

# The Banking Law Journal

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# The Consumer Financial Protection Bureau's Abusive Policy Statement

*By Eric J. Mogilnicki*

*In this article, the author reviews the Policy Statement on Abusive Acts or Practices recently issued by the Consumer Financial Protection Bureau (CFPB), and argues that the guidance offered in the Policy Statement includes unsupported conclusions and excludes much of the CFPB's own enforcement docket.*

Our ancestors found pictures in the night sky. By drawing lines between some stars (and ignoring others), they drew a fish and a bull and a big dipper. These constellations, and the origin stories that accompanied them, brought a sense of order to randomly spaced stars. And these constellations provided some assistance in navigating uncharted seas until more complete maps became available.

The Policy Statement on Abusive Acts or Practices (Policy Statement)<sup>1</sup> recently issued by the Consumer Financial Protection Bureau (CFPB or the Bureau) likewise seeks to bring order to chaos. Like the ancient astronomers, the Bureau has drawn a picture of “abusive practices,” including an origin story, by squinting at the available information and ignoring points that do not fit the chosen narrative. The resulting picture may provide some guidance in navigating the current CFPB's perspective on this legal standard, but is no substitute for a more complete map of the text and history of the abusive standard.

The Bureau's interest in providing guidance on this new legal standard is commendable. However, as is detailed below, the Policy Statement provides only a guide to what the current administration of the Bureau might consider to be abusive under the Consumer Financial Protection Act. The Policy Statement promises a “summary of precedent,” but that summary is incomplete, and the precedents cited are mostly untested allegations in the Bureau's own Complaints and Consent Orders. Similarly, the “analytical framework” proposed by the Policy Statement simply superimposes the Bureau's current thinking over the legislative history, statutory text, and a curated set of Bureau enforcement actions. As a result, the Policy Statement outlines an approach to

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<sup>1</sup> Available at [https://files.consumerfinance.gov/f/documents/cfpb\\_policy-statement-of-abusiveness\\_2023-03.pdf](https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf). The Policy Statement became effective on April 12, 2023, but the Bureau has solicited and received comments on it. This article refers to the April 12, 2023 version.

the abusive standard for the use of “fellow government enforcers” that is far more expansive than the approach actually applied by every Bureau administration – including this one – to its enforcement efforts.

### INCONSISTENT USE

Part of the problem confronting the Policy Statement is that the Bureau’s use of abusive claims has been consistently inconsistent. To cite the most recent example, in September 2022, the Bureau alleged that Authorized-Positive-Settled-Negative (APSN) overdraft fees were both unfair and abusive.<sup>2</sup> However, in December 2022, the Bureau alleged that APSN overdraft fees were unfair, but did not allege that the fees were abusive.<sup>3</sup> In January, 2023, the Bureau issued a Circular on APSN fees that asserted that such fees were unfair, but did not assert that such fees were abusive.<sup>4</sup> If there is an explanation for this apparent inconsistency, it is nowhere to be found in the Policy Statement.

This kind of unexplained inconsistency has long dogged the CFPB’s enforcement cases:

- In 2013, the Bureau sued two debt assistance firms for falsely promising to help debtors, but charged only one with abusive conduct under the Consumer Financial Protection Act.<sup>5</sup>
- In 2014, the Bureau sued two companies on the same day for false

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<sup>2</sup> In re Regions Bank, File No. 2022-CFPB-0008, ¶¶ 35-37 (C.F.P.B. Sept. 28, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_Regions\\_Bank-Consent-Order\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_Regions_Bank-Consent-Order_2022-09.pdf) (“Respondent’s assessment of Authorized-Positive Overdraft Fees was abusive,” because “many consumers did not understand Respondent’s overdraft practices or expect Authorized-Positive Overdraft Fees.”).

<sup>3</sup> In re Wells Fargo, File No. 2022-CFPB-0011, ¶¶ 43-47 (C.F.P.B. Dec. 20, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_wells-fargo-na-2022-consent-order\\_2022-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_wells-fargo-na-2022-consent-order_2022-12.pdf) (Respondent’s assessment of Authorized-Positive Overdraft Fees was unfair “because they were contrary to consumers’ reasonable expectations.”).

<sup>4</sup> CFPB, Consumer Financial Protection Circular 2022-06, <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-06-unanticipated-overdraft-fee-assessment-practices/> (An Authorized-Positive Overdraft Fee may be unfair because “[c]onsumers are likely to reasonably expect that a transaction that is authorized at point of sale with sufficient funds will not later incur overdraft fees.”).

<sup>5</sup> Compare Complaint, CFPB v. American Debt Solutions Inc., No. 9:13-cv-80548-DMM (S.D. Fl. May 30, 2013), [https://files.consumerfinance.gov/f/201305\\_cfpb\\_complaint\\_adss.pdf](https://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf), at ¶ 57 (alleging that misleading consumers about “how long it will take ADSS to settle their debts” is abusive) with Complaint, CFPB v. Morgan Drexen, No. SACV-13-10267-JST (C.D. Cal. Aug. 20, 2013), [https://files.consumerfinance.gov/f/201308\\_cfpb\\_complaint\\_morgan-drexen.pdf](https://files.consumerfinance.gov/f/201308_cfpb_complaint_morgan-drexen.pdf) (alleging that misleading consumers about how quickly they will become debt free is deceptive).

marketing that induced consumers to seek their help repaying student loans. The Bureau charged only one of them with “abusive” conduct under the Consumer Financial Protection Act – despite a press release that grouped the two cases as “scams that illegally tricked borrowers.”<sup>6</sup>

- In 2015, the Bureau alleged that creating “an artificial sense of urgency” to encourage a consumer to take out a loan was deceptive despite having alleged a year earlier that creating “an artificial sense of urgency” to encourage a consumer to take out a loan was abusive.<sup>7</sup>
- In 2016, the Bureau brought two cases alleging that improper sales practices focused consumers on the size of their monthly payments in order to hide the true costs of a loan. This conduct was alleged to be deceptive (but not “abusive”) in one case and “abusive” (but not deceptive) in the other.<sup>8</sup>

In a host of ways, the Policy Statement ignores these and other data points that would disrupt its picture of the abusive standard.

First, the Policy Statement never grapples with the fact that each Bureau Director and Acting Director has taken a different approach to the abusive standard. For example, the Policy Statement largely ignores Director Richard

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<sup>6</sup> See CFPB Press Release, CFPB Takes Action to End Student ‘Debt Relief’ Scams (Dec. 11, 2014), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-end-student-debt-relief-scams/>. Compare Complaint, CFPB v. College Education Services, et. al, No. 8:14-cv-3078t36-EAG, ¶ 57 (Dec. 11, 2014), [https://files.consumerfinance.gov/f/201412\\_cfpb\\_complaint\\_the-college-education-services.pdf](https://files.consumerfinance.gov/f/201412_cfpb_complaint_the-college-education-services.pdf) (alleging that “creat[ing] the illusion of expertise and individual advice to induce consumers to reasonably rely on the company to act in their interests. . . .” is abusive), with Complaint, CFPB v. Irvine WebWorks, Inc. d/b/a Student Loan Processing US, et. al., No. 8:14-cv-1967, ¶¶ 59-60 (C.D. Cal. Dec. 11, 2014), [https://files.consumerfinance.gov/f/201412\\_cfpb\\_complaint\\_student-loan-processing.pdf](https://files.consumerfinance.gov/f/201412_cfpb_complaint_student-loan-processing.pdf) (alleging that “creat[ing] the net impression that Defendants were affiliated with the U.S. Department of Education” was deceptive).

