

## Despite New Policy, CFPB Seems Uncertain On Abusive Acts

By **Eric Mogilnicki** (February 4, 2020, 4:09 PM EST)

The Consumer Financial Protection Bureau's recently published policy statement on abusive acts or practices[1] sets forth several significant bureau policies. First, it commits the bureau to conducting a cost-benefit analysis before citing the abusive standard in supervisory and enforcement actions.

Second, it promises the bureau typically will not cite the prohibition on abusive practices on the basis of the same facts that establish a violation of the prohibitions on deceptive or unfair practices. Third, it states that the bureau will avoid imposing civil monetary penalties against persons who made a good faith effort to avoid engaging in abusive practices. Each of these new policies marks additional certainty regarding when and how the abusive standard will be deployed by the bureau.

While the policy statement is informative regarding the bureau's plans for the abusive standard, it leaves some important issues unresolved. For now, the bureau is not adding any commentary, elaboration or examples that would help consumers or financial institutions know in advance what constitutes an abusive practice.

Indeed, the policy statement reflects the bureau's overall enforcement and supervisory philosophy, rather than a bureau interpretation of the statutory language. However, the bureau promises to provide additional clarity in the future, by explaining its reasoning as it applies the abusive standard in additional enforcement and supervisory actions. The policy statement also holds out the possibility of a future rulemaking to define the abusiveness standard.

This article describes the uncertain meaning of the abusive standard, the approach taken by the bureau in the policy statement, and the issues that remain.

### The Uncertain Meaning of "Abusive"

The policy statement begins by observing that: "Uncertainty remains as to the scope and meaning of abusiveness. This uncertainty creates challenges for covered persons in complying with the law." This uncertainty is well established.

Former Sen. Christopher Dodd, D-Conn., remarked on the Senate floor in 2010 that "the word 'abusive' [in the Dodd-Frank Wall Street Reform and Consumer Protection Act] does need to be defined." Former



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Acting CFPB Director Mick Mulvaney in 2018 announced plans for the bureau to issue a regulation defining the abusive standard, arguing that "the people we regulate should have the right to know what the rules are before being charged with breaking them."

As the policy statement notes, at a recent bureau symposium on the abusive standard, "most of the experts agreed that there is uncertainty as to the scope and meaning of abusiveness that the Bureau should seek to resolve."

No one benefits from this uncertainty. Consumers may not be receiving the full benefit of the new legal regime, as a vague standard may fail to deter all prohibited conduct. Financial institutions are not on fair notice of what conduct may violate the law.

Without a clear understanding of what practices are abusive, the bureau itself cannot be certain it is applying the same standard consistently across institutions. And Congress is unable to review -- and revise, if needed -- the bureau's interpretation of the new standard.

### **The Policy Statement**

The policy statement addresses one facet of this uncertainty: it provides guidance on how the bureau will apply the standard in its enforcement and supervisory activities. At the same time, the policy statement stops short of explaining what conduct the bureau will consider to be abusive.

### ***Cost-Benefit Analysis***

The policy statement commits the bureau to focusing its enforcement and supervisory actions against abusive practices when the "harms to consumers from the conduct outweigh its benefits to consumers." This bureau policy is "consistent with the priority it accords to the prevention of harm," its commitment "to using its scarce resources to address conduct that harms consumers," and with ensuring "that the Bureau's supervisory and enforcement decisions are consistent across matters."

The prospect of such a cost-benefit analysis may encourage the development of innovative products and services. On balance, a financial institution that knows that the bureau will balance costs and benefits before pursuing an abusive claim may be more confident in offering a product with substantial consumer benefits even if there is also a risk that a small number of consumers may not fully understand the product. This additional comfort is limited by the fact that cost-benefit tests are not purely mathematical, and that "the Bureau's consideration of the harms and benefits can be qualitative as well as quantitative."

The addition of a cost-benefit analysis to the bureau's analysis of the abusive standard also makes plain that the policy statement is more a declaration of bureau enforcement and supervisory philosophy than an interpretation of the statutory language. The bureau's focus on consistency and on the appropriate allocation of bureau resources are clearly policy rationales rather than interpretations of the relevant statutory text or a reflection of its legislative history.

