Federal Register
Vol. 88, No. 70
Wednesday, April 12, 2023

Rules and Regulations

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

[Docket No. CFPB–2023–0018]

Statement of Policy Regarding Prohibition on Abusive Acts or Practices

AGENCY: Consumer Financial Protection Bureau.

ACTION: Policy statement; request for comment.

SUMMARY: The Consumer Financial Protection Act of 2010 (CFPA) prohibits any ''covered person'' or ''service provider'' from ''engag[ing] in any unfair, deceptive, or abusive act or practice'' and defines abusive conduct. An abusive act or practice: 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 a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service, the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service, or the reasonable reliance by the consumer on a covered person to act in the interests of the consumer. Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. This policy statement summarizes those actions and explains how the Consumer Financial Protection Bureau (CFPB) analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and supervisory agencies and to the market for how to identify violative acts or practices. While not required under the Administrative Procedure Act, the CFPB is opting to collect comments on the policy statement and may make revisions as appropriate after reviewing feedback received.

DATES: This policy statement is applicable as of April 12, 2023. Comments must be received by July 3, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2023–0018, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: 2023-AbusivenessPolicyStatement@cfpb.gov.* Include Docket No. CFPB–2023–0018 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—Statement of Policy Regarding Prohibition on Abusive Acts or Practices, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at the CFPB is subject to delay, commenters are encouraged to submit comments electronically.

Instructions: The CFPB encourages the early submission of comments. All submissions must include the document title and docket number. In general, all comments received will be posted without change to *https://www.regulations.gov.* All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Bradley Lipton, Senior Counsel, Legal Division, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In 2010, Congress passed the Consumer Financial Protection Act of 2010 (CFPA) and banned abusive conduct.[1] The CFPA's prohibition on abusive conduct was the most recent instance of congressional tailoring of the Federal prohibitions intended to ensure fair dealing and protect consumers and market participants in the United States.[2]

Since the beginning of the 20th century, Congress has amended these prohibitions in response to evolving norms, economic events, and judicial interpretations, guiding those tasked with enforcing the law. Beginning with the creation of the Federal Trade Commission, and the development of the ''unfair methods of competition'' [3] and ''unfair or deceptive acts or practices'' [4] prohibitions, Congress has

[1] CFPA section 1036(a)(1)(B), 12 U.S.C. 5536(a)(1)(B). In CFPA section 1031, Congress prohibited covered persons and services providers from committing or engaging in unfair, deceptive, or abusive acts or practices in connection with the offering or provision of consumer financial products or services. CFPA section 1031(d) sets forth the general standard for determining whether an act or practice is abusive. *See* 12 U.S.C. 5531(d).

[2] *See, e.g., FTC* v. *Standard Educ. Soc'y,* 86 F.2d 692, 696 (2d Cir. 1936), *rev'd in part on other grounds,* 302 U.S. 112, 116 (1937) (describing the congressional prohibitions intended to regulate methods of fair dealing in the marketplace). 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), 15 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.'' 15 U.S.C. 6102(a)(1).

[3] In 1914, Congress passed the FTC Act, which declared as unlawful ''unfair methods of competition'' but did not define the term ''unfair.'' Act of Sept. 26, 1914, ch. 311, sec. 5(a), 38 Stat. 717, 719 (codified at 15 U.S.C. 45(a)). Congress intended that this prohibition would capture conduct that caused competitive harm yet remain flexible enough to allow the law to develop and avoid circumvention. As the Supreme Court explained in 1934, ''[n]either the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories,'' and Congress, in defining the powers of the FTC, ''advisedly adopted a phrase which . . . does not admit of precise definition, but the meaning and application of which must be arrived at by . . . the gradual process of judicial inclusion and exclusion.'' *FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304, 310, 312 (1934) (internal quotation marks omitted).

[4] In 1938, in the Wheeler-Lea Act, Congress amended the FTC Act to declare as unlawful ''unfair or deceptive acts or practices.'' Wheeler-Lea Act, ch. 49, sec. 3, 52 Stat. 111, 111–14 (1938); 15 U.S.C. 45(a). As it had done previously with ''unfair methods of competition,'' Congress did not define this term, instead intending for it to be developed over time. *See Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 978 (D.C. Cir. 1985) (*AFSA*) (''[N]either Congress nor the FTC has seen fit to delineate the specific 'kinds' of practices which will be deemed

Continued

passed laws to regulate fair dealing, and the agencies tasked with administering those laws have issued policy statements to offer guidance on the agencies' approach to enforcing those prohibitions.[5]

For centuries, lenders and investors generally had an incentive to ensure that a borrower had the ability to repay a debt. But innovations in capital markets and fixed income instruments altered this alignment of incentives.[6] The advent of complex securitization led to lenders no longer bearing risk when a borrower defaulted because they had sold the underlying asset, and passed on the exposure to investors. Fair dealing laws in the U.S. have long sought to address the risks and harms from market failures.

The 2007–2008 financial crisis tested U.S. consumer protection laws, government watchdogs, and the ability of the existing authorities to address the predatory lending that was a root cause of the collapse.[7] The financial crisis was set in motion by a set of avoidable interlocking forces—but at its core were mortgage lenders profiting (by immediately selling on the secondary market) on loans that set people up to fail because they could not repay.[8] Millions of Americans saw their home values drop and their jobs eliminated as a result of forces largely out of their control.

In response, 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.[9] In the CFPA, Congress granted authority over unfair or deceptive acts or practices to the States, the Federal banking agencies, and the newly created Consumer Financial Protection Bureau (CFPB). Congress also added a prohibition on abusive acts or practices.[10]

Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. The CFPB is issuing this Policy Statement to summarize those actions and explain how the CFPB analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and to the market for how to identify violative acts or practices.[11]

II. Analysis

Under the CFPA, there are two abusiveness prohibitions.[12] An abusive 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 lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

• The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

• The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[13]

The statutory text of these two prohibitions can be summarized at a high level as: (1) obscuring important features of a product or service, or (2) leveraging certain circumstances to take an unreasonable advantage. The circumstances that Congress set forth, stated generally, concern *gaps in understanding, unequal bargaining power, and consumer reliance*.[14]

Unlike with unfairness but similar to deception, abusiveness requires no showing of substantial injury to establish liability, but is rather focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market. An act or practice need fall into only one of the categories above in order to be abusive, but an act or practice could fall into more than one category.[15]

---

unfair . . . . Instead the FTC has adhered to its established convention, envisioned by Congress, of developing and refining its unfair practice criteria on a progressive, incremental basis.'').

[5] *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 the Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in Int'l Harvester Co.,* 104 F.T.C. 949, 1070–76 (1984), *https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness* (Policy Statement on Unfairness); Letter from the FTC to Hon. John D. Dingell, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), *reprinted in Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174–84 (1984), *https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception* (Policy Statement on Deception).

