SCOURING MUDDIED WATERS: TOWARDS CLARIFYING THE CFPB'S "ABUSIVE" PRACTICES

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While this Article was pending publication, several events unfolded altering the landscape of the abusive power. As a preliminary note, during the pendency of publication several dispositions changed—either by court order or agreement between the parties.

Next, in June 2019, Director Kraninger kicked off the Bureau's symposium series by holding an open forum over the abusive power. The symposium consisted of two panels: one focusing on policy, composed of law professors, and one focusing on practical application, comprised of practicing attorneys in private and government practice. Both panels were intellectually stimulating and presented diverging views. In the policy panel, major disagreement arose in two areas: (1) whether the abusive prong required consumer harm and (2) whether abusive contains a scienter requirement. Further, the practical panel debated on the issue of whether the abusive power needs clarification right now. The panel did not come to an agreement, however, it made one thing clear: there is widespread disagreement on whether rulemaking is necessary to clarify the abusive power. This Article will address that disagreement.

Finally, on September 7, 2019, Kraninger brought her first abusive (with deceptive) action against Certified Forensic Loan Auditors, LLC. This case shows Kraninger's willingness to use the abusive power. This action, though, leaves open the question of whether she should, as a practical matter, continue to allow abusive allegations without further clarification. Thus, the era of regulation by

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enforcement continues.

INTRODUCTION

The power of the Consumer Financial Protection Bureau (the "CFPB" or "Bureau") to act against "abusive" conduct is infinite, yet the meaning of the word abusive is vague. Abusive is a catchall term that the Bureau uses to impose penalties upon unsuspecting businesses and individuals in the financial industry. The only method of discerning whether conduct is abusive is through an analysis of prior enforcement actions, which are rare. There is no guidance or rule—businesses must determine for themselves whether their conduct is abusive. If they misjudge or rectify their actions too late, they may face the thrust of the CFPB and their massive penalties. This era of regulation by enforcement must end.

On October 15, 2018, then-acting CFPB Director Mick Mulvaney ("Mulvaney") announced that the Bureau's era of "regulation by enforcement" concerning the abusive power "is done."[1] Mulvaney, though, did little to clarify the power—he failed to initiate rulemaking, or even guidance, on the topic. Before leaving, Mulvaney announced his intent to request information regarding whether the CFPB should initiate rulemaking to clarify the power—which is attracting both support and fierce opposition from businesses and individuals.[2]

The means to bringing clarity is unclear. Mulvaney, himself, even commented: "I'm not sure we know how to define abusive."[3] His comments are typical. While some legal scholars and the financial community support clarifying the abusive power, many remain unsure whether rulemaking is necessary and, if it is considered necessary, those individuals continue to disagree on the scope of a potential rule. This Article intends to delve into the various views regarding

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[1] *See* Richard J. Andreano, Jr., *Regulation by Enforcement is Dead*, CONSUMER FIN. MONITOR (Oct. 15, 2018), https://www.consumerfinancemonitor.com/2018/10/15/regulation-by-enforcement-is-dead; Katie Grzechnik Neill, *Mulvaney: BCGP Intends to Define "Abusive" of UDAAP*, INSIDE ARM (Oct. 16, 2018, 12:00:00 PM), https://www.insidearm.com/news/00044416-mulvaney-bcfp-define-udaaps-abusive-new-r/; Mike Sorohan, *Mulvaney: Regulation by Enforcement is Done*, MORTGAGE BANKERS ASS'N NEWSLINK (Oct. 16, 2018), https://www.mba.org/mba-newslinks/2018/october/mba-newslink-tuesdayam-10-16-18/mulvaney-regulation-by-enforcement-is-done.

[2] *Infra* Part IV.

[3] Sorohan, *supra* note 1.

rulemaking and the abusive power. First, Part II will present the problem. Next, Part III Article will categorize the Bureau's abusive enforcement actions and delve into the scope of the power. Thereafter, Part IV will lay out the diverging views on initiating rulemaking to clarify the power. Finally, Part V and VI will provide recommendations on whether the Bureau should initiate rulemaking and, if so, the necessary contents of such a rule.