<sup>7</sup> Compare Complaint, CFPB v. Global Financial Support et al., No. 15-cv-2440- GPC-WVG, ¶ 60 (S.D. Cal. Oct. 29, 2015) at ¶60 with Consent Order, In re CFPB v. ACE Cash Express, Inc., 2014-CFPB-0008, ¶ 29 (C.F.P.B. July 10, 2014), [https://files.consumerfinance.gov/f/documents/201407\\_cfpb\\_consent-order\\_ace-cash-express.pdf](https://files.consumerfinance.gov/f/documents/201407_cfpb_consent-order_ace-cash-express.pdf) at ¶29.

<sup>8</sup> Compare Consent Order, In re TMX Finance LLC, 2016- CFPB-0022, ¶ 32 (C.F.P.B. Sept. 26, 2016), [https://files.consumerfinance.gov/f/documents/092016\\_cfpb\\_TitleMaxConsentOrder.pdf](https://files.consumerfinance.gov/f/documents/092016_cfpb_TitleMaxConsentOrder.pdf) (alleging that oral and written materials that confused consumers about the potential cost of the loan were abusive) with Consent Order, In re Bridgepoint Education, Inc., 2016-CFPB0016, ¶ 10 (C.F.P.B. Sept. 12, 2016), [https://files.consumerfinance.gov/f/documents/092016\\_cfpb\\_BridgepointConsentOrder.pdf](https://files.consumerfinance.gov/f/documents/092016_cfpb_BridgepointConsentOrder.pdf) (alleging that inaccurate “oral statements to Students about the potential costs of the loans” were deceptive).



Cordray's congressional testimony regarding the abusive standard<sup>9</sup> and Director Kathleen Kraninger's 2020 Statement of Policy Regarding Prohibition on Abusive Acts and Practices.<sup>10</sup> In ignoring this history, the Policy Statement becomes less a summary of precedent and more a guide to the Bureau's current thinking.<sup>11</sup>

Second, the Policy Statement never acknowledges the tentative nature of a statement of law that relies upon allegations in Complaints and Consent Orders,<sup>12</sup> rather than judicial decisions. The allegations on which the CFPB now relies were drafted by the Bureau with little or no input from anyone outside the CFPB. Almost none of them have been evaluated by a trial court, nor reviewed by an appellate court. The Bureau quoting itself is very different from the FTC Policy Statement on Deception, which cites dozens of appellate court opinions.<sup>13</sup>

Third, a more comprehensive review of the Bureau's enforcement actions demonstrates that the CFPB routinely decides to forgo an allegation that particular practices are abusive. There may be robust explanations for the distinctions implicitly drawn by the Bureau's charging decisions. However, by ignoring all the cases that did not include an allegation of abusive conduct, the Policy Statement fails to explain where or how the Bureau decides to draw the line between allegedly abusive conduct and conduct that is allegedly deceptive or unfair, or not prohibited at all. The Policy Statement describes factual allegations that might be sufficient to support a claim of abusiveness, but not

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<sup>9</sup> See *infra*.

<sup>10</sup> CFPB, Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 Fed. Reg. 6733 (Feb. 6, 2020) ("2020 Policy Statement"), <https://www.govinfo.gov/content/pkg/FR-2020-02-06/pdf/2020-01661.pdf>. The 2020 Policy Statement acknowledged that "[u]ncertainty remains as to the scope and meaning of abusiveness" and that "[t]his uncertainty creates challenges for covered persons in complying with the law." *Id.* at 6733.

<sup>11</sup> This is despite the contrast that the Policy Statement attempts to draw between it and the 2020 Policy Statement, which it characterizes as merely having "communicated how the CFPB intends to exercise prosecutorial discretion regarding some issues relating to abusiveness." Policy Statement, n.11.

<sup>12</sup> See Policy Statement, nn.20, 22, 40, 41, 44, 45, 47, 49, 50, 52, 54, 62, 65, 70, 71, 75, & 77 (citing CFPB Complaints); *id.* nn.18, 19, 51, 53, 61, 64, 66, 68, 69, & 72 (citing CFPB Consent Orders). See also *id.*, nn. 58 & 69 (citing CFPB, Supervisory Highlights, Issue 27 (Sept. 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_student-loan-servicing-supervisory-highlights-special-edition\\_report\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf)).

<sup>13</sup> See Director Rohit Chopra's Prepared Remarks at the University of California Irvine Law School (Apr. 3, 2023), <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/> (comparing the Policy Statement to FTC Policy Statements on Deception and Unfairness.)

what factual allegations would be *insufficient* to support such a claim.<sup>14</sup> In fact, it explicitly rejects any inference that its description of abusive conduct is complete,<sup>15</sup> or that the absence of a particular fact that would support an abusive claim undermines an abusive claim.<sup>16</sup> The result is predictably amorphous; a map without boundaries.

## THE ORIGINS OF THE ABUSIVE STANDARD

The CFPB's Policy Statement offers a simple explanation of the origins of the abusive standard. The Statement asserts that "Congress concluded that the manner in which agencies had enforced the prohibitions on unfair and deceptive acts or practices was too limited to be effective at preventing the financial crisis, and once again amended existing law to better meet new challenges."<sup>17</sup> One such response was the "add[ition of] a prohibition on abusive acts or practices"<sup>18</sup> to the prohibition on unfair and deceptive acts and practices.

This account is thinly sourced. The only source cited for what "Congress concluded" in 2010 is the 2007 testimony of FDIC Chairwoman Sheila Bair.<sup>19</sup> When the Policy Statement cites the relevant Senate Committee reports, it merely identifies references to the language of the abusive standard itself, and collects references to "abusive" practices in the underwriting and terms of mortgages.<sup>20</sup>

A more fulsome examination of the history of "abusive" requires acknowledging the extent to which the legislative history provides little context for the statutory language. A 2009 Obama Administration regulatory reform white-paper added "abusive" to the established prohibition on deceptive and unfair acts and practices, and identified credit cards (as well as mortgages) as a source

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<sup>14</sup> By way of contrast, the FTC Policy Statement on Deception (October 14, 1983) includes examples of the kinds of representations, and consumer misunderstanding, that will not generally lead to an allegation of deceptive conduct

<sup>15</sup> See, e.g., Policy Statement at 4 n.14 ("The CFPB does not intend its use of . . . shorthand phrases to limit in any way the scope" of the abusive standard); *id.* at 5 (examples of "interference" include "various other means"), 6 (describing "a number of methods to prove material interference", "including but not limited to those listed below"), 13 (offering only examples of how "[o]ne can demonstrate a person's lack of understanding").

