# <u>The Question Of A General Rulemaking To Define The "Abusive" Standard</u>

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The Consumer Financial Protection Bureau (CFPB or Bureau) has convened a symposium to consider whether to adopt a general definition of the term "abusive acts or practices." In this statement, I examine the need for such a rule and whether it would be wise.

I conclude that an "abusive" rulemaking would be inadvisable because there is no evidentiary basis for a general rule at this time. The CFPB should not undertake government intervention—particularly by invoking its discretion—where there is no proven empirical justification for taking action. When the actual data are examined, CFPB claims based on its "abusive" power turn out to be exceedingly rare. The Bureau predicated only one enforcement case on the "abusive" authority alone. Further, entire segments of the consumer finance industry have been virtually free from "abusive" enforcement actions. That includes depository institutions, mortgage lenders and servicers, and fintech. Even the rate of "abusive" claims against the fringe banking sector, where those claims are concentrated, is breathtakingly low. Similarly, there is no evidence that the "abusive" standard has had an adverse impact on markets. Bottom line, there is no factual basis or need for a rule defining the term "abusive" in general terms at this time. To the extent there are any lingering compliance concerns, the Bureau can successfully address those concerns through no-action letters, guidances, and the like, instead of through a rule.

To the extent the Bureau decides otherwise and embarks on an "abusive" rulemaking, however, the statutory text of the "abusive" standard will control the meaning of that provision. The content of that statutory text has a number of implications for any definition of the term "abusive." First, Congress added the term "abusive" in order to expand the CFPB's enforcement powers, which means that limiting the meaning of that term to "unfair" or "deceptive" would violate the statute. Second, the "abusive" power is different from its latter two cousins, is couched in different language, and focuses on the conduct of providers. Third, the legislative record establishes that the Bureau should construe the term "abusive" broadly for the benefit of consumers. Fourth, Congress intentionally omitted a cost-benefit or other impact analysis test from the "abusive" standard. Finally, the statutory text – not economic theory – is what defines the outer limits of acts or practices that are "abusive."

This statement proceeds in four parts. Section I sets forth the statutory text of the "abusive" power. Section II discusses why an "abusive" rulemaking lacks a factual foundation. In Section III, I explore the statutory text of the "abusive" authority and the implications of that text for the meaning of that term. Section IV concludes.

## I. Statutory Authority

In the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or Dodd-Frank),[1] Congress prohibited covered persons and service providers from "engag[ing] in any unfair, deceptive, or abusive act or practice . . ." (UDAAP).[2] Congress further made it unlawful for "any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of" Dodd-Frank's UDAAP provisions.[3] This prohibition against UDAAPs builds on and expands the Federal Trade Commission's traditional authority in Section 5(a) of the Federal Trade Commission Act making unfair or deceptive acts or practices (UDAPs) unlawful.[4]

In Dodd-Frank, Congress took pains to specify the terms "unfair" and "abusive" by statute for purposes of CFPB enforcement and rulemaking.[5] Section 1031(c) states that the Bureau "shall have no authority to declare an act or practice unlawful as 'unfair'" unless:

> the Bureau has a reasonable basis to conclude that—
>
> (A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and
>
> (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[6]

Dodd-Frank further states, with respect to the term "unfair," that:[7]

> In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

Meanwhile, in Section 1031(d) of the Dodd-Frank Act, Congress limited CFPB oversight to the following "abusive" acts or practices:[8]

> (d) The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless
> the act or practice—

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1 Pub. L. No. 111-203, 111th Cong. (2010).
2 12 U.S.C. § 5536(a)(1).
3 12 U.S.C. § 5536(a)(3).
4 15 U.S.C. § 45(a). Congress amended Section 5 in 1938 to prohibit UDAPs. *See* March 21, 1938, ch. 49, § 3, 52 Stat. 111.
5 12 U.S.C. § 5531(c)-(d).
6 12 U.S.C. § 5531(c)(1).
7 12 U.S.C. § 5531(c)(2).
8 12 U.S.C. § 5531(d).

(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) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Because Congress couched these two descriptions of the terms "unfair" and "abusive" as limitations on the CFPB's authority, these descriptions do not bind state attorneys general when exercising their authority to enforce the UDAAP prohibition under Dodd-Frank.[9]

Turning to the term "deceptive," Congress did not describe it, relegating the interpretation of that term to the common law interpreting UDAPs and UDAAPs. As a result, the statutory description of the term "abusive" in Section 1031(d) is more detailed than Congress' description (or lack thereof) of the terms "unfair" and "deceptive" and provides more guidance to providers about how to conform their conduct to the law.

Congress, in Dodd-Frank, vested the CFPB with authority to enforce the new UDAAP authority. In order to give that authority teeth, Congress authorized the Bureau to take enforcement action to prevent covered persons or service providers from committing or engaging in unfair, deceptive, or abusive acts or practices under Federal law in connection with the offering of, or any transaction with a consumer for, a consumer financial product or service.[10]

## II. <u>Should The CFPB Initiate A Rulemaking Proceeding To Define The Term "Abusive"?</u>

The Consumer Financial Protection Bureau is contemplating a possible rulemaking to adopt a general definition of the term "abusive." In this section, I discuss the advisability of such a rulemaking.

In the Dodd-Frank Act, Congress gave the Bureau discretionary authority to adopt rules defining unfair, deceptive, or abusive acts or practices that would apply to covered persons or service providers.[11] The Bureau has not adopted a general definition of the terms "unfair," "deceptive," or "abusive" via rulemaking to date. Similarly, in the eighty-one years since Congress amended Section 5 of the FTC Act to add the UDAP authority, the Federal Trade Commission (FTC) has not adopted a general definition of the terms "unfair" or "deceptive" by rule for purposes of

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9 12 U.S.C. §§ 5536, 5552.
10 12 U.S.C. § 5531(a); *see id.* §§ 5561-5567.
11 12 U.S.C. § 5531(b).

UDAP enforcement.[12] Instead, both agencies have developed the meaning of those terms primarily through the common-law process, both through court decisions and enforcement orders.

After examining the data, I find no empirical basis for embarking on an "abusive" rulemaking now. The number of "abusive" enforcement cases has been miniscule to date and there have been virtually no "abusive" claims whatever against major sectors of the consumer finance industry. Where, as here, the legal exposure to firms is *de minimis* and the Bureau's puny universe of "abusive" cases denotes a lack of deep agency experience with applying the "abusive" standard, a rulemaking would be premature. The scant number of "abusive" cases further means that there is no credible evidence that the standard has had any adverse impact on markets. For all of these reasons, the Bureau should eschew a rulemaking and continue to develop that standard through the common law.

### a. <u>The Bureau Lacks The Necessary Justification For Government Intervention</u>

It is a bedrock economic precept that the government should refrain from intervention absent market failure or behavioral anomalies. This principle has even greater force when it comes to discretionary rules, where the Bureau has the choice whether to stay its hand or take action.

In order to justify an "abusive" standard rulemaking, there must be a need, based on a solid factual foundation, to define that term by rule. There is no substantiated need, however, to initiate such a rulemaking at this time.

#### i. <u>The Bureau Has Exercised Its "Abusive" Power Sparingly</u>

The concerns about the "abusive" standard focus on CFPB enforcement.[13] However, an examination of the CFPB's enforcement record reveals that the Bureau has been abstemious and cautious in relying on its new "abusive" authority in enforcement actions.

From the Bureau's inception through June 7, 2019, the CFPB brought a total of 222 enforcement actions. Of those, 31 cases (14%) raised a UDAAP claim with an "abusiveness" theory or count. In 30 of those 31 cases, the "abusiveness" count was mixed with other UDAAP counts based on "unfair" or "deceptive" conduct or both. To the best of my knowledge, three of those 31 mixed cases singled out an individual act or practice as "abusive" on a standalone basis without also declaring it "unfair" or "deceptive" (1.4% of total CFPB enforcement cases).[14] Only one

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[12] The FTC did promulgate a rule defining "abusive telemarketing" acts or practices pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act. 16 C.F.R. § 310.4. However, the telemarketing act *required* the FTC to adopt such a rule and was highly prescriptive in detailing the contents of that rule. 15 U.S.C. § 6102. For these reasons, the FTC telemarketing rule is distinguishable and does not provide a precedent for a CFPB "abusive" rule or for how the term "abusive" should be interpreted for purposes of the Bureau's separate UDAAP authority.