BACKGROUND

In response to the financial crisis of the late-2000s, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") establishing the Bureau of Consumer Financial Protection "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[4] To accomplish such a task, the Bureau derives its power to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial law" from (1) the Bureau's authority under the Consumer Financial Protection Act and (2) preexisting laws transferred to the Bureau such as the Truth in Lending Act, the Fair Housing Act, and the Equal Credit Opportunity Act.[5]

A. Unfair, Deceptive, and Abusive Acts or Practices

Among the powers granted to the Bureau are the powers to act to prevent and punish entities engaged in "unfair, deceptive, or abusive acts or practices" ("UDAAP"), thereby subjecting a business or individual to civil penalties.[6] Before the CFPB's creation, the Federal Trade Commission ("FTC") possessed authority to prevent and punish unfair and deceptive practices.[7] Due to a statutory definition and an extensive enforcement and adjudicative history, individuals and businesses are generally well aware of the practices and conduct these terms entail.[8] Under Dodd-Frank, the Bureau has the power to declare

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[4] *See* 12 U.S.C. §§ 5491(a), 5511(a) (2010).

[5] 12 U.S.C. § 5491(a); *see also* MICHAEL S. BARR ET AL., FINANCIAL REGULATION: LAW AND POLICY 581 (Saul Levmore et al., eds., 2nd ed. 2018).

[6] 12 U.S.C. § 5531 (2010).

[7] Joshua L. Roquemore, *The CFPB's Ambiguous "Abusive" Standard*, 22 N.C. BANKING INST. 191, 191 (2018).

[8] *Id.*; *see also* 15 U.S.C. § 45(a) (2016) (defining unfair and deceptive under the

a practice unfair when:

> (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.[9]

Accordingly, the unfair standard has three parts: (1) the consumer must sustain a substantial economic injury, (2) the consumer cannot reasonably avoid the injury, and (3) countervailing benefits to the consumer or competition must not outweigh the injury.[10] Further, while deceptive does not possess a statutory definition, there is extensive enforcement history and CFPB guidance to determine the types of acts and practices under the prohibition.[11] An act or practice is deceptive when:

> (1) *The representation, omission, act, or practice misleads or is likely to mislead the consumer*; (2) The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) The misleading representation, omission, act, or practice is material.[12]

B. The Abusive Power

Unlike the other UDAAP powers, the abusive prong does not possess a lengthy history of enforcement due to its inclusion in 2010 through Dodd-Frank. Under the Consumer Financial Protection Act ("CFPA"), or Title X of Dodd-Frank, Congress provided a vague

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FTC and supplying examples of conduct that it entails); 12 U.S.C. § 5531(c) (2010) (defining unfair under Dodd-Frank).

[9] 12 U.S.C. § 5531(c).

[10] Examples of unfair conduct includes refusing to release a lien after a consumer makes final payment on a mortgage, dishonoring credit card convenience checks without notice, and processing payments for companies engaged in fraudulent activities. *See* CONSUMER FIN. PROT. BUREAU, *CFPB Consumer Laws and Regulations: Unfair, Deceptive, or Abusive Acts or Practices* (October 2012), https://files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf.

[11] Examples of deceptive conduct include providing inadequate disclosure of material lease terms in television advertising and misrepresenting loan terms. *See id*.

[12] *Id*. (emphasis added). The author highlights subsection (1) due to its importance later in the paper. This portion is overlapping with many actions under the abusive power. *See infra* Part III.

statutory definition of conduct that constitutes an abusive act or practice.[13] Dodd-Frank states:

> 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—(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.[14]

This statutory definition "is broad and arguably subjective in nature."[15] As a result, the abusive standard is the subject of much "hand wringing in the financial services industry and excitement amongst consumer advocates."[16] For example, consumer advocates seek to utilize this broad power to "tap the growing body of behavioral economic analysis of consumer contracts to prevent harmful practices not effectively addressed by the deceptive-and-unfair practices prohibition."[17] In contrast, those in the financial services industry worry that without clarification the standard will become "infinitely flexible and therefore meaningless," thereby granting the Bureau unfettered power to over-regulate the industry.[18] Thus, while consumer advocates urge the Bureau to refrain from rulemaking, businesses in the financial services industry urge the Bureau to act and narrow the abusive power's scope or, at a minimum, define its contours through

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[13] 12 U.S.C. § 5531(d) (2015). This author addresses this vagueness throughout the enforcement section. *See infra* Part III.