<sup>16</sup> See *infra*.

<sup>17</sup> Policy Statement at 3.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.* n.9.

<sup>20</sup> See *id.* n.10.

of potential abusive practices.<sup>21</sup> However, although the “abusive” standard was brand new, the administration stated that the legal standards for banned practices “are generally well-established.”<sup>22</sup> The original House bill establishing the CFPB added the words “and abusive” to the prohibition on unfair and deceptive acts or practices, but did no more.<sup>23</sup> Senate consideration of the abusive standard was similarly sparse.<sup>24</sup> Indeed, long after the legislative history cited by the Policy Statement had been made, former Senator Christopher Dodd acknowledged that “the word ‘abusive’ does need to be defined,” and he discussed on the Senate floor “either striking that word or defining it better.”<sup>25</sup> Congress did neither, and so the text of the standard is not deeply informed by the legislative history.<sup>26</sup>

The Policy Statement projects the CFPB’s current concerns and goals onto this relatively blank legislative history. For example, the Policy Statement asserts, without any evidence or citation, that Congress was “focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market.”<sup>27</sup> This focus on market competition is a hallmark of Director Rohit Chopra’s vision for the CFPB.<sup>28</sup> However, the association of

<sup>21</sup> U.S. Dept. of the Treasury, *Financial Regulatory Reform: A New Foundation 3* (June 2009), <https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123>.

<sup>22</sup> *Id.* at 68.

<sup>23</sup> The Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Congress, <https://www.congress.gov/bill/111th-congress/house-bill/3126>. H.R. 3126 was consolidated into a more comprehensive financial reform bill (H.R. 4173) which ultimately passed the House in December 2009.

<sup>24</sup> The Senate Banking Committee report on the relevant legislation noted that “abusive” would be added “to ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers.” S. Rep. No. 111-176, at 172 (2010), <https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1>.

<sup>25</sup> 156 Cong. Rec. S3310-11 (daily ed. May 6, 2010) (statement of C. Dodd), <https://www.congress.gov/congressional-record/volume-156/issue-67/senate-section/article/S3303-3>.

<sup>26</sup> The Bureau conceded, in its Payday Lending Rule, that “the legislative history on the meaning of the Dodd-Frank’s abusiveness standard is fairly limited,” with “primary focus . . . on unaffordable mortgages.” 82 Fed. Reg. 54472, 54521 (Nov. 17, 2017). See also 2020 Policy Statement at 6733-34 (“there is relatively limited legislative history discussing the meaning of the language in section 1031(d), (including in distinguishing the abusive standard from the deception and unfairness standards).”).

<sup>27</sup> See Policy Statement at 4; see also *id.* at 8 (“[i]n crafting the abusiveness prohibition, Congress identified categories of practices that distort the market and ultimately harm consumers.”)

<sup>28</sup> See, e.g., CFPB Prepared Statement of Director Rohit Chopra before the House Committee on Financial Services (Dec. 14, 2022), <https://www.consumerfinance.gov/about-us/>

the new abusive standard with concerns about competition is, at best, an unsupported interpretation of what motivated Congress.<sup>29</sup> As is noted below, this new interpretation drives important aspects of the Policy Statement's substantive analysis.<sup>30</sup>

### THE TEXT AND USES OF THE "ABUSIVE STANDARD"

The Policy Statement walks through the statutory text<sup>31</sup> with an eye to describing its potential breadth, but not its limits. For example, the Policy Statement sets forth such a broad explanation of "materially interferes with the ability of a consumer to understand" that it cannot explain why the Bureau does not bring an abusive claim whenever it brings a claim of deception. Similarly, the Policy Statement sets forth such a broad explanation of "taking unreasonable advantage" of a consumer that it cannot explain why the Bureau does not bring an abusive claim whenever it brings a claim of unfairness. This failure is particularly striking because, for more than a decade, the Bureau has been evaluating whether or not to bring an abusive claim in addition to a claim of

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newsroom/prepared-statement-of-director-chopra-before-house-committee-on-financial-services/ (citing Promoting Competition and a Decentralized Market as a critical goal of the CFPB).

<sup>29</sup> The Dodd-Frank Act, establishes that the purpose of the Bureau is to "implement and, where applicable, 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 markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511. The abusive standard is explicitly focused on fairness (e.g., by prohibiting acts that take unreasonable advantage of consumers) and transparency (e.g., by prohibiting acts that interfere with consumer understanding).

<sup>30</sup> See *infra*.

<sup>31</sup> The abusive standard consists of the following:

(d) Abusive

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.

12 U.S.C. §5531(d).

unfairness or deception. However, the principles (if any) that underlie those decisions are not provided by the Policy Statement.

### **MATERIALLY INTERFERING WITH A CONSUMER'S UNDERSTANDING OF TERMS AND CONDITIONS**

The statutory text of the abusive standard prohibits acts or practice where an entity “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.”<sup>32</sup> This poses an important interpretive issue, because the existing prohibition on deceptive conduct already covers practices that are “likely to mislead the consumer.”<sup>33</sup> However, the canons of legislative construction counsel that the “materially interferes” prong of the “abusive” standard should not be superfluous.<sup>34</sup>

The Policy Statement does not wrestle with this interpretive problem. Instead, it announces a three part test for material interference: “(1) an act or omission intended to impede consumers’ ability to understand terms or conditions; (2) has the natural consequence of impeding consumers’ ability to understand; or (3) actually impedes understanding.”<sup>35</sup> Taken together, these three disjunctive prongs offer a sweeping description of how often the “abusive” label may be attached to misconduct.

The first prong of this test, which relates to intentional misconduct, comports with Director Cordray’s understanding of the abusive standard. He testified before Congress in 2012 that:

with standards like [abusive], there is a gray area and then there is a core. And within the core, there is really no question that the people who are perpetrating acts that are within the core, they know that what

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<sup>32</sup> 12 U.S.C. §5531(d)(1).

<sup>33</sup> CFPB UDAAP Supervision Manual at 5, Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) examination procedures | Consumer Financial Protection Bureau (consumerfinance.gov) (March 16, 2022). See also FTC Policy Statement on Deception at 2 (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf); CFPB Bulletin 2013-07, Prohibition on Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts at pp. 2-3 (July 10, 2013) (misrepresentations may be overt or implied, and are material if “likely to affect a consumer’s choice or, or conduct regarding, the product or service.”).

