-practices/ (last visited Jan. 16, 2020). The Symposium included two panels, each featuring four outside experts and a Bureau moderator. The first panel included academics specializing in consumer protection issues. The second panel featured practitioners with significant experience applying UDAP laws at the Federal and State levels. Among the panelists were several former Bureau and FTC officials. The Bureau selected the panelists to represent diverse viewpoints on the topics under discussion.

[15] *See id.*

[16] *See, e.g.*, William MacLeod, *Interpreting Abusive Practices* at 8, submission for CFPB Symposium, https://files.consumerfinance.gov/f/documents/cfpb_macleod-written-statement_symposium-abusive.pdf ("[C]lients continue to tell us that the ambiguity surrounding the authority contributes to regulatory uncertainty that results in certain products and services being curtailed or not offered to certain populations altogether. Simply adding some certainty and predictability to the abusiveness standard could yield significant benefits. There should be no need to cite authority for the proposition that uncertainty is an impediment to investment and innovation. When uncertainty applies to the legality of a business practice, the reaction in markets is predictable. Legitimate businesses shy away."); Letter from Lucy Morris to Bureau Director Kathleen Kraninger Regarding Abusive Acts or Practices Symposium, at 3 (June 17, 2019), https://files.consumerfinance.gov/f/documents/cfpb_morris-written-statement_symposium-abusive.pdf (noting that "[t]here are different ways that the Bureau could provide guidance, without limiting its broad legal authority to protect consumers," that "[a]t a minimum, the Bureau should use its abusiveness authority carefully and sparingly, to show through cases (and its other tools) how abusiveness is unique and different from unfairness and deception" and to avoid "'overlapping UDAAP claims,'" and suggesting alternatively that the Bureau issue a policy statement or other guidance on the abusiveness standard).

expressed the alternative view that the statutory definition of abusiveness is sufficiently clear and that, to the extent further clarification may be warranted, the Bureau should wait until a more extensive body of precedent interpreting the standard has developed.[17] In short, although not unanimous, most of the experts agreed that there is uncertainty as to the scope and meaning of abusiveness that the Bureau should seek to resolve.

The Symposium participants' feedback has been an important part of the process of determining whether the Bureau should use its rulemaking or other tools to provide clarity about the general meaning of the abusiveness standard—and, if so, which principles should be applied to determine the scope of the standard. The Bureau appreciates the differing perspectives shared by these experts—and by the many other stakeholders who have expressed views on this issue.

The Bureau has concluded that there is uncertainty as to the scope and meaning of the abusiveness standard.[18] The current uncertainty is not beneficial. Businesses that want to

---

[17] *See, e.g.*, Adam J. Levitin, *"Abusive" Acts and Practices: Towards a Definition?*, Written Submission Prepared for CFPB Symposium on "Abusive" at 6-7, 9, https://files.consumerfinance.gov/f/documents/cfpb_levitin-written-statement_symposium-abusive.pdf (arguing that the "statutory language of the [Dodd-Frank Act] and the Bureau's enforcement actions to date provide a sense of the scope of 'abusive,'" that "[t]he Bureau would do better to allow the term to be better defined through the common law process," and that "there is no evidence that uncertainty on the issue is affecting business practices at all; the claims of certain trade associations on the matter are completely unsubstantiated"); Nicholas F.B. Smyth, presenting on behalf of Pennsylvania Attorney General Josh Shapiro, Statement submitted to the Bureau for the symposium on Abusive Acts or Practices at 1, 5 (June 25, 2019), https://files.consumerfinance.gov/f/documents/cfpb_smyth-written-statement_symposium-abusive.pdf (asserting that "the purported cloud of uncertainty created by the [abusiveness standard] has been exaggerated," that the abusiveness standard "does not stifle innovation any more than the prohibitions on unfairness or deception do," and that "[e]very time Congress creates a new standard, there is a period of time when some uncertainty may exist as to what conduct violates that standard and what does not. This is perfectly normal, and the Courts are well equipped to interpret new standards.").

[18] Although the Bureau seeks to foster greater certainty regarding the abusiveness standard through this Policy Statement, it should be noted that courts have consistently found that the statutory language in section 1031(d) provides sufficient notice for due process purposes. *See, e.g.*, *Consumer Fin. Prot. Bureau* v. *All Am. Check Cashing, Inc.*, No. 16-cv-356, 2018 WL 9812125, at *3 (S.D. Miss. Mar. 21, 2018) (rejecting vagueness challenge to the abusiveness prohibition); *ITT Educ. Servs.*, 219 F. Supp. 3d at 906 ("Because the CFPA itself elaborates the conditions under which a business's conduct may be found abusive—and because agencies and courts have successfully applied the term as used in closely related consumer protection statutes and regulations—we conclude that the language in question provides at least the minimal level of clarity that the due process clause demands of non-criminal economic regulation."); *Illinois* v. *Alta Colleges, Inc.*, No. 14-cv-3786, 2014 WL 4377579, at *4 (N.D. Ill. Sept. 4, 2014) (rejecting vagueness challenge to abusiveness prohibition). Nothing in this Policy Statement should be interpreted to suggest that the assertion of abusiveness claims in the Bureau's prior or future enforcement actions was or will be contrary to due process.