[14] 12 U.S.C. § 5531(d) (2015). Further, Dodd-Frank defines "covered person" as "(A) any person that engages in offering or providing a consumer financial product or service; and (B)any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person." *See* 12 U.S.C. § 5481(6) (2010). In this Article, covered person is synonymous with covered entity.

[15] Laurie A. Lucas et al., *Abusive Acts of Practices under the CFPA's UDAAP Prohibition*, 71 BUS. LAW. 749, 750 (2016).

[16] Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TULANE L. REV. 1057, 1070 (2016).

[17] *Id.*

[18] *Id.*

rulemaking.

To date, the Bureau has not initiated rulemaking, but they have brought thirty (30)[19] actions under this power.[20] While many of these enforcement actions are helpful in defining the power, commentators criticize the Bureau's regulation by enforcement practices due to the inability of covered entities to possess prior knowledge of conduct that the CFPB seeks to prohibit.[21] These actions remain largely confusing because of the minimal depth of discussion of the standard in many cases.[22] Further, the abusive standard is particularly confusing because twenty-eight (28) of the thirty (30) abusive actions involve the abusive standard in conjunction with either the unfair or the deceptive standards, thereby, leaving many individuals to question the relevancy of the abusive power and whether the two stand-alone actions should also represent claims under the unfair and deceptive power.[23] Accordingly, to understand the current scope and confusion exhibited by the abusive power, the necessity of rulemaking, and the extent of such a rule, an analysis of current agency and court precedent follows.

THE CFPB'S ENFORCEMENT PRACTICES

The Bureau acts under their abusive power if they possess the power to declare the practice abusive under one of its four statutory definitions codified by Dodd-Frank. While many violations satisfy more than one of the four statutory definitions, general themes and conduct appear around each category with distinct features and groupings. The primary issue in rulemaking, though, is whether rulemaking would be necessary to further clarify, limit, or expand one of the groupings or features within a statutorily defined category because the majority of these actions clearly overlap with the prohibition on unfair and deceptive acts or practices.

A. Category One: Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial

[19] The separate enforcement actions against D&D Marketing, Inc. d/b/a T3Leads, Davit Gasparyan, and Dmitry Fomichev are combined due to all three enforcement actions arising from T3Leads deceptive and abusive marketing activity. Further, this number includes actions up to Certified Forensic Loan Auditors, LLC in September 2019.

[20] CONSUMER FIN. PROT. BUREAU, Enforcement Actions, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/.

[21] *Infra* Part IV.

[22] *Id.*

[23] *Id.*

product or service

Under the first statutory category, the Bureau may declare an act or practice abusive if it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service."[24] This category generally revolves around activities that are misleading and represents practices that involve one or more of the following three groups: (i) misrepresentations, (ii) withholding information, and (iii) deliberately designing a process to prevent the consumer from understanding a term or condition of their financial product.[25]

1. Misrepresentations

The first group under this category involves practices that materially interfere with the consumer's ability to understand a term or condition due to a company's misrepresentations.[26] In *NDG Financial Corp*., the Bureau alleged that through its business practices NDG Financial Corp. ("NDG") and its subsidiaries distributed payday loans over the internet to consumers in all fifty states with interest rates above the amount permitted under state usury laws.[27] When consumers complained to NDG, NDG falsely informed them that state usury laws did not apply to the consumer's loan because its subsidiary, whom held NDG's consumer accounts, were organized under the laws of the Republic of Malta.[28] The Bureau alleged that NDG's conduct of "[f]alsely representing to consumers that the loans they sought (1) are valid and must be repaid and (2) are not covered by state or federal law

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[24] 12 U.S.C. § 5531(d)(1) (2010).

