



3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org

National Association of Federally-Insured Credit Unions

July 3, 2023

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.

**RE: Statement of Policy Regarding Prohibition on Abusive Acts or Practices (Docket
No. CFPB-2023-0018)**

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU) I am writing in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) April 3, 2023 Statement of Policy Regarding Prohibition on Abusive Acts or Practices (2023 Policy Statement) which sets forth guidance on the types of acts or practices that constitute abusive conduct. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 135 million consumers with personal and small business financial service products. NAFCU appreciates the Bureau taking this first step to provide transparency to a prohibition that has been, since enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in 2010, extremely opaque and open ended. Although guidance such as this 2023 Policy Statement is welcome for its ability to narrow the scope of an expansive prohibition, the policy statement fails to provide the level of clarity that covered entities require to comply with any degree of certainty. NAFCU urges the Bureau to establish clear rules of the road by issuing formal guidance or additional policy statements that include specific examples, case studies, or objective criteria for each aspect of the abusiveness prong and ultimately, to more clearly define this provision through an official rulemaking process.

General Comments

The abusiveness prong of unfair, deceptive or abusive acts or practices (UDAAP) has been a particular source of uncertainty since the passage of the Dodd-Frank Act. Because the Dodd-Frank Act was the first federal law to broadly prohibit *abusive* acts or practices, there has been little, if any, basis for how to approach and apply the standards. Of particular concern is the absence of a body of jurisprudence addressing the parameters of abusive conduct and the desired legal response to such enforcement actions. The prevailing uncertainty has created challenges for covered persons in complying with UDAAP and may impede the lawful use of financial products or services that are beneficial to consumers. Additionally, the cost to financial

institutions has been tremendous. According to *NAFCU's 2022 Federal Reserve Meeting Survey*, credit union respondents experienced a 45 percent increase in regulatory burden related to UDAAP over the past five years and 62 percent of respondents expect to experience an increase in UDAAP related burdens over the next five years.¹

When Director Kathy Kraninger was confirmed in 2018, she chose to focus the CFPB's attention on preventative measures to discourage UDAAP among depository and nonbank institutions. In January 2020, then-Director Kraninger announced that the Bureau would clarify the murky "abusiveness" standard in UDAAP with the release of a Policy Statement (2020 Policy Statement).²

The 2020 Policy Statement set forth a three-part set of principles stating that the Bureau would:

1. Focus on citing or challenging conduct as abusive in supervision and enforcement matters only when the harm to consumers outweighs the benefit;
2. Generally avoiding "dual pleading" of abusiveness and unfairness or deceptive violations arising from all or nearly all the same facts; and alleging "stand alone" abusiveness violations that demonstrate clearly the nexus between cited facts and the Bureau's legal analysis; and
3. Seek monetary relief for abusiveness only when there has been a lack of a good-faith effort to comply with the law, except that the Bureau will continue to seek restitution for injured consumers regardless of a good-faith consideration.

In March 2021, under former Acting Director Uejio, the Bureau rescinded this Policy Statement, claiming it was "inconsistent with the Bureau's duty to enforce Congress's standard" and that its rescission will "better serve the CFPB's objective to protect consumers from abusive practices."³

Although the guidance included in the 2023 Policy Statement is helpful in providing a clearer framework for credit unions to understand the type of conduct that might qualify as abusive, the 2023 Policy Statement lacks the nuanced approach to abusiveness found in the 2020 Policy Statement. The 2020 Policy Statement contained a set of three principles that outlined the why and the how of the Bureau's enforcement of the abusiveness prong. This included a cost-benefit analysis of the harm versus benefit of conduct, an analysis which the 2023 Policy Statement explicitly rejects. While the other principles in the 2020 Policy Statement provided financial institutions with assurance that the Bureau would not engage in dual-pleading and only seek monetary relief in instances where there was a lack of good-faith effort to comply with the law, the 2023 Policy Statement places no such limitations on the Bureau's enforcement strategy. The

¹ NAFCU, "2022 Federal Reserve Meeting Survey" (Sept. 2022) *available at*

https://www.nafcu.org/sites/default/files/NAFCU_Report_on_Credit_Unions_2022.pdf.

² CFPB, "Statement of Policy Regarding Prohibition on Abusive Acts or Practices" (Jan. 24, 2020) *available at*

https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-enforcement-policy_statement.pdf.