comply with the law face significant challenges in doing so, and these challenges can impose substantial costs, including impeding innovation. As a result of those costs, consumers may lose the benefits of improved products or services and lower prices. In light of this uncertainty, the Bureau has decided to provide greater clarity on how the Bureau plans to implement and apply the abusiveness standard in its supervisory and enforcement work. In issuing this Policy Statement, the Bureau does not foreclose the possibility of engaging in a future rulemaking to further define the abusiveness standard.

II. Policy Statement

Clarifying the abusiveness standard is in the public interest and the issuance of a supervision and enforcement policy statement regarding the abusiveness standard is beneficial to all stakeholders. Among other things, greater certainty as to how the Bureau intends to use the abusiveness standard in supervision and enforcement furthers the Bureau's purpose in implementing and enforcing the prohibition on abusiveness in the Dodd-Frank Act.[19] In addition, an approach to the abusiveness standard that provides greater certainty and fosters the development of a clearer standard will promote compliance with that standard. This compliance, in turn, assists the Bureau in achieving its objective under the Dodd-Frank Act of protecting consumers from abusive acts or practices.[20] The Bureau therefore issues this Policy Statement to describe certain aspects of how it intends to approach its use of the abusiveness standard in its supervision and enforcement matters going forward.[21]

---

[19] 12 U.S.C. 5511(a).
[20] 12 U.S.C. 5511(b)(2).
[21] The Bureau intends to apply this Policy Statement going forward in its enforcement and supervisory activities. Where the Bureau has previously asserted an abusiveness claim in an enforcement action that remains pending in court, the Bureau in its discretion will determine how to proceed in light of this Policy Statement based on the facts and circumstances of the particular case. In general, the Bureau intends to take this Policy Statement into account when seeking monetary relief in pending cases asserting abusiveness claims.

First, consistent with the priority it accords to the prevention of harm, the Bureau intends to focus on citing conduct as abusive in supervision or challenging conduct as abusive in enforcement if the Bureau concludes that the harms[22] to consumers from the conduct outweigh its benefits to consumers.[23] Second, the Bureau will generally avoid challenging conduct as abusive that relies on all or nearly all of the same facts that the Bureau alleges are unfair or deceptive. Where the Bureau nevertheless decides to include an alleged abusiveness violation, the Bureau intends to plead such claims in a manner designed to clearly demonstrate the nexus between the cited facts and the Bureau's legal analysis of the claim. In its supervision activity, the Bureau similarly intends to provide more clarity as to the specific factual basis for determining that a covered person has violated the abusiveness standard. Third, the Bureau generally does not intend to seek certain types of monetary relief for abusiveness violations where the covered person was making a good-faith effort to comply with the abusiveness standard.

A. Prevention of Consumer Harm from Abusive Acts or Practices

The Dodd-Frank Act authorizes the Bureau to exercise its authorities under Federal consumer financial law, including the authority to issue supervision and enforcement policy statements, for the purpose of ensuring that "consumers are protected from unfair, deceptive, and abusive acts and practices,"[24] thereby preventing the harm to consumers from the conduct. The Dodd-Frank Act also states that the Bureau shall seek to implement and, where applicable,

[22] The Bureau's consideration of the harms and benefits of the conduct (*i.e.*, its effects) on consumers can be qualitative as well as quantitative. That is, a quantitative analysis is not necessary for every citation or challenge to conduct as being a violation of the abusiveness standard.
[23] Competition among firms can lead to lower prices for and innovation in consumer financial products and services. Consequently, conduct that fosters competition can benefit consumers, while conduct that impedes competition can harm consumers.
[24] 12 U.S.C. 5511(b)(2).

enforce Federal consumer financial law consistently for the purpose of ensuring that "all consumers have access to markets for consumer financial products and services" and that such markets are "fair, transparent, and competitive."[25] To fulfill these statutory mandates, the Bureau has made it a priority to direct its supervisory, enforcement, and other tools to the prevention of harm to consumers from unlawful acts and practices.[26]

Consistent with the priority it accords to the prevention of harm, the Bureau intends to focus on citing conduct as abusive in supervision and challenging conduct as abusive in enforcement if the Bureau concludes that the harms to consumers from the conduct outweigh its benefits to consumers (including its effects on access to credit).[27] Explicitly incorporating this focus into the Bureau's supervision and enforcement decisions concerning abusiveness not only ensures that the Bureau is committed to using its scarce resources to address conduct that harms consumers, but also ensures that the Bureau's supervisory and enforcement decisions are consistent across matters.