[25] Susan Manship Seaman, *"Abusive" Acts or Practices: A Different Approach*, 71 CONSUMER FIN. L.Q. REP. 288, 289 (2017)

[26] *Id*. at 290; *See* Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729 (S.D.N.Y. 2018) (holding "[r]epresentations that a transaction is a sale when it does not, in fact, transfer validly any rights of ownership from the consumer to the RD Entities are materially misleading because such representations are false," therefore, the act or practice is abusive); complaint, *Consumer Fin. Prot. Bureau v. NDG Fin. Corp*., No. 1:15-cv-05211-CM, 2015 WL 4638325 (S.D.N.Y. July 31, 2015); complaint, *Consumer Fin. Prot. Bureau v. Pension Funding, LLC.*, No. 8:15-cv-01329, 2015 WL 4940079 (C.D. Cal. Aug. 20, 2015) (alleging the defendant's conduct of falsely representing to consumers that loans were actually "pension advances" and lacked an interest rate or had a substantially lower interest rate was abusive when in fact the product was a loan with a high interest rate).

[27] Complaint at ¶¶ 120–22, 130–43, *NDG Fin. Corp*., No. 1:15-cv-05211-CM, 2015 WL 4638325 (S.D.N.Y. 2015).

[28] *Id.* at ¶ 89.

'materially interferes' with consumers' ability to understand the terms and conditions of their loans."[29] Accordingly, NDG took affirmative action to prevent consumers from possessing the requisite knowledge to understand their product and this misrepresentation of the product's terms is abusive.[30]

2. Withholding Information

The second group under this category involve practices whereby the company withholds a *crucial* term or condition involving the consumer's product, which prevents the consumer from making decisions regarding their product or service[31] In *All American Check Cashing, Inc.* the CFPB took action against a covered entity due to "a policy to never tell the consumer the fee [of a check cashing service]—even when the consumer asks," and for the its continual conduct of blocking consumer access to view or discover the fee, and for making "misleading statements to consumers about their ability to cancel" the transaction.[32] This deliberate conduct to avoid disclosure of a term or condition prevented the consumer from being informed about the terms of their product or service; therefore, this practice is abusive.

3. Abusive Process

The final group under this category involves practices by covered persons whereby a business or individual deliberately designs a process, or instructs its agents, to interfere with the consumer's ability to acquire information.[33] For example, under the "Opt-In Rule"

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[29] Decision and Order Denying Defendants' Motion to Dismiss, *NDG Fin. Corp*., No. 1:15-cv-05211-CM, 2016 WL 7188792, at *15 (S.D.N.Y. Dec. 2, 2016).

[30] Complaint, *NDG Fin. Corp.,* No. 1:15-cv-05211-CM, 2015 WL 4638325 (also alleging claims of deceptive and unfair practices).

[31] Seaman, *supra* note 26 at 290; *see also, e.g., Wells Fargo Bank, N.A., Consumer Fin. Prot. Bureau,* No. 2016-CFPB-0015 (Sept. 8, 2016) (alleging the defendant's acts of opening credit card accounts using consumers' information without their knowledge or consent materially interfered with the ability to understand the terms or condition of a consumer financial product and, therefore, was abusive); complaint at ¶ 83, *Pension Funding, LLC*., No. 8:15-cv-01329, 2015 WL 4940079 (alleging the defendant's conduct was abusive by failing to disclose and misrepresenting the high interest rates associated with their loans).

[32] Complaint at ¶ 67, Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., No. 3:16-cv-00356-WHB-JCG (S.D. Miss. May 11, 2016).