<sup>34</sup> See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant’”) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

<sup>35</sup> Policy Statement at 5.

they are doing is probably wrong, and they do it anyway.”<sup>36</sup>

Director Cordray added that the Bureau should “tread cautiously” in the “gray area” beyond intentional wrongdoing.<sup>37</sup> The Bureau continued to acknowledge this gray area through 2020, when the Bureau “concluded that there is uncertainty as to the scope and meaning of the abusive standard” and sought to identify and enforce the core of the abusive standard.<sup>38</sup>

The second prong set forth in the Policy Statement, which would punish unintentional conduct, does not summarize the Bureau’s historical position. For example, Director Cordray testified that:

... for something to be an abusive practice, it would have to be a pretty outrageous practice. And if you, in your business, stay away from pretty outrageous practices, you should be pretty safe.<sup>39</sup>

Similarly, the 2020 Policy Statement committed the Bureau to forgo civil penalties and disgorgement where an entity had made good-faith efforts to comply with the abusiveness standard.<sup>40</sup> The Policy Statement does not provide an example of a Bureau enforcement action alleging material interference that was unintentional.

The third prong goes even further. For it to have independent meaning, the words “did in fact impede understanding” must apply even when a financial institution did not intend to impede consumers’ understanding, and the consumer’s confusion is not a “natural consequence” of the financial institution’s actions.<sup>41</sup> If so, the Policy Statement’s approach was rejected by

<sup>36</sup> The Semi-Annual Report of the Consumer Financial Protection Bureau: Hearing Before the H. Fin. Servs. Comm., 112th Cong. at 27 (Mar. 29, 2012) (testimony of CFPB Director Richard Cordray), <https://financialservices.house.gov/uploadedfiles/112-114.pdf>.

<sup>37</sup> *Id.* at 41 This prong does little to distinguish between ‘deceptive’ and ‘abusive’ conduct, as the Policy Statement cites the FTC Policy Statement on Deception to explain that intentionally misleading consumers is abusive. See Policy Statement n.23.

<sup>38</sup> 2020 Policy Statement, 85 Fed. Reg at 6737 et. seq.

<sup>39</sup> How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on the TARP, Financial Services, and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Government Reform, 112th Cong. at 71 (Jan. 24, 2012), <https://oversight.house.gov/wp-content/uploads/2012/06/01-24-12-Subcommittee-on-TARP-Financial-Services-and-Bailouts-of-Public-and-Private-Programs-Hearing-Transcript.pdf>.

<sup>40</sup> 2020 Policy Statement, 85 Fed. Reg at 6737.

<sup>41</sup> Indeed, the Policy Statement suggests that proof that the confusion was unintentional or unnatural would not suffice as a defense. Cf. Policy Statement at 6 (“while evidence of intent would not provide a basis for inferring material interference under the first method, it is not a required element to show material interference.”).

Congressman Barney Frank, one of the framers of the Dodd-Frank Act. Responding to a critic of the standards, he explained:

. . . no, the fact that [a] consumer couldn't understand it is not in itself a reason to be declared abusive."<sup>42</sup>

The Policy Statement does not provide an example of a Bureau enforcement action alleging material interference where a consumer misunderstanding was not a natural consequence of the defendant's actions.

This third prong of the Bureau's standard, which would hold financial institutions liable for unreasonable misunderstandings, offers little practical guidance. A financial institution committed to compliance can control what it does intentionally, and seek to control the predictable consequences of its acts and omissions, but it cannot protect itself against confusion that is neither intended nor a natural consequence of an act or practice. Nor does the Policy Statement explain how the Bureau would marshal evidence that consumers were confused that does not rely upon evidence that the confusion was intended or a natural consequence of an entity's conduct. A case built solely on allegations that some consumers misunderstand a product (even though such misunderstanding was not intended or a natural consequence) would require evidence about particular consumers, rather than a sweeping claim relating to all consumers. However, the Bureau's practice has been to bring claims of abusive conduct on behalf of all consumers who purchased a particular product or service – not just the fraction who misunderstood it.<sup>43</sup>

This expansive framework of "material interference" also fails as a guide to the CFPB's actual decisions about when to make an allegation of abusive

<sup>42</sup> The Consumer Financial Protection Bureau: The First 100 Days: Hearing Before the Subcomm. on Fin. Inst. & Consumer Credit on H. Comm. on Fin. Servs., 112th Cong., at 18 (Nov. 2, 2011), <https://financialservices.house.gov/uploadedfiles/112-80.pdf>.

<sup>43</sup> For example, in *CFPB v. TCF National Bank*, No. 17-cv-00166-RHK-KMM (D. Minn. Mar. 1, 2017), [https://files.consumerfinance.gov/f/documents/bcfp\\_TCF\\_complaint\\_2017-03.pdf](https://files.consumerfinance.gov/f/documents/bcfp_TCF_complaint_2017-03.pdf), the CFPB alleged that a sales bank materially interfered with the ability of a consumer to understand a term or condition by, inter alia, using a sales process that increased overdraft opt-in rates from 33% to 77%. The Bureau sought, and eventually obtained, redress on behalf of all consumers who opened an account and opted into overdraft protection – even though the Bureau's own evidence indicated that 33% of those consumers would have opted in without the revised sales process. See *CFPB v. TCF National Bank*, Stipulated Final Judgment and Order, No. 17-cv-00166-RHK-KMM (D. Minn. July 2018), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp\\_TCF\\_stipulation\\_2018-07.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_TCF_stipulation_2018-07.pdf). See also CFPB, *A Closer Look: Overdraft and the Impact of Opting In*, at 3 (Jan. 19, 2017), [https://files.consumerfinance.gov/f/documents/201701\\_cfpb\\_Overdraft-and-Impact-of-Opting-In.pdf](https://files.consumerfinance.gov/f/documents/201701_cfpb_Overdraft-and-Impact-of-Opting-In.pdf) (citing opt-in rates ranging from 7.4% to 44.5%).

conduct. For example, in November 2002, the Bureau alleged that a mortgage service “made representations to consumers that were false or misleading” regarding their forbearance and repayment options.<sup>44</sup> In August 2022, the Bureau alleged that a fintech company knowingly misled consumers about its automated savings tool.<sup>45</sup> These allegations meet the Policy Statement’s “material interference” test, since these actions had “the natural consequence of impeding consumers’ ability to understand terms and conditions,”<sup>46</sup> but the Bureau relied solely upon a claim of deception in both cases, and did not make a claim of abusive practices.<sup>47</sup>

The Bureau may have had principled reasons for not including abusive claims in these cases, but the Policy Statement sheds no light on what those reasons might be. Instead, the Policy Statement suggests that the Bureau has the option of bringing a claim of abusive conduct whenever it can make a deception claim.<sup>48</sup>

### **Taking Unreasonable Advantage**

As with its analysis of material interference, the Policy Statement provides the CFPB with enormous flexibility in determining if a covered person is “taking unreasonable advantage” of a consumer. Here too, the Policy Statement does so by taking liberties with the legislative history and ignoring many of its own enforcement decisions.

The Policy Statement first makes a meal out of a few crumbs of legislative history. The Policy Statement asserts that, “when Congress formulated the

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<sup>44</sup> In re Carrington Mortgage Services, File No. 2022-CFPB-0010, ¶ 15 (C.F.P.B. Nov. 17, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_carrington-mortgage-services-llc\\_consent-order\\_2022-11.pdf](https://files.consumerfinance.gov/f/documents/cfpb_carrington-mortgage-services-llc_consent-order_2022-11.pdf).