[13] *See, e.g.*, CTR. FOR CAPITAL MKTS., U.S. CHAMBER OF COMMERCE, CONSUMER FINANCIAL PROTECTION BUREAU: WORKING TOWARDS FUNDAMENTAL REFORM 4–5, 11, 14–15 (2018) [hereinafter Chamber of Commerce], https://www.centerforcapitalmarkets.com/resource/working-towards-fundamental-reform.

[14] CFPB v. Aequitas Capital Management Inc., et al., Case No. 17-1278 (D. Ore.); Complaint, CFPB v. PayPal, Inc., Civil Action No. 1:15-cv-01426 (D. Md. May 19, 2015); Consent Order, In re: Zero Parallel, LLC, File No. 2017-CFPB-0017 (CFPB Sept. 6, 2017).

UDAAP case (0.45% of total CFPB enforcement cases) was limited to "abusive" conduct alone.[15]

**<u>Analysis of CFPB Enforcement Cases, From Inception Through June 7, 2019</u>**

| | **Number of Cases** | **Percentage of Total Cases** |
|---|---|---|
| **All Enforcement Cases** | 222 | 100.00% |
| **UDAAP Cases With "Abusive" Claims** | 31 | 14.00% |
| **UDAAP Cases With A Standalone "Abusive" Claim** | 4 | 1.40% |
| **UDAAP Cases Relying Solely on An "Abusive" Claim** | 1 | 0.45% |

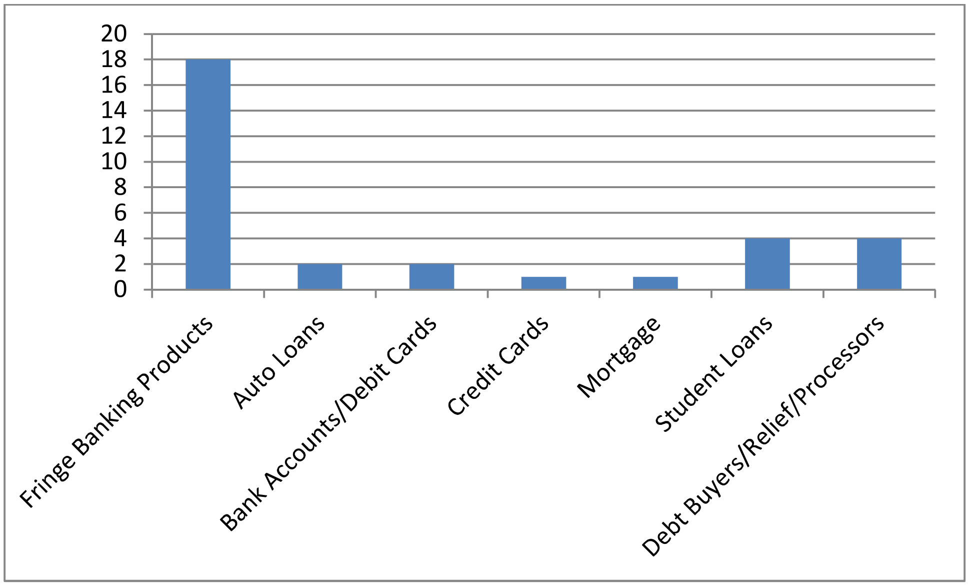
From this flows two conclusions. First, "abusive" claims are rare to begin with. The CFPB, on average, has brought fewer than five such claims on average a year and that pace has recently slowed. And second, in the limited cases where the CFPB brings those claims, it puts predominant reliance on its "unfair" or "deceptive" powers and almost always only includes the "abusive" claim as an adjunct to those claims. There was only one exception to that trend in seven years, in a case that involved highly unusual facts.[16]

In addition, the CFPB's "abusiveness" cases are not equally distributed among various consumer financial products or services. An analysis of the distribution of those cases across product and service categories reveals that the CFPB's "abusiveness" claims principally focus on fringe banking services:

15 CFPB v. Aequitas Capital Management Inc., et al., Case No. 17-1278 (D. Ore.).

16 Aequitas Capital Management Inc., the lead defendant in that case, was a secondary market purchaser of private student loans originated by a for-profit school and did not do business with the injured students in that case.

**Total "Abusive" Cases from the CFPB's Inception Through June 7, 2019, by Product/Service**




**Note:** "Fringe banking products" include payday loans and lead aggregators for those loans, auto title loans, other small loan products, and check cashing. "Auto loans" refer to auto purchase loans. "Student loans" include student loan origination, collection, and debt relief. "Debt buyers/relief/processors" includes debt buyers, debt relief services, and debt payment processors. The one mortgage case was limited to a biweekly payment program and did not involve mortgage origination or traditional mortgage servicers. The total number of cases reported equaled 32 because one case spanned two product categories, involving both bank accounts and credit cards.

This chart provides several insights. First, the CFPB has concentrated its few "abusiveness" claims on the fringe banking industry. This is not surprising because the sector is less regulated and serves customers who are more vulnerable by virtue of being, on average, lower-income, less-educated, younger, black and Hispanic, working-age people who are disabled, and households with volatile income.[17] Second, insured depository institutions, which are more heavily regulated, virtually never face "abusiveness" claims for traditional bank products such as bank accounts, debit cards, and credit cards. Putting aside the *Wells Fargo* fake bank and credit card account opening case,[18] only one other depository institution has faced an "abusiveness" claim over the past seven years.[19] Third, no "abusiveness" claim has been brought against a traditional mortgage lender or servicer. Fourth, there is no serious concern about the effect of the

[17] Federal Deposit Insurance Corporation, 2017 FDIC National Survey of Unbanked and Underbanked Households 8 (2018), https://economicinclusion.gov/downloads/2017_FDIC_Unbanked_HH_Survey_Report.pdf; *see also id.* at 1.

[18] Consent Order, In re: Wells Fargo Bank, N.A., 2016 CFPB 0015 (CFPB Sept. 8, 2016).

[19] Complaint, CFPB v. TCF National Bank, Case No. 17-cv-00166-RHK-KMM (D. Minn. March 1, 2017).

"abusiveness" standard on innovation, because the fintech industry has not been the subject of an "abusiveness" claim. Finally, when broken down by product or service, the annual average number of "abusiveness" claims is extremely low: averaging 2 ½ claims a year nationally for fringe banking and 0.14 to 0.57 claims a year nationwide for all other categories of products and services.

These statistics establish that there is no problem needing solving. For vast swaths of the consumer financial services industry, the "abusiveness" standard is a non-issue. Traditional depository institutions have been virtually exempt from that standard as a practical matter and so have traditional mortgage lenders and servicers. Even for the entire fringe banking sector, ranging from payday loans, refund anticipation loans, and auto title loans, to installment loans and check cashing services, the average exposure is *de minimis*, averaging two cases a year. Accordingly, a cold, sober look at these facts reveals that there is no empirical need for government intervention in the form of a general "abusiveness" rule.

Further, it would be unwise to rush into a rulemaking without substantially more experience with the types of factual scenarios that justify an "abusiveness" theory. Here the experience of the FTC is instructive. The FTC waited *46 years* to adopt its Credit Practices Rule, identifying certain remedies used by lenders and retail installment sellers in consumer credit contracts as "unfair acts or practices" under Section 5(a)(1) of the Federal Trade Commission Act.[20] In the intervening decades, the Commission amassed a massive body of cases involving "unfair" consumer harm and had deep experience evaluating the pros and cons of different regulatory approaches. In the Bureau's short life, in contrast, there have been too few cases, spread thinly across too many products and services, to properly inform a general "abusive" rule, particularly in today's rapidly evolving and robust market.

### ii. <u>The Other Stated Justifications For An "Abusiveness" Rule Are Unsubstantiated</u>

Although the Dodd-Frank Act authorizes an "abusiveness" rulemaking,[21] consumer organizations are not calling for such a proceeding. Instead, the impetus for such a rule is coming from one or more industry trade associations.