[6] *See* Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report,* at 191–192 (2011), *https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf* (describing how synthetic collateralized debt obligations, which gained popularity in the mid-2000s, involved ''two types of investors with opposing interests: those who would benefit if the assets performed, and those who would benefit if the mortgage borrowers stopped making payments and the assets failed to perform'').

[7] *See id.* at xvii, xxiii–xxiv.

[8] *See id.* at 104–111, 113–18; *see also* S. Rep. No. 111–176, at 11 (2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1* (''Th[e] financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms, followed by a broad fall in housing prices as those mortgages went into default and led to increasing foreclosures.'').

[9] For example, in 2007, Federal Deposit Insurance Corporation (FDIC) Chairwoman Sheila Bair explained in congressional testimony that unfairness ''can be a restrictive legal standard'' and proposed that Congress consider ''adding the term 'abusive,' '' which she noted existed in the Home Ownership and Equity Protection Act, and which ''is a more flexible standard to address some of the practices that make us all uncomfortable.'' Sheila C. Bair, *Improving Federal Consumer Protection in Financial Services,* House Committee on Financial Services (June 13, 2007), *https://www.govinfo.gov/content/pkg/CHRG-110hhrg37556/html/CHRG-110hhrg37556.htm.*

[10] *See, e.g.,* S. Rep. No. 111–176, at 172 (Apr. 30, 2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1* (''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.''); Public Law 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, *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1* (''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. 111–367, 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), *https://www.congress.gov/congressional-report/111th-congress/house-report/517* (Conf. Rep.) (''The Act also prohibits financial incentives . . . that may encourage mortgage originators . . . to steer consumers to higher-cost and more abusive mortgages.'').

[11] This Policy Statement is the CFPB's first formal issuance that summarizes precedent on abusive acts or practices and provides an analytical framework for identifying abusive acts or practices. The CFPB previously issued a Policy Statement on Abusive Acts or Practices in 2020, *see* 85 FR 6733 (Feb. 6, 2020) (2020 Policy Statement), *rescinded in* 86 FR 14808 (Mar. 19, 2021), *https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-policy-statement-consolidated_2021-03.pdf.* The 2020 Policy Statement communicated how the CFPB intended to exercise prosecutorial discretion regarding some issues related to abusiveness. However, the 2020 Policy Statement did not summarize existing precedent on abusive acts or practices or provide an analytical framework for identifying abusive acts or practices.

[12] The second of the two prohibitions has three independent disjunctive grounds for finding abusiveness.

[13] CFPA section 1031(d), 12 U.S.C. 5531(d).

[14] This Policy Statement uses the phrases ''gaps in understanding,'' ''unequal bargaining power,'' and ''consumer reliance'' as shorthand descriptors of the inquiries required under the three subparagraphs of CFPA section 1031(d)(2). The CFPB does not intend its use of these shorthand phrases to limit in any way the scope of section 1031(d)(2)'s text.

[15] The conduct that underlies an abusiveness determination may also be found to be unfair or deceptive, depending on the circumstances.

A. Materially Interfering With Consumers' Understanding of Terms and Conditions

The first abusiveness prohibition concerns situations where an entity [16] ''materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.'' [17] Material interference can be shown when an act or omission is intended to impede consumers' ability to understand terms or conditions, has the natural consequence of impeding consumers' ability to understand, or actually impedes understanding.

Acts or Omissions

Material interference may include actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide information relevant to the ability of a consumer to understand terms and conditions. Interference can take numerous forms, such as buried disclosures, physical or digital interference, overshadowing, and various other means of manipulating consumers' understanding.

Buried disclosures include disclosures that limit people's comprehension of a term or condition, including but not limited to, through the use of fine print, complex language, jargon, or the timing of the disclosure.[18] Entities can also interfere with understanding by omitting material terms or conditions.[19]

Physical interference can include any physical conduct that impedes a person's ability to see, hear, or understand the terms and conditions, including but not limited to physically hiding or withholding notices.[20]

Digital interference can include impediments to a person's ability to see, hear, or understand the terms and conditions when they are presented to someone in electronic or virtual format. This form of interference includes but is not limited to user interface and user experience manipulations such as the use of pop-up or drop-down boxes, multiple click-throughs, or other actions or ''dark patterns'' [21] that have the effect of making the terms and conditions materially less accessible or salient.

Overshadowing includes the prominent placement of certain content that interferes with the comprehension of other content, including terms and conditions.[22]

Material Interference

There are a number of methods to prove material interference with a consumers' ability to understand terms or conditions, including but not limited to those described below. First, while intent is not a required element to show material interference, it is reasonable to infer that an act or omission materially interferes with consumers' ability to understand a term or condition when the entity intends it to interfere.[23] Second, material interference can be established with evidence that the natural consequence of the act or omission would be to impede consumers' ability to understand. And third, material interference can also be shown with evidence that the act or omission did in fact impede consumers' actual understanding. While evidence of intent would provide a basis for inferring material interference under the first method, it is not a required element to show material interference.

Certain terms of a transaction are so consequential that when they are not conveyed to people prominently or clearly, it may be reasonable to presume that the entity engaged in acts or omissions that materially interfere with consumers' ability to understand. That information includes, but is not limited to, pricing or costs, limitations on the person's ability to use or benefit from the product or service, and contractually specified consequences of default.

Additionally, an entity's provision of a product or service may interfere with consumers' ability to understand if the product or service is so complicated that material information about it cannot be sufficiently explained or if the entity's business model functions in a manner that is inconsistent with its product's or service's apparent terms.

B. Taking Unreasonable Advantage

The second form of ''abusiveness'' under the CFPA prohibits entities from taking unreasonable advantage of certain circumstances.[24] Congress determined that it is an abusive act or practice when an entity takes unreasonable advantage of three particular circumstances.[25] The circumstances are:

(1) A ''lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service.'' [26] This circumstance concerns *gaps in understanding* affecting consumer decision-making.

(2) The ''inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.'' [27] This circumstance concerns *unequal bargaining power* where, for example, consumers lack the practical ability to switch providers, seek more favorable terms, or make other decisions to protect their interests.

(3) The ''reasonable reliance by the consumer on a covered person to act in the interests of the consumer.'' [28] This circumstance concerns *consumer reliance* on an entity, including when consumers reasonably rely on an entity to make a decision for them or advise them on how to make a decision.

Under the CFPA, it is illegal for an entity to take unreasonable advantage of one of these three circumstances, even if the condition was not created by the entity.[29]

---

[16] This Policy Statement refers to covered persons, service providers, and persons that provide substantial assistance to abusive conduct by a covered person or service provider as ''entity'' or ''entities.''