<sup>45</sup> In re Hello Digit, LLC, File No. 2022-CFPB-0007 (C.F.P.B. Aug. 10, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_hello-digit-llc\\_consent-order\\_2022-08.pdf](https://files.consumerfinance.gov/f/documents/cfpb_hello-digit-llc_consent-order_2022-08.pdf).

<sup>46</sup> Policy Statement at 5. [https://files.consumerfinance.gov/f/documents/cfpb\\_onemain-financial-holdings-llc\\_consent-order\\_2023-05.pdf](https://files.consumerfinance.gov/f/documents/cfpb_onemain-financial-holdings-llc_consent-order_2023-05.pdf).

<sup>47</sup> See In re Carrington Mortgage Services, File No. 2022-CFPB-0010 (C.F.P.B. Nov. 17, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_carrington-mortgage-services-llc\\_consent-order\\_2022-11.pdf](https://files.consumerfinance.gov/f/documents/cfpb_carrington-mortgage-services-llc_consent-order_2022-11.pdf); In re Hello Digit, LLC, File No. 2022-CFPB-0007 (C.F.P.B. Aug. 10, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_hello-digit-llc\\_consent-order\\_2022-08.pdf](https://files.consumerfinance.gov/f/documents/cfpb_hello-digit-llc_consent-order_2022-08.pdf). On the other hand, in May, 2023, the Bureau alleged that a nonbank lender that misled consumers regarding the availability of a cost-free trial engaged in abusive conduct. See In re Matter of OneMain Financial Holdings, LLC, et. al., File No. 2023-CFPB-0003 (C.F.P.B. May 31, 2023), [https://files.consumerfinance.gov/f/documents/cfpb\\_onemain-financial-holdings-llc\\_consent-order\\_2023-05.pdf](https://files.consumerfinance.gov/f/documents/cfpb_onemain-financial-holdings-llc_consent-order_2023-05.pdf).

<sup>48</sup> Cf. 2020 Policy Statement (pledging that the CFPB will not charge “abusive” conduct when “unfair” or “deceptive” will do). 85 Fed. Reg. at 6733-34.



CFPB, one of its main concerns was financial products and services that may be ‘set up to fail.’” Despite the asserted centrality of this concern, the Policy Statement cites no legislative history for this point. Similarly uncited is the Policy Statement’s assertion that “Congress prohibited certain abusive business models . . .”

The Policy Statement does provide a citation to its assertion that “the CFPB’s legislative history emphasized” the importance of consumer choice “without having to worry about getting trapped by fine print into an abusive deal.” However, this citation is to a glancing use of “abusive” in a single sentence in the Economic Impact Section of the Senate Committee report, located on page 229 of 251.<sup>49</sup> That that same report summarizes the Dodd-Frank Act, section by section. However, the Report’s description of the new abusive standard includes none of the very specific concerns attributed to Congress by the Policy Statement. The Senate Committee Report merely repeats the statutory language.<sup>50</sup>

The Policy Statement uses its over-reading of the legislative history to over-read the abusive standard. As noted above, the Policy Statement argues that “[i]n crafting the abusiveness prohibition, Congress identified categories of practices that distort the market and ultimately harm consumers.”<sup>51</sup> This assertion lays the foundation for the Policy Statement’s conclusion that, because Congress was focused on harm to competition, “government enforcers do not need to independently prove that an act or practice caused substantial injury in order to establish liability under the abusiveness prohibition.”<sup>52</sup>

This focus in the Policy Statement on competitive markets both understates and overstates the breadth of the abusive standard.

First, nothing in the statutory text indicates that abusiveness is directed at “practices that distort the market.”<sup>53</sup> To the contrary, the text indicates that taking unreasonable advantage of a single consumer is sufficient to state a claim. Indeed, Congressman Barney Frank defended the abusive standard by explaining that it could protect a particular individual consumer from harm:

there are mortgage products that are suitable for some people that are not suitable for an 89-year old woman who has never had her own

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<sup>49</sup> S. Rep. No. 111-176, at 251 (2010).

<sup>50</sup> See *Id.* at 172.

<sup>51</sup> Policy Statement at 8.

<sup>52</sup> *Id.*

<sup>53</sup> See *supra*.

experience in economic affairs.<sup>54</sup>

Second, the statutory text does not prohibit acts that distort the market unless those actions take unreasonable advantage of consumers. As the Policy Statement itself makes clear, the phrase “take advantage of” assumes a zero-sum game, in which one person’s gain is another’s loss.<sup>55</sup> Furthermore, only actions “exceeding the bonds of reason or moderation” qualify as unreasonable.<sup>56</sup> Both of these concepts relate to consumer injury, not competition. If such practices are prohibited only because they “ultimately harm consumers,”<sup>57</sup> that harm should be part of the legal standard.

Third, the Policy Statement’s insistence that an abusive claim requires no consumer injury is belied by the CFPB’s own enforcement cases, which routinely plead injury as part of the alleged violation. For example, the very first case the Bureau brought under the abusive standard alleged that a debt relief organization took unreasonable advantage of consumers by causing consumers “to spend their last savings paying . . . fees for a service from which they will not benefit.”<sup>58</sup> More recently, in January 2023, the Bureau charged that a nonbank lender took unreasonable advantage of consumers not merely because it incentivized auto dealers to artificially inflate the amounts financed (thereby distorting the market) but because “borrowers ended up in costlier, and therefore riskier loans than what might have been available.”<sup>59</sup> This focus on injury is consistent with Director Cordray’s testimony that abusiveness claims should be directed at “pretty outrageous” conduct.

The Policy Statement also asserts that any “windfall” due to a gap in understanding, unequal bargaining power, or consumer reliance violates the standard,<sup>60</sup> and cites examples where the Bureau made such a claim. Here too, the Policy Statement does not account for the Bureau’s full enforcement history. For example, the Policy Statement cites *CFPB v. Think Finance LLC* as an

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<sup>54</sup> The Consumer Financial Protection Bureau: The First 100 Days: Hearing Before the Subcomm. on Fin. Inst. & Consumer Credit on H. Comm. on Fin. Servs., 112th Cong., at 18 (Nov. 2, 2011), <https://financialservices.house.gov/uploadedfiles/112-80.pdf>.

<sup>55</sup> Policy Statement at 8.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Complaint, *CFPB v. American Debt Solutions*, No. 9:13-cv-80548-DMM, ¶ 59 (S.D. Fl. May 30, 2013), [https://files.consumerfinance.gov/f/201305\\_cfpb\\_complaint\\_adss.pdf](https://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf).

<sup>59</sup> Complaint, *CFPB v. Credit Acceptance Corp.*, No. 1:23-cv-00038, ¶¶ 183-84 (S.D.N.Y. Jan. 4, 2023), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_credit-acceptance-corporation\\_complaint\\_2023-01.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_credit-acceptance-corporation_complaint_2023-01.pdf).