B. Articulating Acts or Practices that Violate the Abusiveness Standard

Whether conduct constitutes an unfair, deceptive, or abusive act or practice often is dependent upon the facts and circumstances of a particular matter. In enforcement, the Bureau's

[25] 12 U.S.C. 5511(a).
[26] *See, e.g.*, Kathleen L. Kraninger's Speech at the Exchequer Club (July 18, 2019), https://www.consumerfinance.gov/about-us/newsroom/kathleen-l-kraningers-speech-exchequer-club/.
[27] The Bureau's focus on the effects of conduct on consumers is consistent with the FTC's approach to unfairness and deception. Section 5(n) of the FTC Act expressly codifies, in its unfairness standard, a weighing of the costs and benefits of the conduct at issue. 15 U.S.C. 45(n). Section 5 of the FTC Act does not expressly direct the FTC to consider costs and benefits as part of its deception standard. 15 U.S.C. 45(a)(1). As a leading commentator has explained, however, "the primary difference between full-blown unfairness analysis and deception analysis is that deception does not ask about offsetting benefits. Instead, it presumes that false or misleading statements either have no benefits, or that the injury they cause to consumers can be avoided by the company at very low cost. In other words, deception analysis essentially creates a shortcut, assuming that when a material falsehood exists, the practice would not pass the full benefit/cost analysis of unfairness, because there are rarely, if ever, countervailing benefits to deception." J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2005), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

experience indicates that a single course of conduct may provide the factual basis for allegations of unfair, deceptive, or abusive acts or practices. Where such circumstances arise, the Bureau intends generally to avoid alleging an abusiveness violation that relies on all or nearly all the same facts as an unfairness or deception violation.[28] The Bureau nevertheless intends to allege "stand-alone" abusiveness violations (*i.e.*, violations that are not accompanied by related unfairness or deception violations) where doing so would be consistent with the abusiveness standard and this Policy Statement. Where the Bureau alleges "stand-alone" abusiveness violations, it intends to plead such claims in a manner designed to demonstrate clearly the nexus between the cited facts and the Bureau's legal analysis of the claims.[29]

The Bureau believes that this approach to pleading will provide more certainty to covered persons as to the metes and bounds of conduct the Bureau determines is abusive. It also will facilitate the development of a body of jurisprudence as to the conduct courts conclude is abusive.[30]

In its supervision activity, the Bureau similarly intends to provide more clarity as to the factual basis for determining that a covered person has violated the abusiveness standard. In citing covered persons during examinations for having engaged in abusive acts or practices, the Bureau intends to apply the same approach as set forth above with regard to pleading abusiveness in enforcement actions. In addition, in future editions of Supervisory Highlights, the

[28] In limited circumstances, the Bureau intends to allege both an abusiveness violation and a related unfairness or deception violation where it would help clarify the scope of the abusiveness standard. Where the Bureau alleges both an abusiveness violation and a related unfairness or deception violation, the Bureau intends to allege the abusiveness violation with sufficient detail to distinguish it from the related unfairness or deception violation.
[29] Because the Bureau will be guided by the facts in determining which claims to bring, examinations and investigations may seek information that could relate to unfair, deceptive, or abusive acts or practices without distinguishing among the potential claims. The Bureau may also use its supervisory and enforcement processes to seek an institution's written response where the facts indicate that the institution's conduct may qualify as abusive or unfair or deceptive.
[30] To the extent practicable, the Bureau in the future intends to develop model pleadings and updates to its UDAAP examination procedures in order to provide greater specificity and clarity as to the abusiveness standard.

Bureau intends to describe the basis for abusiveness citations with greater clarity (consistent with the need to keep the identity of the supervised entities confidential). Additional clarity in supervisory materials about how the Bureau views particular facts and how those facts support an abusiveness violation will result in more transparency as to the conduct the Bureau determined violates the abusiveness standard, thereby providing more certainty, especially as to covered persons who are subject to Bureau supervisory authority.

C. Limits on Monetary Relief in Abusiveness Enforcement Actions

The Bureau recognizes that covered persons must make decisions about whether to engage in conduct notwithstanding uncertainty as to whether the Bureau will allege that conduct violates the abusiveness standard and will seek substantial amounts in monetary relief based on the alleged violation. This uncertainty and its consequences may chill or overly deter covered persons from engaging in conduct that may be beneficial to consumers.