In calling for an "abusiveness" rule, the U.S. Chamber of Commerce has advanced two principal arguments.[22] First, the Chamber asserts that without an "abusiveness" rule, the Bureau fails to "provide clear rules of the road"[23] and leaves "businesses guessing as to the meaning of central aspects of its authority."[24] Second, and in a related vein, the Chamber criticizes the Bureau for not issuing "formal guidance" on the meaning of the term "abusive."[25]

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20 FTC, *Trade Regulation Rule; Credit Practices: Final Trade Regulation Rule*, 49 Fed. Reg. 7740 (March 1, 1984).

21 12 U.S.C. § 5531(b).

22 Chamber of Commerce, *supra* note 13, at 4–5, 11, 14–15.

23 *Id.* at 14.

24 *Id.* at 5.

25 *Id.*

This criticism is unsubstantiated. The Chamber provides no citations or other factual support for its assertions. Moreover, as documented above, the application of the "abusive" standard has been concentrated in fringe banking products. More heavily regulated segments of the consumer financial services sector--especially depository institutions and mortgage lenders and servicers—have faced virtually no enforcement for abusive practices under Section 1031. Even the threat of an "abusive" claim to fringe banking providers is negligible. Given companies exceedingly low legal exposure—the CFPB has brought less than a handful of "abusive" cases on average a year—complaints about needing "clear rules of the road" to avoid liability are much ado about nothing. A rulemaking needs a basis in fact and here there is none.

Not surprisingly, there is no evidence that the "abusive" standard has had a negative effect on consumer financial markets, given the CFPB's rare use of the "abusive" power. The Chamber does not argue otherwise. Sample size problems would make statistical proof of an effect impossible. Only one case – the *Aequitas* case – relied on an "abusive" count alone. The other 30 cases combined an "abusive" count with an "unfair" and/or "deceptive" count, hampering the ability in those cases to disentangle the effect of the "unfair" or "deceptive" counts from that of their "abusive" sibling. Similarly, any meaningful markets analysis would have to limit itself to discrete product or services markets, such as student loans or payday loans, and not combine both. The sample sizes in each of these discrete markets are too small (sometimes equaling zero) to support statistically significant findings, especially when broken out by year.[26] Furthermore, in view of those small sample sizes, economists would have too few degrees of freedom to control for the other possible major factors affecting market trends. [27] For these reasons, there is and can be no reliable evidence that the "abusive" standard has had any adverse market effects to date. There is thus no evidence that the "abusive" standard has unduly hindered competition or innovation.

The Chamber's objection about lack of guidance similarly lacks a factual foundation. That assertion notwithstanding, the Bureau *has* issued multiple guidances fleshing out the meaning of the term "abusive" in specific product or services markets:

- Early on, in 2013, in CFPB Bulletin 2013-07, the Bureau enumerated a long list of debt collection practices that could be unfair, deceptive, or abusive.[28]
- In 2013, another detailed guidance notified mortgage servicers of a long list of servicing transfer issues to assist in avoiding abusive acts or practices.[29]
- The following year, in CFPB Bulletin 2014-02, the CFPB alerted credit card issuers that offer promotional interest rates that they might "risk engaging in abusive conduct if [they

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[26] *See, e.g.*, DOUGLAS C. MONTGOMERY & GEORGE C. RUNGER, APPLIED STATISTICS AND PROBABILITY FOR ENGINEERS 312-321 (2d ed. 1999, New York: John Wiley & Sons, Inc.).

[27] *See, e.g.*, Patrick Runkel, *What Are Degrees of Freedom in Statistics?*, THE MINITAB BLOG, Apr. 8, 2016, http://blog.minitab.com/blog/statistics-and-quality-data-analysis/what-are-degrees-of-freedom-in-statistics ("if the amount of data isn't sufficient for the number of terms in your model, there may not even be enough degrees of freedom (DF) for the error term and no p-value or F-values can be calculated at all"). The term "degrees of freedom" refers to the number of variables that a statistician can analyze and still draw reliable inferences. The larger the sample size, the more degrees of freedom.

[28] CFPB, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* 5-6, CFPB Bull. 2013-07 (July 10, 2013); *see also id.* at 4.

[29] CFPB, *Mortgage Servicing Transfers*, CFPB Bull. 2013-01 (Feb. 11, 2013).

failed] to adequately alert consumers to" the consequences of not paying off the full balance by the payment due date. The Bureau discussed detailed factual scenarios that could cause that situation to be abusive. The agency also advised issuers to adopt internal controls to avoid this risk.[30]

- In a 2016 guidance, the Bureau described a recent example of an abusive practice involving production incentives for sales personnel.[31]
- A 2017 CFPB guidance enumerated situations where conduct related to phone pay fees could constitute UDAAPs.[32]

These guidances provide exactly the type of tailored roadmap that the Chamber calls for. The Bureau could and should issue more of them.

In 2017, the CFPB also adopted two narrow notice-and-comment rules that defined specific acts or practices in payday lending as "abusive":

- 12 C.F.R. § 1041.4 states that it is unfair and abusive "for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that the consumers will have the ability to repay the loans according to their terms."
- 12 C.F.R. § 1041.7 provides that "[i]t is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts."

Although the CFPB reopened 12 C.F.R. § 1041.4 for comment,[33] the larger point remains that the Bureau can use narrowly drafted rules that are tailored to specific products or services to give more direction to providers in those industries about how to avoid "abusive" acts or practices.

The Chamber also voiced concern about the scope of the Bureau's discretion in connection with the "abusive" standard.[34] However, the Bureau does not develop the meaning of the term "abusive" free from oversight. Article III courts adjudicate the vast majority of the CFPB's "abusive" cases. In fact, almost 75% (23) of the Bureau's 31 enforcement cases involving an "abusive" claim were filed in federal court. The CFPB's administrative cases are subject to judicial review as well. Courts thus retain final word over the interpretation of the "abusive" authority while developing the doctrine's case law.

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30 CFPB, *Marketing of Credit Card Promotional APR Offers*, CFPB Bull. 2014-02 (Sept. 3, 2014).

31 CFPB, *Detecting and Preventing Consumer Harm from Production Incentives*, CFPB Bull. 2016-03 (Nov. 28, 2013).

32 CFPB, *Phone Pay Fees*, CFPB Bull. 2017-01 (July 31, 2017).

33 BCFP, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 84 Fed. Reg. 4252, 4296 (Feb. 14, 2019).

34 Chamber of Commerce, *supra* note 13, at 20.

More importantly, one of the major virtues of the UDAAP prohibitions lies in discouraging companies from evading the law. In general, the enumerated consumer laws and their implementing rules provide the "clear rules of the road" that companies want. But since no rule-writer can anticipate every future consumer financial protection problem that will arise, companies can undermine the purpose and spirit of rules that are too narrow. For this reason, Congress added the UDAAP provisions to give the CFPB the flexibility to address new harms to consumers that the enumerated consumer laws do not cover or anticipate. Only recently, in 2018 and 2019 in fact, the CFPB has taken avail of that flexibility three times.[35] A rule that reduced the "abusive" standard to "clear rules of the road" would undermine this function of the UDAAP authority and tie the Bureau's hands unnecessarily when faced with future, novel types of consumer harm.

### iii. The Bureau Can Manage Any Concern About Over-Deterrence Through Other Regulatory Techniques Than A General Rule

As the previous section discussed, there is no evidence that the Chamber's objections to the "abusive" standard as it currently stands have merit. To the extent that concerns persist, however, it would be a better use of the Bureau's limited resources to manage those concerns through more targeted means than a general rule. This approach would have the added benefit of being focused on specific factual scenarios and consumer financial products and services, where industry actors will find the Bureau's advice most useful.

A narrow guidance or rule on the "abusive" standard that is specific to a product or service is much more helpful to providers than a general "abusive" rule spanning the entire consumer finance space. As an examination of the CFPB's "abusive" cases to date reveals, the application of the "abusive" test is highly fact-specific and varies according to industry. For example, identifying actual debt collection practices that could be deemed "abusive" is infinitely more useful to debt collectors than a general rule that is not keyed to the debt collection industry. Particularly given the Bureau's limited staff resources, these sorts of product-specific guidances are the better way to address industry's concerns.