[33] *See* Seaman, *supra* note 26, at 290; s*ee also, e.g., TMX Finance, LLC.*, CFPB No. 2016-CFPB-0022, at ¶ 29 (Sept. 26, 2016) (alleging TMX Finance's conduct materially interfered with the consumer's ability to understand a term because the

it is unlawful for a bank to charge overdraft fees on ATM and one-time debit card transactions unless the account-holder previously consented to overdraft coverage for those transactions.[34] Overdraft fees are essential to many banks as a source of revenue.[35] In *TCF National Bank*, the defendant-bank had an abnormally high opt-in rate—nearly triple that of other banks.[36] To achieve this, the bank developed a "pitch that would maximize" opt-ins by forming a focus group to study the most effective approach to obtain consumer opt-ins.[37] The pitch, the CFPB alleges, was a short statement presented after certain mandatory provisions, which was effective because it led the consumer to believe the opt-in provision was mandatory.[38] Essentially, the pitch characterized "opting in as a choice to allow the Bank to provide a benefit" while remaining "silent as to the attendant risks and costs."[39] Additionally, the Bureau alleged that the bank coached its employees to overcome consumer objections by presenting a hypothetical to the consumer detailing a scenario whereby the consumer's transaction would be publicly declined at a store if they did not opt-in; therefore, the bank sought to elicit an emotional response, through potential public shaming, forcing the consumer to accept the provision.[40] The CFPB alleged that the entire process used by the defendant-bank materially interfered with the consumer's ability to understand a crucial term of their financial product and, therefore, their conduct was abusive.[41]

Interestingly*, every* CFPB action based on misrepresentations and withholding information overlaps with one or more other

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company trained its employees to use a sale pitch that failed to provide the total cost of a consumer product if the consumer paid over an extended period by including vast quantities of irrelevant material as to distract the consumer from the total cost of the product and, thereby, harming the consumer). *Compare id.* (alleging deceptive and abusive practices) *with Bridgepoint Education, Inc.*, CFPB No. 2016-CFPB-0016 (Sept. 12, 2016) (alleging only deceptive practices).

[34] Complaint at ¶ 17, *Consumer Fin. Prot. Bureau v. TCF Nat'l Bank*, No. 0:17-cv-00166 (D. Minn. Jan. 19, 2017).

[35] *Id.* at ¶ 27 (emphasizing that overdraft fees are so critical to a bank's revenue that TCF's CEO even named his boat the "***Overdraft***").

[36] *Id.* at ¶ 31.

[37] *Id.* at ¶¶ 49–57.

[38] *Id.* at ¶¶ 67–73.

[39] *Id.* at ¶ 74.

[40] *Id.* at ¶ 85.

[41] *See generally* Eric Mogilnicki & D. Jean Veta, *Bloomberg Law Insights: Defining 'Abusive' Acts and Practices,* COVINGTON (2017), https://www.cov.com-/media/files/corporate/publications/2017/02/defining_abusive_acts_and_practices.pdf.

statutorily defined abusive category. In contrast, the Bureau has not brought claims of an abusive process under any other defined category. This third group represents the only clear example of practices that do not overlap with the other abusive categories. This group, though, still may overlap with the prohibition on unfair or deceptive acts or practices.

Additionally, every action in this first category overlaps with either the unfair or deceptive prongs. For example, misrepresentations and withholding information clearly fall within the scope of the prohibition on deceptive practices per guidance provided by the CFPB because these actions mislead the public.[42] This gives rise to disagreement as to whether category one abusive actions represent an expansion of the other UDAAP prohibitions by simply allowing the Bureau to add a second claim to its allegations. Similarly, this raises the issue of whether category one abusive actions are merely repetitive of the deceptive power. In either scenario, the scope of the abusive power under category one remains indiscernible from the deceptive power.

B. Category Two: Takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service

Under the second defined category, the CFPB may declare an act or practice abusive if it "takes unreasonable advantage of—a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."[43] This category is the most frequently used prong of the abusive standard and represents a wide range of conduct and industries; therefore, the category is difficult to classify into succinct groups.[44] Actions under this category, though, possess two features.