<sup>60</sup> Policy Statement at 10.

example of how the Bureau will claim it is abusive for lenders to induce students to take out loans with a high rate of default.<sup>61</sup> However, the Policy Statement does not explain why the Bureau declined to make abusive claims against other entities that allegedly induced students to take out unaffordable student loans<sup>62</sup> or to pay for ineffective debt relief programs.<sup>63</sup> In fact, the Bureau routinely seeks to return any improper windfall to consumers – with or without a claim of abusive conduct.

Of course, the CFPB can and should exercise its prosecutorial discretion in deciding when to bring an abusive claim. The CFPB's 2020 Policy Statement describes how the Bureau will approach that discretion; its successor does not. Instead, the new Policy Statement is focused on keeping all of the CFPB's enforcement options open. To this end, the Policy Statement identifies the hallmarks of an abusive practice, only to then assert that the absence of each hallmark does not preclude a claim of abusive conduct. For example, the Policy Statement asserts (without explanation or citation) that the fact that a practice is atypical or offers a large advantage may support an abusiveness claim – but that a practice that is typical or offers only a small advantage may also be abusive.<sup>64</sup> Similarly, the fact that an entity benefitted from an act or practice is relevant to the “unreasonable advantage” test – but the absence of a benefit may not prevent such a claim, as “section 1031(d)(2) does not require an investigative accounting of costs and benefits.”<sup>65</sup> This approach significantly limits the amount of guidance provided by the Policy Statement to financial institutions seeking to comply with the abusive standard.

As noted above, the inconsistency of the Bureau's enforcement approach is particularly vivid in its actions relating to an APSN overdraft fee. This fee is charged when a consumer had enough money in their account to cover a

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<sup>61</sup> See Policy Statement at 9 n.40.

<sup>62</sup> See *In re Bridgepoint Education Inc.*, File No. 2016-CFPB-0016 (C.F.P.B. Sept. 12, 2016), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092016\\_cfpb\\_BridgepointConsentOrder.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092016_cfpb_BridgepointConsentOrder.pdf).

<sup>63</sup> See Complaint, CFPB v. Morgan Drexen, No. SACV-13-10267-JST (C.D. Cal. Aug. 20, 2013), [https://files.consumerfinance.gov/f/201308\\_cfpb\\_complaint\\_morgan-drexen.pdf](https://files.consumerfinance.gov/f/201308_cfpb_complaint_morgan-drexen.pdf); Complaint, CFPB v. Irvine WebWorks, Inc. d/b/a Student Loan Processing US, et. al., No. 8:14-cv-1967, ¶¶ 59-60 (C.D. Cal. Dec. 11, 2014), [https://files.consumerfinance.gov/f/201412\\_cfpb\\_complaint\\_student-loan-processing.pdf](https://files.consumerfinance.gov/f/201412_cfpb_complaint_student-loan-processing.pdf).

<sup>64</sup> See Policy Statement at 9 n.36.

<sup>65</sup> Policy Statement at 10. See also Policy Statement at note 31 (profit is a sign of advantage-taking, but a lack of profit is not a sign that the entity did not take advantage of consumers). The 2020 Policy Statement indicated that the Bureau would conduct a cost-benefit analysis of conduct before bringing a claim of abusive conduct. See 85 Fed. Reg. at 6733-34.

purchase at the time of the purchase, but insufficient funds when the purchase was posted to their account. In its September 2015 Supervisory Highlights, the CFPB suggested such fees were unfair, but did not claim they were abusive.<sup>66</sup> However, in a September 2022 enforcement case, the CFPB alleged that APSN overdraft fees were abusive.<sup>67</sup> In an October 2022 Circular, the CFPB asserted that APSN overdraft fees are likely to be unfair (without claiming they are abusive),<sup>68</sup> and in a December 2022 enforcement case, the CFPB alleged that an APSN overdraft fees are unfair, but did not claim they were abusive.<sup>69</sup>

## LACK OF UNDERSTANDING

The abusive standard also prohibits financial institutions from taking unreasonable advantage of “a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service.” This standard requires an individualized determination of a consumer’s understanding. Congressman Barney Frank himself noted that the meaning of abusive “may depend upon the consumer.”<sup>70</sup> He added that some products could be abusive as to some consumers, but not others.<sup>71</sup> The first Director of the CFPB, Richard Cordray, echoed this point, explaining that determining whether an act or practice is abusive involves the “facts and circumstances” of individual circumstances, and is “unavoidably situational.”<sup>72</sup>

As the Policy Statement notes, there are circumstances where a lack of understanding can be shown by demonstrating that a particular transaction entails costs, but no benefits.<sup>73</sup> This makes sense. Where a consumer is induced

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<sup>66</sup> See CFPB, Supervisory Highlights, Winter Issue, at 8-9 (Sept. 2015), [https://files.consumerfinance.gov/f/201503\\_cfpb\\_supervisory-highlights-winter-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf).

<sup>67</sup> See *In re Regions Bank*, File No. 2022-CFPB-0008, ¶¶ 35-38 (C.F.P.B. Sept. 28, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_Regions\\_Bank-\\_Consent-Order\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_Regions_Bank-_Consent-Order_2022-09.pdf).

<sup>68</sup> See CFPB, Consumer Financial Protection Circular 2022-06, <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-06-unanticipated-overdraft-fee-assessment-practices/>.

<sup>69</sup> See *In re Wells Fargo*, File No. 2022-CFPB-0011, ¶¶ 43-47 (C.F.P.B. Dec. 20, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_wells-fargo-na-2022\\_consent-order\\_2022-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_wells-fargo-na-2022_consent-order_2022-12.pdf).

<sup>70</sup> The Semi-Annual Report of the Consumer Financial Protection Bureau: Hearing Before the H. Fin. Servs. Comm., 112th Cong. at 10 (Mar. 29, 2012) (testimony of CFPB Director Richard Cordray), <https://financialservices.house.gov/uploadedfiles/112-114.pdf>.

<sup>71</sup> See *id.*

<sup>72</sup> *Id.* at 14, 18.

<sup>73</sup> See Policy Statement at 7.

to pay a high interest rate instead of an available lower rate,<sup>74</sup> or to pay a high check cashing fee instead of an available lower fee,<sup>75</sup> or to make a payment that they are not required to make,<sup>76</sup> the CFPB alleges a lack of understanding because no consumer who understood the transaction would enter into it.<sup>77</sup>

However, many cases are less clear. As the Policy Statement notes, “there are differences among consumers in the risks, costs, and conditions that consumers face and in their understanding of them.”<sup>78</sup> In such cases, “there may be a violation with respect to some consumers even if other consumers do not lack understanding.”<sup>79</sup>

Unfortunately, the Policy Statement does not explain how the Bureau can bring (or a defendant might defend) enforcement actions that do not identify which consumers lack understanding. Nor does the Policy Statement provide an example of a CFPB enforcement case that alleged “a violation with respect to some consumers even if other consumers do not lack understanding.”<sup>80</sup> Instead, the Policy Statement cites the Bureau’s payday lending rule,<sup>81</sup> which applies the abusive standard to prohibit multiple failed presentments on the grounds that “most consumers” do not understand the process.<sup>82</sup>

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<sup>74</sup> See Complaint, CFPB v. Nationwide Biweekly Administration, Inc., No. 3:15-cv-02106, (N.D. Cal. May 11, 2015), [https://files.consumerfinance.gov/f/201505\\_cfpb\\_complaint-nationwide-biweekly-administration-inc-loan-payment-administration-llc-and-daniel-s-lipsky.pdf](https://files.consumerfinance.gov/f/201505_cfpb_complaint-nationwide-biweekly-administration-inc-loan-payment-administration-llc-and-daniel-s-lipsky.pdf) (alleged steering consumers towards high interest loans when low interest loans were available).