The Bureau has a variety of tools at its disposal other than a general "abusive" rule to provide industry actors with additional direction:

- Through no-action letters.
- Through guidances and narrow rules (such as 12 C.F.R. § 1041.7) that are specific to individual products or services or discrete industry segments.
- Through analyses in *Supervisory Highlights*.

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[35] First Amended Complaint, CFPB v. Think Finance, LLC, et al., Case No. 4:17-cv-00127-BMM (D. Montana March 28, 2018); Consent Order, In re: Cash Express, LLC, File No. 2018-BCFP-0007 (CFPB Oct. 24, 2018); CFPB v. D and D Marketing, Inc., et al., Case No. 2:15-cv-9692 (C.D. Cal. 2019) (stipulated final judgment and order entered March 29, 2019). For discussion, see Ori Lev, *What's in a Name? That Which We Called the CFPB Is Still Bringing UDAAP Claims*, MAYER BROWN (Oct. 25, 2018), https://www.mayerbrown.com/en/perspectives-events/publications/2018/10/whats-in-a-name-that-which-we-called-the-cfpb-is-s.

- Through expanded discussion of the "abusive" standard in the CFPB's examination handbook (which is currently sparse).
- And through measured use of judicious enforcement decisions backed by strong evidentiary support and focusing on the worst actors and practices.

In particular, the Bureau would be well-advised to make more use of guidances, tailored to individual product sectors and based on past insights from supervision and enforcement, to shed light on the Bureau's compliance expectations under the "abusive" standard. My understanding is that the Regulations, Markets, and Research Division has sometimes been reluctant to issue more UDAAP guidances similar to CFPB Bulletin 2013-07. I urge the Bureau to reexamine that reluctance and to make greater use of product-specific guidances to help companies navigate compliance. Through guidances and other tools, the Bureau can provide regulated entities with targeted insight without unnecessarily tying the Bureau's future hands through a more general, binding rule.

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There are fewer than five CFPB enforcement cases with a standalone "abusive" count and only one that relied on the "abusive" theory alone. This small universe—which doesn't even amount to a handful—refutes industry concerns about any potential legal exposure from the "abusive" standard or adverse effects on markets. Instead, these data show that the Bureau has neither the empirical justification nor the requisite depth of expertise in enforcing the standard to proceed with a rulemaking at this time. Instead, the CFPB should make greater use of the many other tools in its arsenal to address any lingering company concerns about compliance.

## III. <u>Any "Abusiveness" Rulemaking Must Hew To The Statutory Text</u>

For the reasons I discuss above, a general "abusive" rulemaking would be premature and a poor use of the Bureau's limited resources. But in the event a rulemaking moves forward on a general definition of the term "abusive," any definition must comport with the text of the Dodd-Frank Act (most notably Sections 1031 and 1036 and their interrelationships with other provisions of Dodd-Frank).[36]

Fidelity to the statutory text has a number of implications. First, Congress necessarily enacted the "abusive" power to cover additional consumer harms that the "unfair" and "deceptive" powers do not reach. Accordingly, a rule that limited the meaning of the term "abusive" to unfair or deceptive acts or practices would violate Section 1031.

Second, when Congress bestowed rulemaking power on the Bureau for UDAAPs in Section 1031(b), it authorized the Bureau to "identify[] as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[37] Congress further stated that rules "under this section may include requirements for the purpose of preventing such acts or

[36] For examples of these other provisions, *see infra* note 57 and accompanying text.
[37] 12 U.S.C. § 5531(b).

practices."[38] By negative implication, Congress did not allow the Bureau to promulgate a UDAAP rule for the purpose of reducing regulatory burden.

Third, and in a related vein, the statutory text of the "abusive" standard does not contain a cost-benefit or impact analysis test. Accordingly, none may be read by implication into that standard.

Fourth, the express statutory language of Sections 1031 and 1036, not economic theory, defines the outer limits of the "abusive" standard. While economic theory can shed light on the types of consumer harms that Congress sought to address in the "abusive" provision, it does not restrict the meaning of that provision. An attempt to define and limit the "abusive" standard according to the precepts of an economic theory would violate the statutory text and invite legal challenge.

### a. The "Abusive" Standard Is Different From And Broader Than The "Unfair" Or Deceptive" Standards

The proscription against "unfair" and "deceptive" acts and practices is longstanding in nature and dates back to the 1938 amendments to the Federal Trade Commission Act over eighty years ago. In the wake of the 2008 financial crisis, however, Congress was not content with merely importing the UDAP power into Title X of Dodd-Frank. Instead, Congress expanded that power by adding the prohibition against "abusive" acts and practices (hence the newly minted acronym UDAAP). Congress made this new "abusive" provision additive in nature, worded it differently than the "unfair" and "deceptive" standards, and in doing so targeted misconduct that the "unfair" and "deceptive" powers do not reach.

This history means that the Bureau cannot reduce the "abusive" power to "unfair" or "deceptive" acts or practices alone. Doing so would write Section 1031(d) out of existence, in contravention of Congress' express mandate. To be sure, conduct that is abusive is often also unfair or deceptive. Nevertheless, as the Bureau has observed, "each of these [three] prohibitions are separate and distinct, and are governed by separate legal standards."[39]

The focus of the "unfair" and "deceptive" standards, furthermore, is different than that of the "abusive" standard. The "unfair" standard requires proof of "substantial injury to consumers" that "is not outweighed by countervailing benefits to consumers or to competition."[40] Meanwhile, the CFPB interprets the "deceptive" standard to require an act or practice that is materially misleading to, or likely to mislead, a consumer.[41] Both standards focus on the consumer side of a transaction and specifically on the effect on consumers.

In contrast, the "abusive" standard focuses on the provider side of the transaction. This third standard does not mention injury to consumers or weigh consumer injury against countervailing benefits to consumers or to competition. Nor does it speak of misleading acts or practices.

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[38] *Id.*.

[39] CFPB Bull. 2013-07, *supra* note 28, at 4.

[40] 12 U.S.C. § 5531(c)(1).

[41] More precisely, the CFPB has incorporated the following test for the meaning of the term "deceptive," based on longstanding FTC precedent: "(1) The act or practice misleads or is likely to mislead the consumer; (2) The consumer's interpretation is reasonable under the circumstances; and (3) The misleading act or practice is material." CFPB Bull. 2013-07, *supra* note 28, at 3.

Instead, the term "abusive" focuses on the nature of a provider's *conduct*, without reference to deception or harm. Thus, subsection (d)(1) of the "abusive" standard is concerned with acts or practices that materially interfere with a consumer's ability to understand a term or condition, with emphasis on material interference by a provider.[42] Meanwhile, subsection (d)(2) of the "abusive" standard focuses on acts or practices that take unreasonable advantage of consumers in one of three ways:

> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of a consumer financial product or service;
> (B) the consumer's inability to protect his or her interests in selecting or using such a product or service; or
> (C) the consumer's reasonable reliance on a covered person to act in the consumer's interests.

Unlike the "unfair" or "deceptive" tests, (d)(2) asks whether a provider has taken "unreasonable advantage."

These differences in wording and emphasis make the "abusive" power especially important in those rare situations that are not technically unfair or deceptive, or harder to so prove. For instance, a provider may technically make all of the necessary consumer disclosures and do so truthfully, but conduct the transaction in such a way to distract the consumer from the disclosures or rush the consumer before he or she has time to absorb them.[43] Another provider may have proprietary information about that transaction showing that a consumer who parts with cold hard cash to pay for the product or service is highly unlikely to receive the benefit of the bargain.[44] (This latter situation could raise an "abusive" claim under subsection (d)(2)(B) and possibly under other subsections). Similarly, the Bureau may have stronger evidence in a particular case to establish an "abusive" claim than a claim sounding in unfair or deceptive conduct.