[17] CFPA section 1031(d)(1), 12 U.S.C. 5531(d)(1).

[18] *See, e.g., TD Bank, N.A.,* File No. 2020–BCFP–0007, at 16–20 (Aug. 20, 2020) (bank materially interfered with consumers' ability to understand terms and conditions of overdraft-protection service by withholding any written notice regarding those terms and conditions until after eliciting an oral-enrollment decision that followed a misleading or incomplete oral presentation regarding the service).

[19] *See, e.g., TMX Finance LLC,* File No. 2016–CFPB–0022, at 6 (Sept. 26, 2016) (lender's sales pitch and Payback Guide materially interfered with consumers' ability to understand that the consumer received a 30-day transaction, that the Payback Guide was not an actual repayment plan, that the terms of the 30-day transaction were not affected by the Payback Guide, and that renewing the transaction over an extended period would substantially affect the overall cost of the transaction, as well as several other aspects of the process, by omitting those terms and conditions).

[20] *See, e.g.,* Complaint at 6, 18–19, *CFPB* v. *All American Check Cashing, Inc.,* No. 3:16–cv–00356 (S.D. Miss. May 11, 2016) (check cashing company materially interfered with consumers' ability to understand a term or condition by requiring employees to block consumers' view of check cashing fees by counting money over the receipt or to quickly remove the receipt).

[21] *See* FTC Staff Report, *Bringing Dark Patterns to Light* (Sept. 2022), *https://www.ftc.gov/reports/bringing-dark-patterns-light.*

[22] *See, e.g.,* First Amended Complaint at 12–13, 26–27, *CFPB* v. *TCF National Bank,* No. 17–cv–00166 (D. Minn. Mar. 1, 2017) (bank chose to use ''an account opening process that interfered with customers' ability to consider the contents of the Notice when they made their Opt-In decision'' by presenting consumers with the choice to select overdraft service during a time when they were not looking at the explanatory notice relating to their opt-in rights); *see also CFPB* v. *TCF Nat'l Bank,* No. 17–cv–00166, 2017 WL 6211033, at *2–3 (D. Minn. Sept. 8, 2017) (denying bank's motion to dismiss abusiveness claim).

[23] *Cf.* Policy Statement on Deception at 5, Federal Trade Commission (''When evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.'').

[24] CFPA section 1031(d)(2), 12 U.S.C. 5531(d)(2).

[25] *See supra* note 14.

[26] CFPA section 1031(d)(2)(A), 12 U.S.C. 5531(d)(2)(A).

[27] CFPA section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B).

[28] CFPA section 1031(d)(2)(C), 12 U.S.C. 5531(d)(2)(C).

[29] *See* CFPA section 1031(d)(2), 12 U.S.C. 5531(d)(2).

The ordinary meaning of the phrase ''take advantage of'' is generally ''to make use of for one's own benefit.'' [30] An advantage can include a variety of monetary and non-monetary benefits to the entity or its affiliates or partners, including but not limited to increased market share, revenue, cost savings, profits,[31] reputational benefits, and other operational benefits to the entity.

The CFPA prohibits taking ''unreasonable'' advantage of the specified statutory circumstances. The term ''reasonable'' means ''[f]air, proper, or moderate under the circumstances,'' [32] and conversely, ''unreasonable'' means ''exceeding the bounds of reason or moderation.'' [33]

In crafting the abusiveness prohibition, Congress identified categories of practices that distort the market and ultimately harm consumers. Therefore, unlike unfairness, 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.[34]

Evaluating unreasonable advantage involves an evaluation of the facts and circumstances that may affect the nature of the advantage and the question of whether the advantage-taking was unreasonable under the circumstances.[35] Such an evaluation does not require an inquiry into whether advantage-taking is typical or not.[36] And even a relatively small advantage may be abusive if it is unreasonable. There are also a number of analytical methods, including but not limited to those described below, that can be used to evaluate unreasonable advantage-taking.

First, when Congress formulated the CFPA, one of its main concerns was financial products and services that may be ''set up to fail.'' Before the 2007–2008 financial crisis, mortgage lenders were willing to make loans on terms that people could not afford in part due to the ability to off-load default risk into the secondary market. This led to significant harm to the household sector, which was ultimately transmitted to the broader financial system.

The CFPA's legislative history explains that, had the CFPB existed, ''the CFPB would have been able to see and take action against the proliferation of poorly underwritten mortgages with abusive terms.'' [37] Partly in response to the financial crisis, Congress prohibited certain abusive business models and other acts or practices that—contrary to many consumer finance relationships where the company benefits from consumer success—misalign incentives and generate benefit for a company when people are harmed.[38] In many circumstances, it is unreasonable for an entity to benefit from, or be indifferent to, negative consumer outcomes resulting from one of the circumstances identified by Congress.

Second, the CFPA's legislative history emphasized that, as a result of CFPB oversight, ''a consumer can shop and compare products based on quality, price, and convenience without having to worry about getting trapped by fine print into an abusive deal.'' [39] Unreasonable advantage-taking includes using the statutory circumstances to acquire particular leverage over people or deprive consumers of legal rights.[40] Relatedly, advantage-taking may be unreasonable when an entity caused one of the circumstances described in CFPA section 1031(d)(2).[41]

One may also assess whether entities are obtaining an unreasonable advantage by considering whether they are reaping more benefits as a consequence of the statutorily identified circumstances, or whether the benefit to the entity would have existed if the circumstance did not exist.[42] In other words, entities should not get a windfall due to a gap in understanding, unequal bargaining power, or consumer reliance. Having said that, section 1031(d)(2) does not require an investigative accounting of costs and benefits or other form of quantification to make a finding. Instead, one may rely on qualitative assessment to determine whether an entity takes an unreasonable advantage.

a. Lack of Understanding

The first circumstance, of which entities cannot take ''unreasonable advantage,'' as defined in the CFPA, concerns ''a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service.'' [43] When there are *gaps in understanding* regarding the material risks, costs, or conditions of the entity's product or service, entities may not take unreasonable advantage of that gap. Such gaps could include those between an entity and a consumer. Certain types of gaps in understanding can create

[30] *E.g., CFPB* v. *ITT Educ. Servs., Inc.,* 219 F. Supp. 3d 878, 918 (S.D. Ind. 2015) (quoting this as one of the definitions from *Webster's Third New Int'l Dictionary* 2331 (3d ed.1993)).