<sup>75</sup> See Complaint, CFPB v. All American Check Cashing Inc., No. 3:16cv356WHB-JCG (S.D. Miss., May 11, 2016), [https://files.consumerfinance.gov/f/documents/201605\\_cfpb\\_complaint-for-permanent-injunction-and-other-relief-all-american-check-cashing-inc.pdf](https://files.consumerfinance.gov/f/documents/201605_cfpb_complaint-for-permanent-injunction-and-other-relief-all-american-check-cashing-inc.pdf) (alleged steering consumers towards high check cashing fees when lower fees were available).

<sup>76</sup> See First Amended Complaint, CFPB v. CashCall et. al., No. 1-13-cv-13167 (GAO) (D. Mass., March 21, 2014), [https://files.consumerfinance.gov/f/201403\\_cfpb\\_amended-complaint\\_cashcall.pdf](https://files.consumerfinance.gov/f/201403_cfpb_amended-complaint_cashcall.pdf) (alleged inducing borrowers to make payments on loans they were not obligated to pay).

<sup>77</sup> See generally Eric Mogilnicki & D. Jean Veta, Defining ‘Abusive’ Acts and Practices, Bloomberg Law, BNA’s Banking Rep. (Feb. 13, 2017), [https://www.cov.com/-/media/files/corporate/publications/2017/02/defining\\_abusive\\_acts\\_and\\_practices.pdf](https://www.cov.com/-/media/files/corporate/publications/2017/02/defining_abusive_acts_and_practices.pdf), and the cases cited therein (identifying worthless product and unnecessary payments as supporting abusive allegations).

<sup>78</sup> Policy Statement at 13.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Policy Statement 13 & nn.56 & 57 (citing 82 Fed. Reg. at 54740, referring to what consumers “may not understand,” and “are likely to expect”).

<sup>82</sup> 82 Fed. Reg. at 54741; see also *id.* at 54740.

The Policy Statement also states that the text of the abusive standard does not require that the relevant lack of understanding be caused by the party allegedly engaging in abusive conduct, nor that the lack of understanding be reasonable.<sup>83</sup> Although the Policy Statement rules out these two limitations, the Bureau's enforcement history suggests that the Bureau applies them. The Bureau's "abusive" allegations are replete with descriptions of how the accused caused the misunderstanding, and the reasonableness of that misunderstanding.<sup>84</sup> The only apparent exception cited by the Policy Statement is a Complaint that holds a lead purchaser responsible for a lack of understanding caused by lead generators – and there the Bureau alleges that the defendant could have vetted and monitored the parties causing the misunderstanding.<sup>85</sup>

### INABILITY OF CONSUMERS TO PROTECT THEIR INTERESTS

Under the abusive standard, entities also cannot take unreasonable advantage of "the inability of the consumer to protect the interests of the consumer is selecting or using a consumer financial service."<sup>86</sup> On this issue, as with others, the Policy Statement makes a series of broad pronouncements, while citing enforcement actions that offer far narrower grounds for alleging an act or practice is abusive. For example, the Policy Statement states that consumer "interests" include "non-monetary interests," including but not limited to privacy, reputational interests, and time spent trying to obtain customer support.<sup>87</sup> However, the "inability to protect" cases actually brought by the CFPB have identified much narrower harms, such as the harm from having an account opened in a consumer's name without their consent,<sup>88</sup> or a series of

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<sup>83</sup> Policy Statement at 12.

<sup>84</sup> See, e.g., *In re Regions Bank*, File No. 2022-CFPB-0008, ¶ 36 (C.F.P.B. Sept. 28, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_Regions\\_Bank\\_Consent-Order\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_Regions_Bank_Consent-Order_2022-09.pdf) (abusive claim relies upon allegation that consumer misunderstanding was caused by the Defendant); *Complaint, CFPB v. Populus Financial Group, Inc.*, No. 3:22-cv-01494-G, ¶ 71 (N.D. Tex. July 21, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_populus-dba-ace\\_complaint\\_2022-07.pdf](https://files.consumerfinance.gov/f/documents/cfpb_populus-dba-ace_complaint_2022-07.pdf) (same).

<sup>85</sup> See Policy Statement at 12 n.54 (citing its Amended Complaint, *CFPB v. D&D Marketing, Inc.*, No. 2:15-cv-09692 (C.D. Cal. June 30, 2016), <https://storage.courtlistener.com/recap/gov.uscourts.cacd.635925.37.0.pdf>).

<sup>86</sup> 12 U.S.C. 5531 (d)(2)(B).

<sup>87</sup> Policy Statement at 8.

<sup>88</sup> See Policy Statement at 14 nn.61 & 64 (citing CFPB Consent Orders alleging Wells Fargo and U.S. Bank opened accounts without consumer consent). But see *Complaint, CFPB v. Richard F. Mosely et al.*, No. 4:14-cv-00789-DW, ¶¶ 73-75 (W.D. Mo. Sept. 8, 2014), [https://files.consumerfinance.gov/f/201409\\_cfpb\\_complaint\\_hydra-group.pdf](https://files.consumerfinance.gov/f/201409_cfpb_complaint_hydra-group.pdf) (alleging that taking out loans for consumers without their consent was deceptive).

obstacles that prevented consumers from being able to exercise control over the allocation of their payments.<sup>89</sup> Although the Policy Statement mentions privacy and reputational interests, it fails to cite any CFPB action that uses the abusive standard to protect those interests.

Similarly, the Policy Statement suggests that “[p]eople are often unable to protect their interests when they do not elect into a relationship with an entity,” such as credit reporting company, debt collector, or third-party loan servicer.<sup>90</sup> However, the enforcement cases cited by the Policy Statement offer only fairly extreme examples, involving prisoners with only one source of financial services,<sup>91</sup> students being denied transcripts over delinquent loans,<sup>92</sup> and a bank that was, by contract, the sole source of government benefits provided via prepaid card.<sup>93</sup> Although the Policy Statement suggests that credit reporting companies and third party debt collectors are examples of entities that a consumers do not choose, it fails to cite any CFPB action that uses the abusive standard against such entities.