The "abusive" standard can also be useful in situations where market developments have outpaced the ability of an enumerated consumer law to adequately police the market. For example, the Equifax data breach raised questions about the ability of the Fair Credit Reporting Act to adequately protect the data security and privacy of consumers. The UDAAP authority—including its "abusive" branch—is a valuable supervisory and enforcement supplement in situations such as these.

Similarly, the "abusive" power can address situations where monopoly or oligopolistic market structures reduce beneficial competition and make it easier for companies to take "unreasonable advantage" of consumers. Debt servicing, where consumers lack a choice of servicers, is one example.

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[42] 12 U.S.C. § 5531(d)(1).

[43] *See, e.g.*, Complaint for Permanent Injunction and Other Relief, CFPB v. All American Check Cashing, Inc., et al., Case No. 3:16cv356WHB-JCG (S.D. Miss. May 11, 2016); First Amended Complaint, CFPB v. TCF National Bank, Case No. 17-cv-00166-RHK-KMM (D. Minn. March 1, 2017).

[44] *See, e.g.*, Complaint, CFPB v. Freedom Debt Relief, LLC, et al., Case No. 3:17-cv-6484 (N.D. Cal. Nov. 8, 2017).

Finally, the "abusive" power is important in situations where consumers are likely to have cognitive limitations that hamper or prevent reasoned consumer decisions. Obvious examples include senior citizens who are experiencing cognitive decline,[45] consumers who have suffered brain trauma,[46] 9/11 first responders struggling with cancer,[47] and victims of lead-paint poisoning.[48] There are other well-recognized situations where cognitive limitations impede reasoned consumer decision-making.

In these scenarios, it may be more effective for the Bureau to address company misconduct through the "abusive" prong than having to prove unfairness or deception. For instance, proper disclosures may (but do not necessarily) preclude a deception claims. Similarly, the lack of an impact analysis requirement in the "abusive" standard gives the Bureau greater latitude to redress situations, such as overdraft fees, where a limited group of injured consumers ends up subsidizing other, more affluent consumers.

Indeed, Congress gave the CFPB added flexibility to take consumers' cognitive limitations into account when it prohibited taking unreasonable advantage of "*a lack of understanding on the part of the consumer* of the material risks, costs, or conditions" of a consumer product or service[49] or of "*the inability of the consumer to*" protect his or her interests "in selecting or using a consumer financial product or service."[50] Similarly, Congress prohibited "materially interfer[ing] with the *ability of a consumer to understand* a term or condition of a consumer financial product or service," whatever that ability is.[51] Dodd-Frank identifies all three types of conduct as "abusive."

Finally, by addressing the provider side of transactions, the "abusive" standard helpfully serves to focus companies' attention on their own conduct and whether there are aspects of that conduct that could take unreasonable advantage of consumers or materially interfere with customers' understanding of terms or conditions. In this way, the "abusive" standard has an added prophylactic effect that can help bolster compliance. Indeed, to the extent that companies complain about having to conduct compliance, it indicates that the "abusive" standard is having a salutary effect.

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45 *See* Complaint for Violations of the Consumer Financial Protection Act and New York Banking and Financial Services Laws, CFPB v. Pension Funding, LLC, et al., Case No. 8:15-cv-1329 (C.D. Cal. Aug. 20, 2015) (alleging that a pension advance scheme targeting senior citizens was abusive).

46 *See* Complaint, CFPB v. RD Legal Funding, LLC, et al., Case No. 1:17-cv-00890 (S.D.N.Y. Feb. 7, 2017) (alleging that a tort settlement advance product that targeted former football players with concussion injuries was "abusive").

47 *See id.* (alleging that a tort settlement advance product that targeted ill 9/11 responders was "abusive").

48 Complaint, CFPB v. Access Funding, LLC. et al., Case 1:15-cv-03759-JFM (D. Md. Nov. 21, 2016). Lead poisoning can lead to cognitive impairment. *See, e.g.*, C. Fenga, et al., *Relationship between lead exposure and mild cognitive impairment*, 57 J. PREV. MED. HYG. 205, 205 (2016) ("Workers exposed to lead often show impaired performance on neurobehavioral tests involving attention, processing, speed, visuospatial abilities, working memory and motor function").

49 12 U.S.C. § 5531(d)(2)(A) (emphasis added).

50 *Id.* § 5531(d)(2)(B) (emphasis added).

51 *Id.* § 5531(d)(1) (emphasis added).

In sum, when Congress added the "abusive" power, it meant to expand relief beyond that already afforded for unfair or deceptive acts or practices. Any effort to limit the "abusive" power to UDAPs would violate Congress' directive.

#### b. <u>The Circumstances Surrounding The "Abusive" Power's Enactment Mean That That Term Should Be Broadly Construed For The Benefit Of Consumers</u>

As just discussed, when Congress enacted Dodd-Frank, it did not simply transfer UDAP powers to the Bureau. Instead, it charged the Bureau with policing an additional set of conduct—"abusive" conduct—beyond conduct that was merely unfair or deceptive. In doing so, Congress unmistakably signaled that it added the "abusive" authority in order to *expand* protections for consumers. Congress reinforced that message when it stated in Dodd-Frank that any CFPB rulemaking on the "abusive" power could "include requirements for the purpose of preventing [abusive] acts or practices."[52]

This drafting record establishes that the CFPB should broadly construe the "abusive" power for the benefit of consumers, not service providers. This flows from the additive nature of that power. In addition, we can see that the "abusive" power should be construed broadly from the last sentence of Section 1031(b), which permits the Bureau to promulgate a rule containing requirements for preventing UDAAPs. In contrast, Congress did *not* give the CFPB the power to undertake a UDAAP rulemaking to reduce industry burden. Congress' inclusion of the phrase "for the purpose of preventing [abusive] acts or practices" in the last sentence of Section 1031(b) means that by negative implication, Congress ruled out an "abusive" or any other UDAAP rulemaking for other purposes than protecting consumers, including for the purpose of relaxing providers' compliance obligations.

This principle of statutory interpretation *expressio unius est exclusio alterius* has important implications for industry complaints about compliance. Obviously, make-work compliance obligations do not serve anyone's interest. However, substantive compliance obligations that carry out the requirements of the "abusive" standard and that afford real consumer protections are exactly what Congress mandated. Bottom line, when it added the "abusive" prong, Congress ordered the CFPB to increase consumer protections and thus to increase companies' efforts to provide those protections. A rule to reduce compliance obligations just for their own sake, without regard for consumer protection, would countermand the statute.

#### c. <u>Congress Omitted A Cost-Benefit Or Other Impact Analysis Test From The "Abusive" Standard</u>

Earlier, I discussed the dearth of evidence that the "abusive" standard has had any negative effect on any consumer financial market. This should come as welcome news, because there is no proof that the "abusive" test has hindered competition or innovation. Beyond that, the statutory text precludes importing an impact analysis or cost-benefit analysis into the administration of the "abusive" power.

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[52] *Id.* § 5531(b).

The drafting history of Section 1031 makes clear that Congress consciously omitted a cost-benefit or other impact analysis test from the "abusive" standard. When Congress defined the tern "unfair" in subsection 1031(c), it expressly included an impact analysis requirement. Specifically, Congress required the CFPB, in order to prove that an act or practice is unfair, to establish that "such substantial injury" to consumers "is not outweighed by countervailing benefits to consumers or to competition."[53]

In contrast, the lengthy statutory text in subsection 1031(d) describing the "abusive" standard includes no impact analysis or cost-benefit analysis requirement at all. By comparing subsections 1031(c) and 1031(d), we can see that Congress knew how to include an impact analysis test when it wanted to. The absence of such a test from Section 1031(d) means that the CFPB is prohibited from reading an impact analysis or cost-benefit analysis requirement into the "abusive" standard.[54]

### d. Economic Theory Informs, But Does Not Control, The Meaning Of "Abusive"

The proper role of economic theory in the definition of the term "abusive" is up for discussion in the debate over a potential "abusive" rulemaking. Lest there be doubt, the text of the statute controls. The CFPB lacks the authority to use economic theory to define the outer limits of the "abusive" power or to negate its statutory text. However, both neoclassical and behavioral economics can be valuable in shedding light on the consumer harms that Congress sought to address when it mandated the "abusive" power.