[31] Advantage-taking may occur when an entity pursues the prospect of monetary gain, even if ultimately it does not accrue a profit. In ordinary usage, one can take advantage of one of the specified statutory circumstances, even if that benefit is not successfully realized. The CFPA's legislative history provides an example of this situation, when discussing abuses in the subprime mortgage industry. The legislative history notes that some ''abusive practices may well be profitable in the short term, but are ticking time bombs waiting to explode'' upon banks. S. Rep. No. 111–176, at 17 (2010) (internal quotation marks omitted). Thus, abusive acts or practices may not ultimately be profitable for the covered party. If an abusive act or practice takes advantage of one of the specified statutory circumstances but fails to turn a profit, for example due to incompetence in carrying out the scheme, it would be in line with congressional intent and the ordinary usage of the phrase ''takes unreasonable advantage of'' to consider the act or practice to be eligible for an abusiveness finding on that basis.

[32] *Reasonable, Black's Law Dictionary* (11th ed. 2019).

[33] *Unreasonable, Webster's Third New Int'l Dictionary* 2507 (3d ed. 1993).

[34] *See* CFPA section 1031(c)(1)(A), 12 U.S.C. 5531(c)(1)(A). The amount of harm is relevant, however, to crafting remedies. Also, harm in some cases may bolster a determination that an entity is taking unreasonable advantage of consumers within the meaning of CFPA section 1031(d)(2).

[35] *Cf., e.g., Swift & Co.* v. *Wallace,* 105 F.2d 848, 854–55 (7th Cir. 1939) (''[U]nreasonable' is not a word of fixed content and whether preferences or advantages are unreasonable must be determined by an evaluation of all cognizable factors which determine the scope and nature of the preference or advantage.'').

[36] While evidence of large or atypical advantage-taking is not required under the reasonableness inquiry, it may nonetheless be relevant.

[37] S. Rep. No. 111–176, at 229 (2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1.*

[38] *See, e.g.,* Complaint at 26–29, *CFPB* v. *Aequitas Capital Management, Inc.,* No. 3:17–cv–01278 (D. Or. Aug. 17, 2017) (action against lender to students at for-profit schools that reaped revenue despite the high default rate of the loans that the students were induced to take out).

[39] S. Rep. No. 111–176, at 229 (2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1.*

[40] *E.g.,* First Amended Complaint at 40–41, *CFPB* v. *Think Finance, LLC,* No. 4:17–cv–00127 (D. Mont. Mar. 28, 2018) (It was abusive for a company to attempt to collect loans that, unbeknownst to the consumers, could not lawfully be collected because they were void.).

[41] *See, e.g.,* Complaint at 9–10, *CFPB* v. *SettleIT, Inc.,* No. 8:21–cv–00674 (C.D. Cal. Apr. 13, 2021) (A debt-settlement company took unreasonable advantage of consumers' reasonable reliance when it ''told consumers that it would work in their interests only,'' thus inducing consumers to rely on the company, but actually prioritized the settlement of debts owed to lenders with which it was affiliated.).

[42] *See, e.g.,* CFPB, *Supervisory Highlights: Issue 28, Fall 2022,* at 22 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (mortgage servicers took unreasonable advantage of consumers' lack of understanding when they profited from insufficiently disclosed phone-payment fees that were materially greater than the cost of other payment options). In *JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021), the CFPB found an abusive practice where a firm leveraged an exclusive contract to charge fees on prepaid cards used to provide money to individuals being released from prison or jail. The prepaid cards replaced the feeless option of receiving such money as cash or by check that previously had been offered by prisons and jails. Under these circumstances, the entire fee accruing to JPay was considered an ''unreasonable advantage.''

[43] CFPA section 1031(d)(2)(A), 12 U.S.C. 5531(d)(2)(A).

circumstances where transactions are exploitative.

Gaps in understanding as to ''risks'' encompass a wide range of potential consumer harms. ''Risks'' include but are not limited to the consequences or likelihood of default [44] and the loss of future benefits.[45] Gaps in understanding related to ''costs'' include any monetary charge to a person as well as non-monetary costs such as lost time, loss of use, or reputational harm.[46] And gaps in understanding with respect to ''conditions'' include any circumstance, context, or attribute of a product or service, whether express or implicit.[47] For example, ''conditions'' could include the length of time it would take a person to realize the benefits of a financial product or service,[48] the relationship between the entity and the consumer's creditors,[49] the fact a debt is not legally enforceable,[50] or the processes that determine when fees will be assessed.[51]

While acts or omissions by an entity can be relevant in determining whether people lack understanding,[52] the prohibition in section 1031(d)(2)(A) does not require that the entity caused the person's lack of understanding through untruthful statements or other actions or omissions.[53] Under the text of section 1031(d)(2)(A), the consumer's lack of understanding, regardless of how it arose, is sufficient. If people lack understanding, entities may not take unreasonable advantage of that lack of understanding. The lack of understanding can be caused by third parties and can exist even when there is no contractual relationship between the person and the entity that takes unreasonable advantage of the person's lack of understanding.[54]

The statutory text of the prohibition does not require that the consumer's lack of understanding was reasonable to demonstrate abusive conduct.[55] Similarly, the prohibition does not require proof that some threshold number of people lacked understanding to establish that an act or practice was abusive.

A person may lack understanding of risks, costs, or conditions, even if they have an awareness that it is in the realm of possibility that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product or service.[56] But consumers generally do not expect companies to benefit from or be indifferent to certain negative consequences, including but not limited to default. Moreover, consumers may not understand that a risk is very likely to happen or that—though relatively rare—the impact of a

[44] *See, e.g.,* Complaint at 13–14, 18, *CFPB* v. *Pension Funding LLC,* No. 8:15–cv–01329 (C.D. Cal. Aug. 20, 2015) (explaining that because pension advance companies ''obscured the true nature of the transactions, failed to disclose and misrepresented the costs of the loans, and gave consumers misleading advice, consumers could not clearly understand the risks or costs of the loans or effectively compare the loans to potential less costly alternatives,'' and describing how companies aggressively pursued consumers who defaulted).

[45] *See, e.g.,* Amended Complaint at 6, *CFPB* v. *Access Funding,* No. 1–16–cv–03759–JFM (D. Md. Dec. 13, 2017) (''Consumers received a steeply discounted lump sum in return for signing away their future payment streams. The lump sums Access Funding provided consumers typically represented only about 30% of the present value of those future payments.'').

[46] *See, e.g., Fort Knox Nat'l Co.,* File No. 2015–CFPB–0008, at 8 (Apr. 20, 2015) (entities took unreasonable advantage of consumers' lack of understanding by charging fees that they ''did not adequately disclose''); CFPB, *Supervisory Highlights: Issue 28, Fall 2022,* at 22 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (mortgage servicers took unreasonable advantage of consumers' lack of understanding when they profited from insufficiently disclosed phone-payment fees that were materially greater than the cost of other payment options); First Amended Complaint at 14, *CFPB* v. *Freedom Debt Relief, LLC,* No. 3:17–cv–06484 (N.D. Cal. June 1, 2018) (''Freedom did not disclose to consumers before they enrolled in its program that they might be required to negotiate with creditors on their own, including by deceiving their creditors, in order to settle their debts.'').