Finally, the Policy Statement indicates that “[c]onsumers may also lack power to protect their interests . . . when entities use form contracts, where contractual provisions are not subject to a consumer choice.”<sup>94</sup> This statement casts a long shadow, as almost all consumer financial services involve form contracts that are drafted by a financial institution and not subject to negotiation. However, the cases cited by the Bureau as representing this concern relate to unique challenges facing servicemembers in their dealings with financial institutions. In *CFPB v. Freedom Stores*, the form contract included a venue-selection clause that required active duty military members who had signed contracts and resided

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<sup>89</sup> See Policy Statement at 14 n.62 (citing Complaint, *CFPB v. PayPal Inc.*, et. al., No. 1:15-cv-01426-RDB (D.C. Md) (May 15, 2015), alleging PayPal customers “often could not reach a customer service representative.”) In fact, the CFPB alleged not only that customers often could not reach a representative, but that if they did, “consumers were often given misinformation,” or had their payment allocation requests ignored or countermanded. *Id.*, ¶ 73.

<sup>90</sup> Policy Statement at 15.

<sup>91</sup> See Policy Statement at 16 n.68 (citing Consent Order, In re JPay LLC, File No. 2021-CFPB-0006 (C.F.P.B. Oct. 19, 2021), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_jpay-llc\\_consent-order\\_2021-10.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_jpay-llc_consent-order_2021-10.pdf)).

<sup>92</sup> See *id.*, 16 n.69 (citing CFPB, Supervisory Highlights, Issue 27, at 14-15 (Sept. 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_student-loan-servicing-supervisory-highlights-special-edition\\_report\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf)).

<sup>93</sup> See *id.*

<sup>94</sup> Policy Statement at 16.

“far away from Norfolk, Virginia” to litigate in Norfolk.<sup>95</sup> In *Security National Auto Acceptance Co.*, the form contract authorized the lender to contact the servicemember’s commanding officer regarding loan delinquency.<sup>96</sup>

These cases illustrate the disproportion between the breadth of the Policy Statement and the narrowness of the enforcement cases it uses for support. The provisions at issue in *Freedom Stores* and *Security National* do not undermine the use of form contracts generally. Instead, they resonate with the longstanding common law prohibition on unconscionable contracts.<sup>97</sup> Moreover, the use of the abusive allegations in two CFPB Complaints, in cases that were immediately settled by relatively small entities, hardly predicts how a court would have evaluated the CFPB’s claims. For example, the allegedly abusive venue-selection clause in *Freedom Stores* is striking similar to one upheld as reasonable by the Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).<sup>98</sup>

### REASONABLE RELIANCE

This last prong of the abusive standard requires proving that an entity took unreasonable advantage of the reasonable reliance of that entity to protect the interests of the consumer. In so doing, it provides a useful reminder to financial institutions that they cannot have it both ways: they cannot seek out a consumer’s trust and then take unreasonable advantage of that trust.

The Policy Statement initially engages on this topic in a common-sense way, noting that reliance is reasonable when prompted by the entity’s communica-

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<sup>95</sup> See CFPB v. Freedom Stores, Inc., 2:14-cv-00643, ¶¶ 74-77 (E.D. Va. Dec. 18, 2014), [https://files.consumerfinance.gov/f/201412\\_cfpb\\_complaint\\_freedom-stores\\_va-nc.pdf](https://files.consumerfinance.gov/f/201412_cfpb_complaint_freedom-stores_va-nc.pdf) (cited in the Policy Statement at 16 n.70).

<sup>96</sup> See Complaint, CFPB v. Security National Auto Acceptance Co., No. 1:15-cv-401-WOB, ¶¶ 25-28 (S.D. Ohio June 17, 2015), [https://files.consumerfinance.gov/f/201506\\_cfpb\\_complaint-security-national-automotive-acceptance-company.pdf](https://files.consumerfinance.gov/f/201506_cfpb_complaint-security-national-automotive-acceptance-company.pdf) (cited by the Policy Statement at 16 n.71).

<sup>97</sup> See Eric Mogilnicki & Eamonn Moran, The CFPB’s Enforcement of the Prohibition on Abusive Acts and Practices, Bloomberg BNA’s Banking Rep. (Feb. 3, 2015), [https://www.cov.com/-/media/files/corporate/publications/2015/02/the\\_cfpbs\\_enforcement\\_of\\_the\\_prohibition\\_on\\_abusive\\_acts\\_and\\_practices.pdf](https://www.cov.com/-/media/files/corporate/publications/2015/02/the_cfpbs_enforcement_of_the_prohibition_on_abusive_acts_and_practices.pdf).

<sup>98</sup> In *Freedom Stores*, consumers in North Carolina agreed to venue in Virginia. In *Carnival Cruise Lines*, a Washington State consumer agreed to litigate in Florida an injury suffered in international waters off the Mexican coast. The Supreme Court (Blackmun, J.) upheld the form contract, reasoning that “it would be entirely unreasonable for us to assume that respondents . . . would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.” *Id.* at 593.



tions with a consumer.<sup>99</sup> The Policy Statement then goes further, however, arguing that these communications can be implicit. Here again, the Bureau's citations do not support its point. Instead of citing cases involving implicit promises, the Policy Statement relies upon a federal district court case that cited a host of explicit oral and written representations that were sufficient for a "reasonable reliance" claim to survive a motion to dismiss.<sup>100</sup> The Policy Statement also cites the Bureau's Supervisory Highlights from 2022 for the general proposition that "[c]onsumers reasonably rely upon servicers to act in their interests."<sup>101</sup> However, the appearance of this issue in the Bureau's Supervisory Highlights denotes that the CFPB determined the relevant fact pattern did not warrant an enforcement action.

## CONCLUSION

The abusive standard has proven hard to define – for its drafters, its enforcers, and the legal and compliance professionals who must anticipate its scope. Bureau guidance can be an important tool towards a shared understanding of this relatively new legal standard. However, the guidance offered in the Policy Statement includes unsupported conclusions and excludes much of its own enforcement docket. As noted above, the resulting effort is a bit like the ancients drawing pictures from the stars above. In both cases, the effort simplifies complicated facts by ignoring most of the data. There is a risk in drawing such imaginary lines. Just as early astronomy begat astrology, the Policy Statement may lead to inaccurate predictions about the future of the abusive standard.

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<sup>99</sup> See Policy Statement at 10.

<sup>100</sup> Policy Statement at 17 n.74 (citing *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 920-21 (S.D. Ind. 2015)); see also Complaint, *CFPB v. ITT Educational Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB (S.D. Ind. Feb. 26, 2014), [https://files.consumerfinance.gov/f/201402\\_cfpb\\_complaint\\_ITT.pdf](https://files.consumerfinance.gov/f/201402_cfpb_complaint_ITT.pdf).

<sup>101</sup> Policy Statement at 17-18 n.74 (quoting CFPB, Supervisory Highlights, Issue 27, at 14-15 (Sept. 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_student-loan-servicing-supervisory-highlights-special-edition\\_report\\_2022-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf)).