#### i. The Term "Abusive" Must Be Defined According To The Statutory Text, Not Economic Theory

As part of the discussion about a possible "abusive" rulemaking, we have been asked to consider the proper role of economic theory in the interpretation of the word "abusive."

The bottom-line answer is simple: the statutory text, not economic theory, controls the meaning of the term "abusive." Any attempt to write all or part of the statutory text describing the "abusive" standard out of Section 1031 based on economic theory would violate the express command of Congress.

In particular, neoclassical economics and its rational actor assumption does not limit the meaning of the term "abusive." The neoclassical theory of economics posits rational consumers who seek to maximize wealth when making economic decisions. Neoclassical economics is mathematically tractable because it is easy to construct optimization models that maximize wealth.[55] But in the real world, there are situations, particularly in the consumer context, where

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[53] *Id.* § 5531(c)(1).

[54] Section 1022(b)(2) of the Dodd-Frank Act requires the Bureau to conduct impact analyses when it writes rules under the federal consumer financial laws. That impact analysis requirement, however, is entirely distinct and does not provide authority to require an impact or cost-analysis requirement for "abusive" determinations in other contexts, such as supervision or enforcement.

[55] *See, e.g.,* Xavier Gabaix & David I. Laibson, *The seven properties of good models, in* THE FOUNDATIONS OF POSITIVE AND NORMATIVE ECONOMICS: A HANDBOOK, online version at 9-11 (Oxford: Oxford Univ. Press, A.

the rational consumer assumption does not always hold.[56] This insight has been so powerful that at least four Nobel Prizes in economics have gone to theorists in behavioral economics and finance (Daniel Kahneman, Robert Shiller, Peter Diamond, and Richard Thaler).

Nobel Prizes aside, however, the key point is that the statutory text of Section 1031 contemplates an "abusive" power that protects consumers in certain situations who operate at a disadvantage due to behavioral anomalies.[57] To reiterate, in the "abusive" authority, Congress prohibited companies from taking unreasonable advantage of "*a lack of understanding on the part of the consumer* of the material risks, costs, or conditions" of a consumer product or service[58] or of "*the inability of the consumer to*" protect his or her interests "in selecting or using a consumer financial product or service."[59] Similarly, Congress outlawed "materially interfer[ing] with the *ability of a consumer to understand* a term or condition of a consumer financial product or service."[60]

Notably, none of these sections predicates relief on a "reasonable" lack of understanding or "reasonable" ability or lack thereof by consumers. Instead, Congress drafted the statutory text of Sections 1031(d)(1), (d)(2)(A), and (d)(2)(b) to apply to lack of understanding or inability of a consumer, even where it is not objectively rational. In contrast, in the last "abusiveness" prong in Section 1031(d)(2)(C), Congress prohibiting "tak[ing] unreasonable advantage of . . . (C) the *reasonable* reliance by the consumer on a covered person to act in the interests of the consumer."[61] Again, the inclusion of a "reasonable consumer" test in this last prong, but not in the first three prongs, means that Congress specifically decided against limiting (d)(1), (d)(2)(A), and (d)(2)(B) to situations involving rational consumer conduct.

In sum, the express references in Section 1031(d) to "lack of understanding," an "inability" to protect one's interests, and the "ability . . . to understand" on the part of the consumers reflects Congress' recognition that consumers may not always have the cognitive capacity to understand things like legally mandated disclosures or complex terms in consumer contracts. Congress also recognized that these situations are ripe for exploitation by unscrupulous actors. Thus, in the

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Caplin & A. Schotter, eds. 2008), https://dash.harvard.edu/bitstream/handle/1/4481492/Laibson_SevenProperties.pdf?sequence=2&isAllowed=y.

56 *See id.* at 9 (calling on economists to model "the confounding factors that prevent individuals from maximizing [their] normative preferences").

57 Beyond that, Congress included numerous other references to consumer behavior and consumer awareness in the Dodd-Frank Act. Dodd-Frank Act, §§ 1013(b)(1) (directing the CFPB's research office to research, analyze, and report on "consumer awareness, understanding, and use of disclosures, " "consumer awareness and understanding of costs, risks, and benefits of consumer financial products or services," and "consumer behavior with respect to consumer financial products or services . . ."), 1022(c)(2)(B) (when monitoring for risks to consumers, the Bureau may consider "understanding by consumers of the risks of a type of consumer financial product or service"), 1032(c) (requiring the Bureau, when adopting rules mandating consumer disclosures, to "consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services"), 1077(b)(8) (requiring the Director and other officials to issue a report evaluating, *inter alia*, student "borrowers' awareness and understanding about terms and conditions of various financial products"), 1405(b) (stating the objective of mortgage disclosures is to "improve consumer awareness and understanding of transactions involving residential mortgage loans").

58 12 U.S.C. § 5531(d)(2)(A) (emphasis added).

59 *Id.* § 5531(d)(2)(B) (emphasis added).

60 *Id.* § 5531(d)(1) (emphasis added).

61 *Id.* § 5531(d)(2)(C).

"abusive" provision, Congress forbade providers from exploiting those cognitive limitations by "materially interfer[ing]" with a consumer's ability to understand terms or conditions or by "tak[ing] unreasonable advantage" of vulnerable consumers in specific situations.

Neoclassical economics is too limited to carry out the statutory text of Section 1031(d) because, while it values the provision of truthful, material information to consumers, it does not pay attention to their ability to process that information. Accordingly, Congress drafted the "abusive" provision to kick in when the ordinary market interventions prescribed by neoclassical economics such as disclosure do not suffice. As a corollary, it would violate the directive of Congress to limit the meaning of the statutory text by construing that text using a neoclassical welfare methodology or by limiting cases of "abusive" conduct to harms measured by the effect on consumer surplus, total surplus, wealth maximization, or some other economic indicator.

### ii. Economics Sheds Light On Issues Congress Sought To Address Through The "Abusive" Standard

While economic theory does not define the outer parameters of the "abusive" standard, both neoclassical economics *and* behavioral economics inform problems that Congress sought to solve when it added the "abusive" power.

#### 1. Market Failures

Interestingly, the bulk of the CFPB's "abusive" cases to date involve traditional market failures such as information asymmetries and market power that fall squarely within the neoclassical rubric. In this section, I discuss CFPB "abusive" cases that draw on those market failure theories.

##### a. Information Asymmetries

Asymmetries where providers have an informational advantage compared to consumers can arise where providers fail to disclose, hide, or misrepresent terms or conditions of products or services. Information asymmetries commonly arise in "abusive" cases.

We can see this in many of the "abusive" cases brought under subsection 1031(d)(1), which prohibits "materially interfer[ing] with" a consumer's ability to understand a term or condition of a product or service. The CFPB has brought a number of (d)(1) enforcement cases involving information asymmetries. One case alleged aggressive collection actions and misrepresentations that caused consumers to believe they owed repayment of debts when, under state law, they did not.[62] In another (d)(1) enforcement case, the defendants allegedly obscured the true nature of a pension advance as a loan, misrepresented the costs of the loans, and advised consumers that the product was cheaper than a home equity loan or a credit card, when it was not.[63] A third (d)(1)

[62] First Amended Complaint, CFPB v. NDG Financial Corp., et al., Case No. 15cv5211 (CM) (RWL) (S.D.N.Y.).

[63] Complaint for Violations of the Consumer Financial Protection Act and New York Banking and Financial Services Laws, CFPB v. Pension Funding, LLC, et al., Case No. 8:15-cv-1329 (C.D. Cal. Aug. 20, 2015); *cf.*

case involved reported sales pitches that touted longer repayment periods to consumers without explaining that renewing a loan over an extended period would substantially raise the total cost of the transaction.[64] Reportedly hiding the fee for cashing a check constituted another (d)(1) violation.[65] An extreme case of information asymmetries arose where the CFPB charged that a bank secretly opened deposit accounts without the knowledge of or consent by the affected customers at all.[66]

Asymmetric information concerns also informed "abusive" cases brought under subsection 1031(d)(2)(A), which outlaws taking unreasonable advantage of a consumer's lack of understanding of the material risks, costs, or conditions of a product or service. These cases involving information asymmetries under (d)(2)(A) had the added feature of unjust enrichment in the form of taking unreasonable advantage of a consumer. Normally this unjust enrichment takes the form of collecting unwarranted fees or supranormal profits.