[47] *See, e.g.,* First Amended Complaint at 40–41, *CFPB* v. *Think Finance, LLC,* No. 4:17–cv–00127–BMM (D. Mont. Mar. 28, 2018) (consumers' ''legal obligation to repay is a material term, cost, or condition of a loan,'' and online lenders ''took unreasonable advantage of consumers' lack of understanding regarding the voidness of [their] loans'' under State usury or licensing laws to charge higher, illegal interest rates); *Zero Parallel, LLC,* File No. 2017–CFPB–0017, at 6 (Sept. 6, 2017) (''Zero Parallel's sale of Leads resulting in, or likely to result in, loans that are void in whole or in part under the laws of the consumer's state of residence based on state-licensing requirements or interest-rate limits takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, and conditions of the loans.''); *see also CFPB* v. *Think Finance, LLC,* No. CV–17–127–GF–BMM, 2018 WL 3707911, at *8 (D. Mont. Aug. 3, 2018) (denying *Think Finance* defendants' motion to dismiss abusiveness claim).

[48] *See, e.g., CFPB* v. *American Debt Settlement Solutions,* No. 9:13–cv–80548–DMM, at 8 (S.D. Fla. June 6, 2013) (Stipulated Final Judgment and Order) (''ADSS's acts or practices are abusive . . . because . . . ADSS has knowingly enrolled in its debt-relief programs consumers whose financial conditions make it highly unlikely that they can complete the programs, and ADSS has nonetheless collected fees from consumers who had inadequate income to complete their debt settlement programs.''); Complaint at 15, *CFPB* v. *American Debt Settlement Solutions,* No. 9:13–cv–80548–DMM (S.D. Fla., May 30, 2013) (''This practice takes unreasonable advantage of consumers' lack of understanding of how long it will take ADSS to settle their debts and therefore how much money they will spend before realizing any benefits from enrolling in ADSS's debt-relief program.'').

[49] *See, e.g.,* Amended Complaint at 14, *CFPB* v. *Access Funding,* No. 1–16–cv–03759–JFM (D. Md. Dec. 13, 2017) (''Consumers did not understand that Smith was not providing independent professional advice or that he did not take their individual circumstances or interests into account. They also did not understand that their interests would likely be better served by a truly independent advisor.'').

[50] *See* First Amended Complaint at 40–41, *CFPB* v. *Think Finance, LLC,* No. 4:17–cv–00127 (D. Mont. Mar. 28, 2018) (It was abusive for a company to attempt to collect loans that, unbeknownst to the consumers, could not lawfully be collected because they were void.); *Colfax Capital Corp.,* File No. 2014–CFPB–0009, at 11–12 (July 29, 2014) (it was abusive for company to service and collect on consumer financing agreements that State laws rendered void or limited the consumer's obligation to repay).

[51] *See, e.g., Regions Bank,* File No. 2022–CFPB–0008, at 15 (Sept. 28, 2022) (''Due to [the bank's] counter-intuitive, complex transaction processing, many consumers did not understand [the bank's] overdraft practices or expect Authorized-Positive Overdraft Fees. [The bank] took unreasonable advantage of this lack of understanding by assessing at least $141 million in Authorized-Positive Overdraft fees during the Relevant Period.'').

[52] *See, e.g.,* Amended Complaint at 15–16, *Bureau of Consumer Fin. Prot.* v. *Certified Forensic Loan Auditors, LLC,* No. 2:19–cv–07722 (C.D. Cal. Nov. 13, 2019) (entities took unreasonable advantage of consumers' lack of understanding regarding the residential-mortgage industry and foreclosure-defense law by making misrepresentations and concealing material facts regarding the mortgage-relief services they offered); *see also Bureau of Consumer Fin. Prot.* v. *Certified Forensic Loan Auditors, LLC,* No. 2:19–cv–07722–ODW, 2020 WL 2556417, at *4 (C.D. Cal. May 20, 2020) (denying *Certified Forensic Loan Auditors* defendants' motion to dismiss abusiveness claim).

[53] *See, e.g., Zero Parallel, LLC,* File No. 2017–CFPB–0017, at 6 (Sept. 6, 2017) (it was abusive to sell leads resulting or likely to result in loans that were void in whole or in part under the laws of the consumer's State of residence).

[54] *See, e.g.,* Am. Complaint at 2, *CFPB* v. *D & D Marketing Inc.,* No. 2:15–cv–09692 (C.D. Cal. June 30, 2016) (lead aggregator ''failed to vet or monitor its lead generators and lead purchasers, exposing consumers to the risk of having their information purchased by actors who would use it for illegal purposes,'' ''allowed its lead generators to attract consumers with misleading statements,'' and ''took unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of the loan products for which they apply'').

[55] Although establishing that a reasonable consumer would lack understanding of the material risks, costs, or conditions of a product or service is not a prerequisite to establishing liability under CFPA section 1031(d)(2)(A), government enforcers or supervisory agencies may rely on the fact that a reasonable consumer would lack such understanding to establish that consumers did not understand.

[56] 82 FR 54472, 54740 (Nov. 17, 2017) (''2017 Payday Rule''), *ratified by* 85 FR 41905 (July 13, 2020), *upheld in Cmty. Fin. Servs. Ass'n of Am., Ltd.* v. *CFPB,* 558 F. Supp. 3d 350, 362 (W.D. Tex. 2021), *aff'd in relevant part,* 51 F.4th 616 (5th Cir. 2022). The CFPB explained in the preamble to a rule rescinding part of the 2017 Payday Rule that ''[t]he [rescission] rulemaking addresse[d] the legal and evidentiary bases for particular rule provisions identified in this final rule. It d[id] not prevent the Bureau from exercising tool choices, such as appropriate exercise of supervision and enforcement tools, consistent with the Dodd-Frank Act and other applicable laws and regulations. It also d[id] not prevent the Bureau from exercising its judgment in light of factual, legal, and policy factors in particular circumstances as to whether an act or practice meets the standards for abusiveness under section 1031 of the Dodd-Frank Act.'' 85 FR 44382, 44415 n.286 (July 22, 2020).

particular risk would be severe.[57] The inquiry under section 1031(d)(2)(A) is whether some consumers in question have a lack of understanding, not all consumers or even most consumers. Since there can be differences among consumers in the risks, costs, and conditions they face and in their understanding of them, there may be a violation with respect to some consumers even if other consumers do not lack understanding.

