

# New Policy on Prohibition of Abusive Acts or Practices—What do you need to know?

In 2010, the Dodd-Frank Act for the first time made it unlawful for persons to engage in an “abusive act or practice.” The “abusive” standard was added to the existing “UDAP” standard—unfair, deceptive acts and practices, creating a new “UDAAP”—unfair, deceptive, or abusive acts and practices.

Now, nearly a decade after the Dodd-Frank Act became law, uncertainty still remains as to the scope and meaning of “abusiveness.” In the Consumer Financial Protection Bureau’s examination manual, the Bureau says that an abusive act or practice is one that:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- Takes unreasonable advantage of: (i) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (ii) the inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or (iii) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

In the past 10 years, the Bureau has not really developed the concept of “abusive” activity separate and apart from the longstanding FTC “unfair” and “deceptive” existing standards. That failure has created uncertainty. In supervision and enforcement actions, the Bureau has made claims against persons alleging both “abusive and deceptive” acts or both “abusive and unfairness” acts from nearly the same set of facts. That is, although a definition of abusive existed, the Bureau rarely called solely asserted an activity was abusive. Rather, using the same set of facts the Bureau would allege both “abusive and deceptive” acts or both “abusive and unfairness” acts instead of alleging “stand alone” abusiveness violations.

However, on January 24th, the Bureau provided some much-needed clarification on how it intends to apply the abusiveness standard going forward. According to the Bureau, it now plans to cite conduct as abusive “only when the harm outweighs the benefit.” Moreover, the Bureau intends to avoid “dual pleading” of abusiveness and unfairness/deceptive violations that arise from essentially the same facts. Lastly, the Bureau intends to only seek monetary relief for actions cited as “abusive” when there has been a lack of good-faith effort to comply with the law. However, the Bureau does plan to continue seeking restitution for consumers, whether or not the company cited acted in good or bad faith.

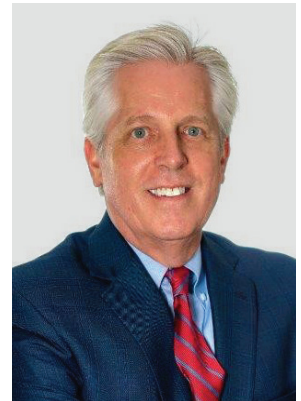
Director Kraninger has publicly stated that she is committed to ensuring that the Bureau has clear rules of the road and to fostering a culture of compliance – a key element in preventing consumer harm. Therefore, the new policy “provides a solid framework to prevent consumer harm while promoting the clarity needed to foster consumer beneficial products as well as compliance in the marketplace, now and in the future.”

Stay tuned. The old days in which an activity was both “abusive and unfair” or both “abusive and deceptive” are gone. The new policy is a precursor for more details in the future on stand-alone abusive activities, and sets a solid foundation in which the Bureau will build its repertoire of “abusive” activity cases.

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