Thus, the CFPB brought several (d)(2)(A) enforcement actions where providers allegedly collected on debts without informing consumers that those debts were not collectible under state law.[67] Another group of cases sought sanctions under (d)(2)(A) for allegedly steering consumers to lenders offering less-favorable terms than might otherwise be available to them, contrary to prior representations made to those consumers.[68] In another steering case, the Bureau charged a pension advance company with directing consumers to an adviser who was supposedly independent but whom the company had paid to advise the consumers to enroll for the product.[69] Profiting from enrolling consumers in a pension advance plan that cost more than consumers were told was the central allegation in another CFPB lawsuit under (d)(2)(A).[70] A payment processor that allegedly failed to disclose certain fees on its services to service members faced

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Complaint, CFPB v. RD Legal Funding, LLC, et al., Case No. 1:17-cv-00890 (S.D.N.Y. Feb. 7, 2017) (similar (d)(1) case involving settlement advances)..

64 Consent Order, In re: TMX Finance LLC, File No. 2016-CFPB-0022 (CFPB Sept. 26, 2016).

65 Complaint for Permanent Injunction and Other Relief, CFPB v. All American Check Cashing, Inc., et al., Case No. 3:16cv356WHB-JCG (S.D. Miss. May 11, 2016); *cf.* First Amended Complaint, CFPB v. TCF National Bank, Case No. 17-cv-00166-RHK-KMM (D. Minn. March 1, 2017) (another (d)(1) case where a bank distracted and impeded customers from understanding to understand their legal rights regarding bank overdraft fees).

66 Consent Order, In re: Wells Fargo Bank, N.A., 2016 CFPB 0015 (CFPB Sept. 8, 2016).

67 First Amended Complaint, CFPB v. CashCall, Inc., et al., No. 1:13-cv-13167 (GAO) (D. Mass. Mar. 21, 2014); Consent Order, In re: Colfax Capital Corporation, et al., File No. 2014-CFPB-0009 (CFPB July 29, 2014); First Amended Complaint, CFPB v. NDG Financial Corp., et al., Case No. 15cv5211 (CM) (RWL) (S.D.N.Y.); Complaint for Permanent Injunction and Other Relief, CFPB v. Golden Valley Lending, Inc., et al., Case No. 17-cv-3155 (N.D. Ill. Apr. 27, 2017); First Amended Complaint, CFPB v. Think Finance, LLC, et al., Case No. 4:17-cv-00127-BMM (D. Montana March 28, 2018); *cf.* Consent Order, In re: Zero Parallel, LLC, File No. 2017-CFPB-0017 (CFPB Sept. 6, 2017) ((d)(2)(A) claim against a lead aggregator for allegedly steering customers toward lenders whose loans were void under state law).

68 Complaint for Violations of the Consumer Financial Protection Act of 2010, CFPB v. D and D Marketing, Inc., et al., Case No. 2:15-cv-9692 (C.D. Cal.). Accord, Complaint for Violations of the Consumer Financial Protection Act of 2010, CFPB v. Fomichev, Case No. 2:16-cv-2724 (C.D. Cal. Apr. 21, 2016); Amended Complaint for Violations of the Consumer Financial Protection Act of 2010, CFPB v. Gasparyan, Case No. 2:16-cv-2725-PSG(Ex) (C.D. Cal. July 8, 2016)..

69 Complaint, CFPB v. Access Funding, LLC. et al., Case 1:15-cv-03759-JFM (D. Md. Nov. 21, 2016).

70 Complaint for Violations of the Consumer Financial Protection Act and New York Banking and Financial Services Laws, CFPB v. Pension Funding, LLC, et al., Case No. 8:15-cv-1329 (C.D. Cal. Aug. 20, 2015); *cf.* CFPB v. RD Legal Funding, LLC, et al., Case No. 1:17-cv-00890 (S.D.N.Y. Feb. 7, 2017) (similar facts involving a settlement advance product).

enforcement under (d)(2)(A).[71] In a final (d)(2)(A) case, the Bureau sought relief where the promoter of a debt relief service was said to know, unlike the consumers, that they were unlikely to complete the program successfully.[72]

Subsection 1031(d)(2)(B) proscribes taking unreasonable advantage of a consumer's inability to protect his or her interests of the consumer in selecting or using a consumer financial product or service. Here too, information asymmetry concerns figure prominently. In one (d)(2)(B) case, a for-profit school allegedly pressured its students into costly refinance loans after initially making them zero-interest private loans, knowing that most of those students could not repay the zero-interest loans.[73] A separate case under that subsection charged a lender with suing service members in distant fora to collect debts, based on venue selection clauses in the loan contracts that the customers had little opportunity to read.[74] In a third case, the Bureau took action under (d)(2)(B) against an open-end lender who allegedly took affirmative steps to make it difficult for consumers to understand how it allocated their payments among balances with promotional interest rates and higher-interest balances.[75] The CFPB brought another (d)(2)(B) case on behalf of service members who could not avoid fees on their balances with a payment processor because they reportedly had never been informed of those fees.[76] An auto lender sued under this provision allegedly took unreasonable advantage of its customers, *inter alia*, by advertising an inaccurately low APR and failing to post sticker prices or otherwise reveal the asking prices of cars offered to consumers until after consumers indicated that they would purchase a car.[77] The Bureau also treated the act of opening bank accounts without customers' permission or knowledge as a violation of (d)(2)(B).[78]

Finally, we can see asymmetric information scenarios in CFPB "abusive" case brought under subsection 1031(d)(2)(C), which forbids taking unreasonable advantage of the reasonable reliance by a consumer on a covered person to act in the consumer's interests. Detrimental reliance by consumers has arisen in several situations involving asymmetric information. For instance, collecting fees from consumers who relied on a provider's promises of debt relief but whom the provider knew were unlikely to successfully complete a debt relief program formed

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71 Consent Order, In re: Fort Knox Nat'l Co., File No. 2015-CFPB-0008 (CFPB Apr. 20, 2015).

72 Stipulated Final Judgment and Order, CFPB v. American Debt Settlement Solutions, Inc. et al., Case No. 9:13-ev-80548-DMM (S.D. Fla., June 6, 2013); *cf.* Complaint, CFPB v. Nationwide Biweekly Administration, Inc., et al., Case No. 15-cv-02106-RS (N.D. Cal.) (a (d)(2)(A) case where consumers were likely to drop out of a high-fee biweekly mortgage payment program before they saved any money); Complaint, CFPB v. Freedom Debt Relief, LLC, et al., Case No. 3:17-cv-6484 (N.D. Cal. Nov. 8, 2017) (a (d)(2)(A) case where a debt settlement provider allegedly charged customers money for its service without telling them they would have to negotiate a settlement of their debts themselves).

73 Complaint for Injunctive Relief and Damages, CFPB v. ITT Educational Services, Inc., Case No. 1:14-cv-292 (N.D. Indiana Feb. 26, 2014); *cf.* Complaint, CFPB v. Aequitas Capital Management Inc., et al., Case No. 17-1278 (D. Ore. Aug. 17, 2017) (suing a secondary market buyer that funded private loans to a for-profit school's students despite knowing that most of the student borrowers would default on those loans).

74 Complaint for Injunctive Relief and Damages, CFPB v. Freedom Stores, Inc., et al., Civil Action No. 2:14cv643 ANA/TEM (E.D. Va. Dec. 18, 2014).