Lastly, one can demonstrate a person's lack of understanding in a number of ways. For example, direct evidence of lack of understanding, including but not limited to complaints and consumer testimony, can suffice. Evidence or analysis showing that reasonable consumers were not likely to understand can likewise be used to establish lack of understanding. One can also demonstrate lack of understanding by considering course of conduct and likely consequences. For example, if a transaction would entail material risks or costs and people would likely derive minimal or no benefit from the transaction, it is generally reasonable to infer that people who nonetheless went ahead with the transaction did not understand those material risks or costs.[58]

b. Inability of Consumers To Protect Their Interests

The second circumstance, of which entities cannot take ''unreasonable advantage,'' as defined in the CFPA, concerns ''the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.'' [59] When people are unable to protect their interests in selecting or using a consumer financial product or service, they can lack autonomy. In these situations, there is a risk that entities will take unreasonable advantage of the *unequal bargaining power.*[60] Thus, Congress has outlawed taking unreasonable advantage of circumstances where people lack sufficient bargaining power to protect their interests. Such circumstances may occur at the time of, or prior to, the person selecting the product or service, during their use of the product or service, or both.

The consumer ''interests'' contemplated in section 1031(d)(2)(B) include monetary and non-monetary interests, including but not limited to property, privacy, or reputational interests.[61] People also have interests in limiting the amount of time or effort necessary to obtain consumer financial products or services or remedy problems related to those products or services. This includes, but is not limited to, the time spent trying to obtain customer support assistance.[62]

A consumer's ''inability'' to protect their interests includes situations when it is impractical for them to protect their interests in selecting or using a consumer financial product or service.[63] For example, when the steps a person would need to take to protect their interests are unknown to the person [64] or are especially onerous,[65] they are likely unable to protect their interest. Furthermore, people who do not have monetary means may be unable to protect their interests if the only practical method for doing so requires payment of money.[66] Of course, merely serving people without monetary means is not abusive. However, it may be abusive to take unreasonable advantage of a person's lack of monetary means to protect their interests.[67]

The nature of the customer relationship may also render consumers unable to protect their interests in selecting or using a consumer financial product or service. People are often unable to protect their interests when they do not elect to enter into a relationship with an entity and cannot elect to instead enter into a relationship with a competitor. These consumer relationships, including but not limited to those with credit reporting companies, debt collectors, and third-party loan servicers, are generally structured such that people cannot exercise meaningful choice in the

[57] 82 FR at 54740.

[58] *See* CFPB, *Supervisory Highlights: Issue 19, Summer 2019,* at 3 (Sept. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf* (''By purchasing a product [guaranteed asset protection] they would not benefit from [because of the low loan-to-value ratio of their auto loans], consumers demonstrated that they lacked an understanding of a material aspect of the product.'').

[59] CFPA section 1031(d)(2)(B), 12 U.S.C. 5531(d)(2)(B).

[60] Consumers may also be unable to protect their interests when the inequality in bargaining power flows from circumstances or vulnerabilities that are present for individual or particular groups of consumers.

[61] *See, e.g., Wells Fargo Bank, N.A.,* File No. 2016–CFPB–0015, at 6–7 (Sept. 8, 2016) (noting that respondent's ''acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability to protect their interests . . . in having an account opened only after affirmative agreement[ ] [and] protecting themselves from security and other risks'').

[62] *See, e.g.,* Complaint at 15, *CFPB* v. *PayPal, Inc.,* No. 1:15–cv–01426–PDB (D. Md. May 19, 2015) (consumers unable to protect their interests where ''Defendants purported to allow consumers to control the allocation of payments by requesting that their payments be allocated to specific balances, but consumers seeking to make such requests often could not reach a customer-service representative'').

[63] 82 FR at 54743 (''The Bureau also rejects the interpretation, presented by commenters, that the prong of 'inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service' can be met only when it is literally impossible for consumers to take action to protect their interests. . . . [T]he Bureau believes the clause 'inability of the consumer to protect' is . . . reasonably interpreted to mean that consumers are unable to protect their interests when it is impracticable for them to do so in light of the circumstances.''); *see also ITT Educ. Servs.,* 219 F. Supp. 3d at 919 (holding that the phrase ''inability . . . to protect the interests of the consumer'' does not refer merely to ''the theoretical power [of consumers] to defend their interests''; it also encompasses circumstances where ''a consumer is unable to protect herself not in absolute terms, but *relative to* the excessively stronger position of the defendant'').

[64] *See, e.g., Wells Fargo Bank, N.A.,* File No. 2016–CFPB–0015, at 6–7 (Sept. 8, 2016) (Bank's ''acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability to protect their interests in selecting or using consumer financial products or services, including [their] interests in having an account opened only after affirmative agreement, protecting themselves from security and other risks, and avoiding associated fees.''); *U.S. Bank, N.A.,* File No. 2022–CFPB–0006, at 10 (July 28, 2022) (Bank's ''conduct violated the CFPA prohibition against abusive acts or practices because [the bank] took unreasonable advantage of the consumers' inability to protect their interests in selecting or using a product or service by opening credit cards, lines of credit, and deposit accounts without consumers' knowledge and consent.'').

[65] *See, e.g.,* Complaint at 15–16, *CFPB* v. *Freedom Stores Inc.,* 2:14–cv–00643 (E.D. Va. Dec. 18, 2014) (consumers were unable to bargain for the removal of a venue-selection clause that designated the State or Federal courts of Virginia, and which ''was almost certain to produce default judgments and lead to garnishments against consumers who were unable to appear and assert a defense'').

[66] *See, e.g., Ace Cash Express Inc.,* File No. 2014–CFPB–0008, at 10–11 (July 10, 2014) (payday loan provider ''leveraged an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loan to take out a new . . . loan with accompanying fees''); *see also* Complaint at 14, *CFPB* v. *S/W Tax Loans, Inc.,* No. 1:15–cv–00299–JB–WPL (D.N.M. Apr. 14, 2015) (''By failing to disclose their financial interests in the high-cost loan products to which they were steering their *cash-strapped and vulnerable customers,* Thomas and the Tax Franchise took unreasonable advantage of their tax clients' inability to protect their own interests . . . .'' (emphasis added)); Credit Practices Rule, 49 FR 7740, 7747 (Mar. 1, 1984) (The results of leading studies indicate ''that the precipitating cause of default is usually a circumstance or event beyond the debtor's immediate control. When such events occur, default is generally an involuntary response.''); *AFSA,* 767 F.2d at 976 (upholding the Credit Practices Rule, including the finding that ''default is ordinarily the product of forces beyond a debtor's control'').