Accordingly, to ensure that uncertainty regarding the abusiveness standard does not impede beneficial conduct, the Bureau generally does not intend to seek certain monetary remedies for abusive acts or practices if the covered person made a good-faith effort to comply with the law based on a reasonable—albeit mistaken—interpretation of the abusiveness standard.[31] Similarly, in supervisory actions, the Bureau will apply the same standard when requesting action as a result of violations in Matters Requiring Attention or other supervisory requests. However, if a covered person makes a good-faith but unsuccessful effort to comply with the abusiveness standard, the Bureau still intends to seek legal or equitable remedies, such as damages and restitution, to redress identifiable consumer injury caused by the abusive acts or practices that would not otherwise be redressed. Absent unusual circumstances, the Bureau does

[31] Although the covered person's good-faith efforts to comply would be relevant to whether the Bureau seeks monetary remedies, it would not be an affirmative defense to an alleged violation.

not intend to seek civil penalties or disgorgement if a covered person made good-faith efforts to comply with the abusiveness standard.

Further, the Bureau emphasizes that it is committed to aggressively pursuing the full range of monetary remedies against bad actors who were not acting in good faith in violating the abusiveness standard, such as those who engage in fraudulent practices or consumer scams. The Bureau's seeking such relief will prevent and deter the continuation or recurrence of such abusive acts or practices.

In determining whether a covered person made a good-faith effort to comply with the abusiveness standard, the Bureau intends to consider all relevant factors, including but not limited to the considerations outlined in CFPB Bulletin 2013-06 regarding Responsible Business Conduct.[32] A "reasonable" interpretation for purposes of this Policy Statement is one based on the text of the abusiveness standard set forth in the Dodd-Frank Act, as well as prior precedent and guidance, including judicial precedent, the Bureau's administrative decisions, rulemakings, supervisory guidance, and past allegations of abusive acts or practices in public enforcement actions.

Covered persons that believe that regulatory uncertainty is hindering the development of new products or services are also reminded that the Bureau has created the Office of Innovation to focus on encouraging consumer-beneficial innovation. The Bureau, primarily through the Office of Innovation, has issued policies to reduce regulatory uncertainty and processes applications from entities under those policies.[33]

---

[32] *See* https://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf. *See also* 12 U.S.C. 5565(c)(3)(A).

[33] *See CFPB Issues Policies to Facilitate Compliance and Promote Innovation* (Sept. 10, 2019), https://www.consumerfinance.gov/about-us/newsroom/bureau-issues-policies-facilitate-compliance-promote-innovation/.

D. Conclusion

For the reasons set forth above, in alleging an act or practice as abusive in violation of the Dodd-Frank Act, the Bureau intends to apply the following principles: (1) consistent with the priority it accords to the prevention of harm, the Bureau intends to focus on citing conduct as abusive in supervision or challenging conduct as abusive in enforcement if the Bureau concludes that the harms to consumers from the conduct outweigh its benefits to consumers; (2) the Bureau will generally avoid challenging conduct as abusive that relies on all or nearly all of the same facts that the Bureau alleges are unfair or deceptive. Where the Bureau nevertheless decides to include an alleged abusiveness violation, the Bureau intends to plead such claims in a manner designed to clearly demonstrate the nexus between the cited facts and the Bureau's legal analysis of the claim. In its supervision activity, the Bureau similarly intends to provide more clarity as to the specific factual basis for determining that a covered person has violated the abusiveness standard; and (3) the Bureau generally does not intend to seek certain types of monetary relief for abusiveness violations where the covered person was making a good-faith effort to comply with the abusiveness standard. Nothing in these principles affect whether and how the Bureau will proceed in taking supervisory or enforcement action to address violations of any other provision of the Dodd-Frank Act (including its prohibition of unfair or deceptive acts or practices), or any of the other statutes, rules, or orders that the Bureau enforces.

III. Regulatory Requirements

This Policy Statement constitutes a general statement of policy that is exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act.[34] It is intended to provide information regarding the Bureau's general plans to exercise its discretion

[34] 5 U.S.C. 553(b). However, this is not a "statement of policy" as that term is specifically used in Regulation X, 12 CFR 1024.4(a)(1)(ii).

and does not impose any legal requirements on external parties, nor does it create or confer any substantive rights on external parties that could be enforceable in any administrative or civil proceeding. Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. The Bureau has also determined that this Policy Statement does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

Pursuant to the Congressional Review Act, 5 U.S.C. 801 *et seq.*, the Bureau will submit a report containing this Policy Statement and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to its applicability date. The Office of Information and Regulatory Affairs has designated this Policy Statement as not a "major rule" as defined by 5 U.S.C. 804(2).

[THIS SIGNATURE PAGE PERTAINS TO THE POLICY STATEMENT TITLED "STATEMENT OF POLICY REGARDING PROHIBITION ON ABUSIVE ACTS OR PRACTICES"]

Dated: January 21, 2020.

Kathleen L Kraninger

Kathleen L. Kraninger,

Director, Bureau of Consumer Financial Protection.