³ CFPB, "Rescission, Statement of Policy Regarding Prohibition on Abusive Acts or Practices" (Mar. 11, 2021)

available at https://files.consumerfinance.gov/f/documents/cfpb_abusiveness-policy-statement-consolidated_2021-03.pdf.

cost-benefit analysis and limitation on dual-pleading are not inconsistent with the standard set forth by Congress and respectively serve the important purposes of ensuring that financial institutions are able to engage in innovation and that a clear body of precedent is established to further define the abusiveness standard. NAFCU urges the Bureau to reinstate these principles in the 2023 Policy Statement.

The 2023 Policy Statement has a clear focus on providing definitions and examples of the actual conduct that might qualify as abusive, and while this information can be informative, the Bureau has ensured that it reserves the right to engage in enforcement outside of the confines of the conduct enumerated in the 2023 Policy Statement. The Bureau's reluctance to set clear parameters around the scope of abusive acts or practices is troubling and only serves to foster an environment in which providers of consumer financial services are unable to operate with any sense of certainty about the permissibility of their acts or practices and which suffocates innovation.

Expansive Prohibition

The policy statement from the Bureau on the definition of the abusiveness prong under UDAAP provides some guidance on what constitutes an abusive act or practice. However, there are several areas where the policy statement is vague or open to interpretation. The policy statement defines abusive acts or practices, in part, as those that "materially interfere with the ability of a consumer to understand a term or condition of a consumer financial product or service."⁴ While the statement provides examples of actions or omissions that may constitute material interference, such as burying disclosures or using complex language, it does not provide a clear framework for determining what constitutes material interference. The lack of specific criteria or standards leaves room for subjective interpretation, making it difficult for financial institutions to determine if their practices may be considered abusive.

The policy statement also includes circumstances in which an entity may take unreasonable advantage of consumers, such as a lack of understanding, inability to protect their interests, or reasonable reliance on a covered person. While these circumstances are described, the policy statement does not provide clear boundaries or thresholds for determining what constitutes unreasonable advantage. This lack of clarity increases the potential for inconsistent enforcement and legal uncertainty for credit unions. Additionally, the policy statement does not address acts or practices that may be outside of the control of a financial institution. It is possible for external factors or market conditions to impact consumers' understanding or ability to protect their interests. However, the policy statement does not provide guidance on how to distinguish between acts or practices that are within the control of an institution and those that are not. This ambiguity further adds to the uncertainty for credit unions.

⁴ 88 FR 21883.

Moreover, the broad definition of abusive acts or practices outlined in the policy statement has the potential to be applied to a virtually limitless array of acts or practices in the consumer financial services market. The policy statement acknowledges that an act or practice can fall into multiple categories of abusiveness, further expanding the scope of its application. This broad interpretation increases the risk that financial institutions may inadvertently violate the abusiveness prohibition due to the lack of clear boundaries. For all of these reasons, although the Bureau's policy statement on the definition of the abusiveness prong under UDAAP is a step in the right direction as some guidance is better than no guidance, it lacks clarity and leaves room for subjective interpretation. To enhance clarity and provide clearer direction, the Bureau must issue formal guidance or additional policy statements that incorporate specific examples, case studies, and objective criteria for each aspect of the abusiveness prong. Furthermore, it is crucial to engage in an official rulemaking process to more definitively define this provision and establish clear rules of the road.

Lack of Understanding

Perhaps the most concerning section of the 2023 Policy Statement is the one that addresses the consumer's lack of understanding. Holding financial institutions accountable for a consumer's lack of understanding places an unreasonable burden on financial institutions. While it is important for financial institutions to provide clear and transparent information to consumers, expecting them to be responsible for ensuring that every consumer fully comprehends the risks, costs, and conditions of a product or service is impractical. Consumers have varying levels of financial literacy and understanding, and it is not feasible for financial institutions to bridge every knowledge gap. Although credit unions excel in delivering financial literacy training and providing resources, it is important to recognize that these efforts cannot practically address the breadth of such potential issues.

The prohibition on taking unreasonable advantage of a consumer's lack of understanding can have a chilling effect on innovation by financial institutions. If institutions are constantly concerned about potential regulatory repercussions due to a consumer's lack of understanding, they may become hesitant to introduce new products or services that could benefit consumers but involve inherent complexities. In fact, the 2023 Policy Statement appears to prohibit the provision of complex products or services. "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."⁵ This statement could be interpreted to fit virtually any financial product or service. A deposit or share account may be too complex for some consumers to understand, but that does not mean that the Bureau should have the ability to bring a UDAAP enforcement against an institution for offering one. Further, "sufficiently explained" is a completely arbitrary standard. Must the program be sufficiently explained by the standards of the financial institution, the Bureau, a consumer of median financial literacy, or a consumer with the lowest level of financial literacy? Credit unions are

⁵ Id.

leaders in providing financial education, but to hold them to this amorphous standard would hamper innovation and deprive consumers of potentially valuable financial solutions.