[67] *ITT Educ. Servs.,* 219 F. Supp. 3d at 887–89, 919–20 (for-profit college took unreasonable advantage of students' inability to protect their interests by first guiding its students into temporary loans that they could not repay and then, once those became due, coercing them into taking out financially irresponsible longer-term loans); Complaint at 26–29, *CFPB* v. *Aequitas Capital Management, Inc.,* No. 3:17–cv–01278 (D. Or. Aug. 17, 2017) (lender to students at for-profit schools reaped revenue despite the high default rate of the loans that the schools induced students to take out).

selection or use of any particular entity as a provider. In these circumstances, people cannot protect their interests by choosing an alternative provider either upfront (*i.e.,* they have no ability to select the provider to begin with) or during the course of the customer relationship (*i.e.,* they have no competitive recourse if they encounter difficulty with the entity while using the product or service). Obviously, such relationships are not *per se* abusive; however, entities may not take unreasonable advantage of the absence of choice in these types of relationships.[68] In addition, entities may not take unreasonable advantage of the fact that they are the only source for important information or services.[69]

Consumers may also lack power to protect their interests in selecting or using a consumer financial product or service when entities use form contracts, where contractual provisions are not subject to a consumer choice.[70] Similarly, where the person is unable to bargain over a clause because it is non-negotiable, they may be deprived of the ability to protect their interests.[71]

Consumers are often unable to protect their interests in selecting or using a consumer financial product or service where companies have outsized market power. When an entity's market share, the concentration in a market more broadly, or the market structure prevents people from protecting their interests by choosing an entity that offers competitive pricing, entities may not use their market power to their ''unreasonable advantage.'' [72]

In addition, people are often unable to protect their interests in using a product or service if they face high transaction costs to exit the relationship. For example, the time, effort, cost, or risks associated with extricating oneself from a relationship with entities may effectively lock people into the relationship.

c. Reasonable Reliance

The third circumstance, of which entities cannot take ''unreasonable advantage,'' as defined in the CFPA, concerns ''the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.'' [73] This basis for finding abusiveness recognizes that sometimes people are in a position in which they have a reasonable expectation that an entity will act in their interest to make decisions for them, or to advise them on how to make a decision. Where people reasonably expect that a covered entity will make decisions or provide advice in the person's interest, there is potential for betrayal or exploitation of the person's trust. Therefore, Congress prohibited taking unreasonable advantage of reasonable *consumer reliance.* There are a number of ways to establish reasonable reliance, including but not limited to the two described below.

First, reasonable reliance may exist where an entity communicates to a person or the public that it will act in its customers' best interest, or otherwise holds itself out as acting in the person's best interest. Where an entity communicates to people that it will act in their best interest, or otherwise holds itself out as doing so, including through statements, advertising, or any other means, it is generally reasonable for people to rely on the entity's explicit or implicit representations to that effect.[74] People reasonably assume entities are telling the truth. The entity in these situations creates an expectation of trust and the conditions for people to rely on the entity to act in their best interest.

Second, reasonable reliance may also exist where an entity assumes the role of acting on behalf of consumers or helping them to select providers in the market. In certain circumstances entities assume the role of acting on behalf of people as their agents or representatives, and people should be able to rely on those entities to act on their behalf. In other circumstances entities often act as intermediaries to help people navigate marketplaces for consumer financial products or services.[75] In these

[68] *See, e.g., JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021) (prison financial services company took unreasonable advantage of its status as a single-source government contractor for prepaid cards; the company charged fees even if consumers did not want to do business with the company).

[69] *See* CFPB, *Supervisory Highlights: Issue 27, Fall 2022,* at 8–9 (Sept. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf* (''Examiners found that institutions engaged in abusive acts or practices by withholding official transcripts as a blanket policy in conjunction with the extension of credit. These schools did not release official transcripts to consumers that were delinquent or in default on their debts to the school . . . . Th[e] heightened pressure to produce transcripts leaves consumers with little-to-no bargaining power while academic achievement and professional advancements depend on the actions of a single academic institution.''); *Bank of America, N.A.,* File No. 2022–CFPB–0004, at 18 (July 14, 2022) (bank reversed permanent credits for consumers' unemployment insurance prepaid debit cards, and cardholders were ''unable to protect their interests because they could not control how and when [the bank] would investigate and resolve their notices of error'').

[70] *See, e.g.,* Complaint at 15–16, *CFPB* v. *Freedom Stores Inc.,* 2:14–cv–00643 (E.D. Va. Dec. 18, 2014) (consumers were unable to bargain for the removal of a venue-selection clause that designated the State or Federal courts of Virginia, and which ''was almost certain to produce default judgments and lead to garnishments against consumers who were unable to appear and assert a defense'').

[71] *See, e.g.,* Complaint at 4, 7, *CFPB* v. *Sec. Nat'l Auto. Acceptance Co.,* No. 1:15–cv–401 (S.D. Ohio June 17, 2015) (alleging, in support of abusiveness claim under CFPA section 1031(d)(2)(B), that consumers ''had no opportunity to bargain for [the] removal'' of contractual language purporting to authorize lender to contact commanding officers of military servicemembers who defaulted on their loans); Credit Practices Rule, 49 FR 7740, 7745–47 (Mar. 1, 1984). In *AFSA,* the D.C. Circuit upheld the FTC's Credit Practices Rule against challenge to FTC's exercise of its unfairness authority in promulgating the rule. The D.C. Circuit noted: ''The Commission further found . . . that due to certain characteristics of the consumer credit market, it could not reasonably conclude that the mix of remedies included in the contracts reflects consumer preferences. Whereas consumers may bargain over terms such as interest rates, and the amount or number of payments, their ability and incentive to bargain over the boilerplate remedial provisions is substantially limited. Several aspects of the credit transaction combine to prevent consumers from making meaningful efforts to search, compare, and bargain over remedial provisions. As noted, standard form contracts are presented on a take it or leave it basis. . . . Given the substantial similarity of contracts, consumers have little ability or incentive to shop for a better contract.'' 767 F.2d at 976–77 (citations omitted).

[72] *See, e.g., JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021) (prison financial services company took unreasonable advantage of the market structure which allowed it, as a single-source government contractor for prepaid cards, to charge fees even if consumers did not want to do business with the company because consumers were denied a choice on how their money would be given to them upon release from incarceration).

[73] CFPA section 1031(d)(2)(C), 12 U.S.C. 5531(d)(2)(C).

[74] *See, e.g., ITT Educ. Servs.,* 219 F. Supp. 3d at 920–21 (denying motion to dismiss abusiveness claim under CFPA section 1031(d)(2)(C) where students reasonably relied on for-profit college's financial-aid staff to act in their interests in signing them up for loans); *see also* CFPB, *Supervisory Highlights: Issue 27, Summer/Fall 2022,* at 14–15 (Sept. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf* (''A servicer . . . engaged in an abusive act or practice by denying [Teacher Loan Forgiveness (TLF)] applications where consumers used a [nonstandard] format for their employment dates . . . . Consumers reasonably rely on servicers to act in their interests, and this servicer encouraged consumers to consult with their representatives to assist in managing their accounts, including on its websites where it provided information about TLF. Further, it was reasonable for consumers who are applying for TLF to rely on their servicers to act in the consumers' best interests because processing forgiveness applications is a core function for student loan servicers, and they are entirely in control of the evaluation policies and procedures.'').