75 Complaint, CFPB v. PayPal, Inc., Civil Action No. 1:15-cv-01426 (D. Md. May 19, 2015).

76 Consent Order, In re: Fort Knox Nat'l Co., File No. 2015-CFPB-0008 (CFPB Apr. 20, 2015).

77 Consent Order, In re: Y King S Corp., File No. 2016-CFPB-0001 (CFPB Jan. 21, 2016).

78 Consent Order, In re: Wells Fargo Bank, N.A., 2016 CFPB 0015 (CFPB Sept. 8, 2016).

the basis of charges under (d)(2)(C).[79] Similarly, a for-profit school that allegedly lulled its students into relying on its staff for what they thought was impartial financial advice, but then pressured those students into expensive private student loans, was the subject of enforcement under this provision.[80] In another student loan case, a debt relief service reportedly created the illusion of expertise to induce consumers to reasonably rely on the company to act in their interests in selecting student loan debt-relief plans, while collecting fees for plans for which the student loans in question were not eligible.[81] In a student loan servicing case, federal student loan borrowers reasonably relied on the servicer to act in their interests by helping borrowers experiencing financial hardship or distress to select a suitable alternative repayment plan; the servicer, however, was charged with steering borrowers experiencing long-term financial hardship to forbearance rather than adequately advising them about income-driven repayment plans that would have been more financially beneficial to those borrowers.[82]

#### b. Market Power Through Economic Coercion

Undermining consumer choice through economic coercion is another theme in CFPB "abusive" cases. This exercise of coercion represents a traditional example of an abuse of market power.

The CFPB has addressed economic coercion through three of the four prongs of the "abusive" power. For instance, the CFPB sued under (d)(1) where the defendants allegedly implicitly threatened criminal prosecution if consumers stopped making payments.[83] In another (d)(1) case, the respondent allegedly used coercive debt collection tactics that exposed embarrassing information about customers to their families, friends, and employers.[84]

The CFPB has also used subsection 1031(d)(2)(A) to punish economic coercion against consumers. The Bureau sought enforcement under (d)(2)(A) where a payday lender and check casher exercised its set-off rights against checks that consumers presented to be cashed to collect prior debts owed by those consumer. An element of coercion arose because the respondent's employees allegedly physically kept the checks away from the consumers until both transactions (the check-cashing transaction and the debt-payment transaction) were complete. [85]

Subsection 1031(d)(2)(B) has also proven helpful in tackling instances of economic coercion. The CFPB instituted suit under (d)(2)(B) against a for-profit school that allegedly pressured its students into refinancing their zero-interest loans from that school into high-interest, high-fee

[79] Stipulated Final Judgment and Order, CFPB v. American Debt Settlement Solutions, Inc. et al., Case No. 9:13-ev-80548-DMM (S.D. Fla., June 6, 2013).
[80] Complaint for Injunctive Relief and Damages, CFPB v. ITT Educational Services, Inc., Case No. 1:14-cv-292 (N.D. Indiana Feb. 26, 2014).
[81] Complaint for Permanent Injunction, Civil Money Penalties, and Other Relief, CFPB v. College Education Services LLC, et al., Civil Action No. 8:14cv3078T36EAS (M.D. Fla. Dec. 11, 2014)
[82] Complaint for Permanent Injunction and Other Relief, CFPB v. Navient Corp., Case 3:17-cv-00101-RDM (M.D. Pa. Jan. 18, 2017).
[83] Complaint for Violations of the Consumer Financial Protection Act and New York Banking and Financial Services Laws, CFPB v. Pension Funding, LLC, et al., Case No. 8:15-cv-1329 (C.D. Cal. Aug. 20, 2015).
[84] Consent Order, In re: TMX Finance LLC, File No. 2016-CFPB-0022 (CFPB Sept. 26, 2016).
[85] Consent Order, In re: Cash Express, LLC, File No. 2018-BCFP-0007 (CFPB Oct. 24, 2018).

private student loans or else face expulsion from school.[86] Also under this subsection, the Bureau sued a payday lender for reportedly using harassment and false threats of lawsuits or criminal prosecution to pressure overdue borrowers into taking out additional loans they could not afford.[87] The CFPB similarly took action against an auto lender who lent to service members under (d)(2)(B) for assertedly contacting or threatening to contact their commanding officers when the borrowers had difficulty paying their car loans.[88] In a fourth case under this provision, a company selling high-interest refund anticipation loans (RALs) allegedly deposited customers' tax refund checks into accounts that it controlled and then made additional RALs payable from those refunds.[89] A check casher who coerced customers into cashing their checks with it by reportedly, among other things, retaining custody of their checks to prevent them from leaving, was sued under (d)(2)(B).[90]

### 2. Cognitive Anomalies

Meanwhile, behavioral economics illuminates situations outside of the neoclassical framework where Congress meant for the "abusive" power to apply. When CFPB enforcement cases address problems identified by behavioral economics, generally those cases involve information asymmetries or other neoclassical market failures as well.

#### a. Framing Effects

Framing effects involve ways of presenting sales information and sales pitches that focus consumers' attention on the benefits of a product and distract their attention away from the disadvantages. The CFPB took enforcement action under (d)(1) where a company's sales materials, among other things, effectively used the phenomenon of framing effects to focus consumers' attention on minimizing monthly loan payments instead of on the total cost of a longer repayment period.[91] In a similar case, a provider allegedly designed its account-opening process to interfere with customers' ability to read the legally mandated opt-in disclosure for overdraft fees.[92]

#### b. Impaired Cognition Due To Medical Conditions Or Advanced Age

Finally, in a series of cases involving advances on anticipated pension or tort settlement payments, the CFPB brought enforcement actions under (d)(1), (d)(2)(A), and/or (d)(2)(B) for

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86 Complaint for Injunctive Relief and Damages, CFPB v. ITT Educational Services, Inc., Case No. 1:14-cv-292 (N.D. Indiana Feb. 26, 2014).

87 Consent Order, In re Ace Cash Express, Inc., File No. 2014-CFPB-0008 (CFPB July 10, 2014).

88 Consent Order, In re Security Nat'l Automotive Acceptance Co., LLC, File No. 2015-CFPB-0027 (CFPB Oct. 28, 2015).

89 Complaint, CFPB, et al. v. S/W Tax Loans, Inc., et al [Navajo Nation], Case 1:15-cv-00299 (D.N.M. Apr. 14, 2015).

90 Complaint for Permanent Injunction and Other Relief, CFPB v. All American Check Cashing, Inc., et al., Case No. 3:16cv356WHB-JCG (S.D. Miss. May 11, 2016).

91 Consent Order, In re: TMX Finance LLC, File No. 2016-CFPB-0022 (CFPB Sept. 26, 2016).

92 First Amended Complaint, CFPB v. TCF National Bank, Case No. 17-cv-00166-RHK-KMM (D. Minn. March 1, 2017).

enticing customers who had or were more likely to have impaired cognitive functioning due to brain trauma, lead poisoning, or advanced age into costly financial products.[93]

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To summarize, the meaning of the CFPB's "abusive" power is not defined according to an economic theory, but rather according to its statutory text. Economic theory, however, can shed light on the economic problems that the "abusive" power was designed to address.

## IV. Conclusion

Understandably, when industry trade associations raise concerns about compliance with legal standards, those concerns should be examined. Fortunately, as I have demonstrated, the CFPB has the data and analytical prowess to lay those concerns to rest. There is no empirical evidence that companies face any real liability exposure from the "abusive" test. Nor have markets suffered any adverse effect. If companies want more guidance, the CFPB can ramp that up through other means short of a rule, including no-action letters, guidances, the *Supervisory Highlights* publication, and the examination handbook.

There is concern that efforts to promulgate a general definition of the term "abusive" via rule are partly meant to scale back the provisions that Congress enacted in subsection 1031(d) and thereby neuter the "abusive" power. For the reasons I have explained, any such rule would open the Bureau up to legal challenge. The wiser course of action would be to make better use the Bureau's limited capital by giving companies and other market actors greater direction about how to comply through other regulatory techniques than a rule.

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[93] Complaint for Violations of the Consumer Financial Protection Act and New York Banking and Financial Services Laws, CFPB v. Pension Funding, LLC, et al., Case No. 8:15-cv-1329 (C.D. Cal. Aug. 20, 2015); Complaint, CFPB v. Access Funding, LLC. et al., Case 1:15-cv-03759-JFM (D. Md. Nov. 21, 2016); Complaint, CFPB v. RD Legal Funding, LLC, et al., Case No. 1:17-cv-00890 (S.D.N.Y. Feb. 7, 2017) (alleging that a tort settlement advance product targeted ill 9/11 responders).