



CFPB's first formal issuance on abusiveness

Forensic & Integrity Services
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The Consumer Financial Protection Bureau (CFPB or Bureau) issued a new policy statement on April 3, 2023¹ to address abusive conduct in consumer financial markets. The policy statement serves as the CFPB's first formal guidance that outlines a framework for analyzing conduct it considers abusive. The analytical framework will help federal and state enforcers identify and assess conduct that may be in violation of law and will help market participants avoid committing abusive acts or practices.

The Bureau defines an "abusive" act or practice as that which obscures features of a financial product or service or takes unreasonable advantage of a consumer leveraging certain circumstances such as gaps in the consumer's understanding of the terms, unequal bargaining power or the consumer's reliance on an entity to act in their best interest.

The policy statement provides several examples that address the various aspects of abusive acts or practice. For instance, material interference in obscuring features of a financial service or product can be evidenced through:

- ▶ Buried disclosures (fine print)
- ▶ Physical or digital interference (hiding notices or through pop-ups)
- ▶ Overshadowing (placing content so it interferes with understanding other content)

Further, the Bureau's statement indicates that evidence of intent to impede a consumer's ability to understand is not required.

Taking unreasonable advantage of a consumer is based on an unbalance of knowledge, power and reliance between the entity and consumer, according to the CFPB.²

¹ "Policy Statement on Abusive Acts or Practices," *Consumer Financial Protection Bureau website*, [consumerfinance.gov](https://www.consumerfinance.gov).

² *Ibid.*

Unbalance of knowledge

The policy statement does not require the lack of understanding by the consumer to be reasonable to be considered abusive conduct, as measured by the Consumer Financial Protection Act (CFPA). According to the policy statement, the Bureau assesses whether entities are benefiting from the gap of understanding and whether this benefit would have existed regardless of this unbalance of knowledge. To demonstrate the unbalance, consumer complaints and testimony from industry experts showing reasonable³ consumers may not understand is sufficient.

Unequal bargaining power

An example of unequal bargaining power is the consumer's inability to find more favorable providers, terms or other actions to protect their own actions. The relationship between banker and consumer is considered abusive if the provider is the only source of important information (e.g., official transcripts⁴) or the fees are too high, as measured by CFPA, to exit the relationship.

Reasonable reliance

Lastly, consumers' reliance on an entity to act in their best interest and not benefit from or be indifferent to negative results is established if the entity communicates to the person or public that it will act in its best interest.

Key takeaways

With several cases, including a number of enforcement actions in just the last few months, the CFPB has a continued focus on Unfair, Deceptive, or Abusive Acts or Practices and is clearly sending a signal of future enforcement actions.

³ "Policy Statement on Abusive Acts or Practices," *Consumer Financial Protection Bureau website*, [consumerfinance.gov](https://www.consumerfinance.gov).

⁴ "CFPB Lays Out 'Framework' For What It Counts As Abusive," *Law 360 website*, [law360.com](https://www.law360.com).

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