[75] *See, e.g.,* Complaint at 15–16, *CFPB* v. *College Educ. Servs. LLC,* 8:14–cv–3078–T–36EAJ (M.D. Fla. Dec. 11, 2014) (College Education Services' (CES) ''telemarketers held themselves out as loan counselors and advisors with the expertise to establish custom-tailored programs to address each student-loan debtor's specific needs. CES created the illusion of expertise and individualized advice to induce consumers to reasonably rely on the company to act in their interests in seeking and selecting student loan debt-relief plans. . . . CES took unreasonable advantage of the reasonable reliance of consumers by enrolling and taking fees from consumers whose loans were ineligible for consolidation . . . . CES also took upfront fees to enroll some consumers in income-based repayment

Continued

situations, the entity, acting as an intermediary, can function as a broker or other trusted source that the person uses in selecting, negotiating for, or otherwise facilitating the procurement of consumer financial products or services provided by third parties. Where the entity's role in the marketplace is to perform these kinds of intermediary functions, people should be able to rely on the entity to do so in a manner that is free of manipulation.[76] In both circumstances, entities that engage in certain forms of steering or self-dealing may be taking unreasonable advantage of the consumers' reasonable reliance.[77]

III. Regulatory Matters

This is a general statement of policy under the Administrative Procedure Act (APA).[78] While not required under the APA, the CFPB is collecting comments and may make revisions to the policy statement at a later time as appropriate in light of feedback received. The CFPB may take no further action if no revisions are warranted. The policy statement provides background information about applicable law and articulates considerations relevant to the CFPB's exercise of its authorities. It does not impose any legal requirements, nor does it confer rights of any kind. It also 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.[79] Pursuant to the Congressional Review Act,[80] the CFPB 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).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–07233 Filed 4–11–23; 8:45 am]

BILLING CODE 4810–AM–P

plans or loan forgiveness programs for which they were not eligible. In addition, CES placed some consumers in repayment plans that increased their monthly student-loan payments, leaving those consumers in a more financially precarious position than before.'').

[76] *See, e.g.,* U.S. Department of Treasury, *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation* 68 (June 2009), *https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123* (''[C]onsumers may reasonably but mistakenly rely on advice from conflicted intermediaries.'').

[77] *See, e.g.,* Amended Complaint at 13–15, *CFPB* v. *Access Funding, LLC,* No. 1:16-cv-03759 (D. Md. Dec. 13, 2017) (consumers seeking structured settlement advances were told by the advance company that they needed independent advice and were directed to an attorney who, though he held himself out as providing professional, independent advice, was not independent and failed to disclose ties to the company); *see also, e.g.,* Complaint at 9–10, *CFPB* v. *SettleIT, Inc.,* No. 8:21–cv–00674 (C.D. Cal. Apr. 13, 2021) (consumers seeking debt-settlement services relied on the company to negotiate for debt reductions because the company told consumers that it would work in their interests only, but the company failed to disclose its financial connections to consumers' creditors); Complaint at 15, *CFPB* v. *Am. Debt Settlement Solutions, Inc.,* No. 9:13–cv–80548 (S.D. Fla. May 30, 2013) (consumers reasonably relied on debt-settlement company to act in their interest by settling their debts expeditiously).

[78] *See* 5 U.S.C. 553(b).

[79] 44 U.S.C. 3501 *et seq.*

[80] 5 U.S.C. 801 *et seq.*

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN 3245–AH92

Small Business Lending Company (SBLC) Moratorium Rescission and Removal of the Requirement for a Loan Authorization

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its business loan program regulations to lift the moratorium on licensing new Small Business Lending Companies (SBLCs) and add a new type of lending entity called a Community Advantage SBLC. SBA is also removing the requirement for a Loan Authorization in the 7(a) and 504 Loan Programs.

DATES: This rule is effective May 12, 2023.

FOR FURTHER INFORMATION CONTACT: Dianna Seaborn, Director, Office of Financial Assistance, Office of Capital Access, Small Business Administration, at (202) 205–3645 or *Dianna.Seaborn@sba.gov.* The phone number above may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission's TTY-Based Telecommunications Relay Service teletype service at 711.

SUPPLEMENTARY INFORMATION:

I. Background Information

The mission of SBA is to ''aid, counsel, assist, and protect . . . the interests of small business concerns in order to preserve free competitive enterprise . . . and to maintain and strengthen the overall economy of our nation.'' 15 U.S.C. 631(a). SBA accomplishes this mission, in part, through programs that bridge the financing gap in the private market. One such program is the 7(a) Loan Program authorized by section 7(a) of the Small Business Act (15 U.S.C. 636(a)), which supports our nation's economy by providing SBA-guaranteed loans to small businesses that lack adequate access to capital on reasonable terms and conditions.

Section 7(a)(17) of the Small Business Act states that SBA shall authorize lending institutions and other entities, in addition to banks, to make 7(a) loans. To this end, SBA has authorized Small Business Lending Companies (SBLCs) as defined in 13 CFR 120.10 to participate in the 7(a) Loan Program. SBLCs are non-depository lending institutions authorized by SBA only to make loans pursuant to section 7(a) of the Small Business Act and loans to Intermediaries in SBA's Microloan program. Under current regulations, SBLCs may not be affiliated with another SBA Lender, including 7(a) Lenders or Certified Development Companies (CDCs) that participate in SBA's CDC/504 Loan Program. SBLCs are subject to all regulations pertaining to 7(a) loans and Loan Program Requirements (as defined in 13 CFR 120.10) regarding origination, servicing, and liquidation. Unlike the majority of 7(a) Lenders, which are Federally-regulated depository institutions, SBLCs are regulated, supervised, and examined solely by SBA. As SBA-regulated entities, SBLCs are subject to specific regulations and policies regarding formation, capitalization, and enforcement actions.

On August 17, 1981, SBA published a proposed rule (46 FR 41523) to, among other things, impose a moratorium on licensing new SBLCs. Subsequently, on January 4, 1982, SBA published a final rule (47 FR 9) repealing its authority to approve additional SBLCs as participating lenders. Since then, the number of SBLC Licenses has remained unchanged at 14. To become an SBLC under current regulations, an entity must acquire one of the existing 14 SBLC Licenses from an entity that is willing to sell its SBLC License and exit the 7(a) Loan Program.

On February 18, 2011, SBA created the Community Advantage (CA) Pilot