Indeed, the abusive standard does not include language, found in the statutory prohibition on unfairness, that limits violations to circumstances where "the injury is not outweighed by countervailing benefits to consumers or to competition." The abusive standard instead focuses on the experience of a consumer rather than the value of the product to consumers as a whole.

This focus has been underscored by remarks by one of the framers of the Dodd-Frank Act, former Democratic House Financial Services Committee Chairman Barney Frank, who explained that a financial product may be abusive when sold to certain consumers even if broadly appropriate in the market.

### ***Dual Pleading***

The policy statement notes that many of the enforcement actions alleging abusive practices to date involved dual pleading, whereby the bureau alleges that the same conduct is both abusive and unfair or deceptive. Going forward, "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."

Moreover, when the bureau alleges a stand-alone abusive allegation "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." Similarly, "in future editions of Supervisory Highlights, the Bureau intends to describe the basis for abusiveness citations with greater clarity." Both changes, according to the policy statement, "will result in more transparency."

This policy should prove valuable in disentangling abusive conduct from deceptive and unfair practices. Many of the consent orders alleging abusive conduct do not draw clear distinctions between these different legal standards. The discipline of describing the reason findings of abusive practices in the bureau's enforcement and supervision activities will help ensure that the bureau is thoughtful and consistent in its actions, and the resulting descriptions will improve understanding of the legal standard.

At the same time, the policy's promise to explain its legal analysis — but only in future enforcement and supervisory activities — demonstrates the extent to which the policy statement is a half-measure. While it will be useful for the bureau to describe its legal analysis after it takes action, such post hoc explanations will occur after consumers have suffered harm.

In contrast, a clearer legal standard could help deter improper conduct well before it meets bureau scrutiny or requires bureau action. Rather than advancing a common understanding of the abusive standard, the policy statement anticipates a continuation of the "I know it when I see it" approach of the last 10 years.

### ***Civil Monetary Penalties***

Finally, the policy makes clear that the bureau does not intend to seek civil monetary penalties for abusiveness violations "where the covered person was making a good-faith effort to comply with the abusiveness standard." In determining whether such a good faith effort was made, the bureau "will consider all relevant factors, including but not limited to the considerations outlined in CFPB Bulletin 2013-06 regarding Responsible Business Conduct."

A good faith effort to comply will still not be an affirmative defense against an alleged violation, nor will it prevent the bureau from seeking legal or equitable remedies, such as redress for consumer injury.

This policy, like the cost-benefit analysis described above, appears to reflect the bureau's overall enforcement philosophy rather than the statutory text. To be sure, good faith confusion about the abusive standard may occur more often than with other statutory provisions. However, the policy statement does not draw any distinction that would suggest the bureau would not take the same

approach — withholding penalties in the face of good faith efforts to comply with the law — in other enforcement matters.

Of course, the potential for "a reasonable — albeit mistaken — interpretation of the abusiveness standard" is a symptom of an underlying problem, which is the continuing uncertainty regarding the scope and meaning of that standard. The policy statement does not directly address this underlying problem.

Moreover, the bureau's citation to its responsible business conduct bulletin illustrates the depth of the problem. The bulletin emphasizes the importance of self-identification and self-reporting of violations of law. However, by definition, a person or entity that believes in good faith that they are complying with the law will not identify or report a violation of the abusive standard.

In sum, the policy statement is a half step. While the bureau has explained when and how it will apply the abusive standard, it has not explained what the standard actually means. Instead, it appears that even the bureau is uncertain about what constitutes an abusive practice.

The policy statement implicitly concludes that this uncertainty cannot be resolved at this time, and that the bureau must continue to rely upon a case-by-case, common law approach to defining the abusive standard. For now, 10 years after Congress first outlawed abusive practices, the uncertainty will continue.

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[1] Statement of Policy Regarding Prohibition on Abusive Acts and Practices.