Beyond the prohibition on taking unreasonable advantage of a consumer's lack of understanding itself, the policy statement lacks clear guidelines on how to determine and demonstrate a consumer's lack of understanding. It mentions various methods that the Bureau or a consumer might use, such as direct evidence, consumer complaints, consumer testimony, and analysis of reasonable consumer expectations. However, without specific criteria or standards, financial institutions have no guidance on how they might assess the comprehensibility of a product or service, whether to assess potential compliance with UDAAP prior to offering the product or service, or in defending against an alleged UDAAP violation.

The policy statement appears to place the burden solely on financial institutions without adequately considering consumer responsibility. The absence of a "reasonable person" standard in the enforcement of the abusiveness prong of UDAAP has serious implications. It stifles innovation and will allow anyone to create seemingly valid claims, leading to increased costs for credit unions and incentivizing plaintiff's attorneys to bring frivolous lawsuits. Without a "reasonable person" standard, fairness and consistency are compromised, and credit unions become vulnerable to subjective interpretations of what constitutes abusive practices. This change burdens credit unions with the potential for baseless accusations, diverting resources from serving their members. A "reasonable person" standard is crucial to maintain a fair and balanced system, prevent the misuse of claims, and protect credit unions from excessive costs.

While financial institutions should, and do, provide accurate and transparent information, consumers also bear a responsibility to educate themselves, seek clarification, and make informed decisions. Ignoring this aspect may create a moral hazard where consumers feel less accountable for their own financial decisions. The prohibition does not consider proportionality or the degree of harm caused by the lack of understanding. It treats all instances of lack of understanding equally, regardless of the magnitude or likelihood of harm. This lack of proportionality can lead to unintended consequences, potentially restraining legitimate business practices and innovation without commensurate benefits to consumer protection. NAFCU urges the Bureau to reinstate the cost-benefit analysis included in the 2020 Policy Statement to ensure that the benefits to consumers from valuable financial products or services are not discarded due to a myopic focus on harm, no matter how minimal. Furthermore, the Bureau should establish a "reasonable person" standard to ensure that credit unions and other community-based financial institutions are not unfairly exposed to the liabilities associated with vexatious litigation, that ultimately will harm the ability of these institutions to serve their members.

This section of the policy statement is impractical and has strong potential to stifle innovation. Striking a balance between consumer protection and the practical realities of the financial industry is crucial to ensure fair and effective regulation. Clearer guidelines, consideration of

consumer responsibility, and a proportional approach would contribute to a more balanced and reasonable framework.

Need for Clarity

Establishing clear criteria for determining material interference would significantly contribute to enhancing clarity in the definition of abusive acts or practices. Currently, financial institutions may struggle to interpret what actions or omissions would be considered as materially interfering with consumers' ability to understand terms and conditions. By providing specific standards or examples, the CFPB can offer much-needed guidance to these institutions, enabling them to navigate the regulatory landscape with greater confidence and accuracy.

When financial institutions have a clear understanding of the criteria for material interference, they can evaluate their practices more effectively. They are able to assess whether their actions or omissions could potentially impede consumers' comprehension of the terms and conditions associated with financial products or services. This evaluation process would be crucial in identifying areas where improvements are needed to align with regulatory requirements. If the Bureau were to provide specific standards or examples, *and limit their enforcement to those standards*, financial institutions could take appropriate measures to comply with the regulations. They could adjust their practices, policies, and procedures to ensure that they are not engaging in conduct that would be deemed abusive due to material interference. However, without clear rules of the road, a proactive approach, which fosters a culture of compliance within the industry, promotes fair treatment of consumers and reduces the likelihood of regulatory violations, can never be achieved.

Furthermore, clear criteria for material interference would facilitate consistency and uniformity across the industry. With specific standards or examples in place, financial institutions could establish a common understanding of what actions or omissions would be considered as materially interfering. This common understanding would not only benefit the institutions themselves but also consumers, who would experience greater consistency and transparency in their interactions with different financial entities.

Defining thresholds for unreasonable advantage is essential. The CFPB should provide more explicit guidance on what constitutes an unreasonable advantage in each of the specified circumstances. Clear thresholds or factors can help financial institutions assess their practices and make informed decisions to avoid potential violations.

Addressing acts or practices outside of an institution's control is another crucial aspect that should be considered when providing clarity to the definition of abusive acts or practices. Financial institutions often face situations where certain actions or practices affecting consumers may be influenced by external factors beyond their direct control. In such cases, it is important for the policy statement to provide guidance on how to distinguish between actions within an

institution's control and those influenced by external factors. By including such guidance, the Bureau would enable financial institutions to better understand their responsibilities and obligations when faced with situations beyond their control. This clarity would be invaluable in helping institutions mitigate potential liability for actions or practices that arise due to external factors.

In many instances, financial institutions may find themselves in situations where they are unable to prevent or control certain acts or practices that could be perceived as abusive. These could include changes in market conditions, fluctuations in interest rates, or external events that impact the availability or pricing of financial products and services. Without clear guidance, institutions may struggle to differentiate between actions they can reasonably be held responsible for and those that are beyond their control. By explicitly addressing acts or practices influenced by external factors, the policy statement would acknowledge that financial institutions should not be held liable for circumstances beyond their reasonable control. This recognition is important in ensuring a fair and balanced regulatory environment where institutions are not unfairly penalized for factors outside of their realm of influence.

Providing guidance on distinguishing between controllable and uncontrollable acts or practices would also contribute to the overall effectiveness of consumer protection efforts. By clarifying the boundaries of institutional responsibility, the CFPB would be able to focus its regulatory efforts on areas where financial institutions can genuinely make a difference in preventing abusive conduct. This targeted approach would enhance the efficiency and effectiveness of regulatory oversight and enforcement. Additionally, clear guidance on acts or practices outside of an institution's control would foster a sense of accountability and fairness within the financial industry. Financial institutions would have a better understanding of their obligations and limitations, allowing them to make informed decisions and allocate resources effectively. This clarity would ultimately benefit consumers by ensuring that financial institutions focus their efforts on areas where they can have the most impact on preventing abusive acts or practices.

Furthermore, providing more specific examples and case studies would be beneficial. Including detailed examples and case studies illustrating the application of the abusiveness prohibition would offer practical guidance to financial institutions. These examples could highlight the boundaries of what is considered abusive and non-abusive conduct, promoting consistency and clarity in compliance efforts. By addressing these areas of concern and providing additional clarity, the CFPB can create a more predictable regulatory environment, enabling financial institutions to better understand and comply with UDAAP.

Need for Rulemaking

NAFCU urges the Bureau to clearly define the contours of the abusiveness prong of UDAAP through the notice and comment rulemaking process. Doing so would benefit consumer welfare and overall compliance with UDAAP prohibitions. Rulemaking would provide clarity and certainty

by allowing stakeholders, such as financial institutions and consumer advocates, to contribute their input and feedback on proposed rules. This inclusive process would help to ensure that the definition of abusiveness is clear, well-defined, and provides certainty to all parties involved, enabling financial institutions to understand their obligations and reduce the risk of unintentional violations.

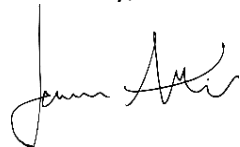
Additionally, a rulemaking on abusiveness would establish consistent standards for enforcement across the industry. Defining the abusiveness prong through notice and comment rulemaking would ensure that regulatory expectations are consistent, reducing ambiguity and the potential for uneven enforcement. This would create a much-needed level playing field for financial institutions and ensure fair treatment for consumers. Furthermore, engaging financial institutions in the rulemaking process would promote industry engagement and cooperation. It would enable institutions to contribute their expertise and insights so that the abusiveness prong is defined in a way that does not ignore the practical realities of consumer financial services and does not chill innovation. This collaborative approach would facilitate a better understanding of regulatory expectations, encourage proactive compliance efforts, and reduce the likelihood of unintended consequences or undue burdens on financial institutions.

Finally, the rulemaking process provides flexibility and adaptability. The Bureau can refine and update the definition of abusiveness over time by considering public comments and feedback. This would allow the rule to address evolving industry practices, technological advancements, and emerging consumer risks. This flexibility would ensure that the regulatory framework remains relevant and responsive to changing market dynamics, ultimately benefiting consumers.

Conclusion

NAFCU appreciates the opportunity to share comments in response to the Bureau's Statement of Policy Regarding Prohibition on Abusive Acts or Practices. If you have any questions or would like additional information, please do not hesitate to contact me at 703-615-5109 or jakin@nafcuhq.org.

Sincerely,



James C. Akin

Senior Regulatory Affairs Counsel