1. Information Asymmetry

The first feature is that the covered person possesses vastly greater knowledge on a transaction or product than the consumer and, as a result, the consumer does not understand the product or service. In most scenarios, a business will possess greater knowledge of their own product than the average consumer; however, an abusive practice arises where the covered entity possesses greater knowledge, or the

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[42] *Supra* note 10.
[43] 12 U.S.C. § 5531(d)(2)(A) (2010).
[44] Seaman, *supra* note 26, at 291.

consumer possess significantly less knowledge, as a result of the covered entity's (1) misrepresentations, (2) knowledge of state law implications, or (3) omissions.[45] Although similar to the first category, information asymmetry under this category relates to the consumer's prior insufficient knowledge of the implications or effects of the consumer's product as opposed to the first category's ability of the consumer to *understand* a term or condition within the contract or product itself.

First, abusive conduct may arise from information asymmetries due to misrepresentations as to the *cost* of a businesses' product or service, thereby, preventing the consumer from understanding the risks involved.[46] Costs may be money, time, or otherwise. In 2013, the CFPB brought its *first* allegation of abuse against American Debt Settlement Solutions, Inc. ("ADSS"), a debt relief service that helps consumers "renegotiate, settle, reduce or otherwise alter the terms of at least one debt."[47] The Bureau alleged that ADSS enrolled its consumers in its programs for twenty-four (24) to forty-eight (48) months in exchange for an enrollment fee—typically, fifteen percent (15%) of the consumers' enrolled debts that were due within three (3) to six (6) months of enrollment—plus a monthly service fee—typically, ninety-nine dollars ($99).[48] In its welcome package, ADSS represented to consumers that the "first settlement [of debts] could be in 90 days or as much as six months."[49] In reality, during the first three to six months ADSS did not settle a vast majority of the consumer's

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[45] *Id.*; *see, e.g.*, *Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols.*, No. 9:13-cv-80548-DMM, 2013 WL 12094225 (S.D. Fla. June 7, 2013).

[46] *See* complaint at ¶¶ 12, 80, *Bureau of Consumer Fin. Prot. v. Certified Forensic Loan Auditors, LLC*, No. 2:19-cv-07722 (C.D. Cal. Sept. 6, 2019) (alleging that the defendant "misrepresented the effectiveness of" their audits that would supposedly "help consumers avoid foreclosures or negotiate loan modifications" in an effort to convince those consumers to purchase their services); complaint, *Consumer Fin. Prot. Bureau v. D&D Mktg., Inc.*, No. 2:15-cv-09692, 2015 WL 9268745 (C.D. Cal. Dec. 17, 2015) (alleging that T3Leads failure to correct a misrepresentation that it knew or should have known existed resulted in harm to the consumer and was abusive); complaint at ¶¶ 57–63, *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, No. 3:15-cv-02106, 2015 WL 2168878 (N.D. Cal. May 11, 2015) (alleging that the defendant misrepresented their product as money saving because consumers were unlikely to understand that during the first several years of enrollment they will actually pay more in fees to defendant than they will save in those years).

[47] Complaint at ¶¶ 6–7, *Am. Debt Settlement Sols.*, No. 9:13-cv-80548-DMM (S.D. Fla. May 30, 2013).

[48] *Id.* at ¶¶ 12–13.

[49] *Id.* at ¶ 24.

debts until the distressed consumer paid their enrollment fees.[50] Meanwhile, ADSS continued to charge the consumers monthly service charges. This conduct served to only compound the consumer's debt problems by adding additional ADSS debt to the consumer's prior liabilities. The CFPB alleged that this practice took "unreasonable advantage of consumers' lack of understanding of how long it would take ADSS to settle their debts and therefore how much money they would spend before realizing any benefits from enrolling."[51] Thus, ADSS' conduct was abusive because they misrepresented their program's benefits by taking unreasonable advantage of the consumer's lack of understanding of the costs and time required to settle or renegotiate a consumer's debts.

Further, information asymmetries may arise from entities who take advantage of a consumer's lack of understanding of state lending or usury laws.[52] In *Colfax Capital Corp.*, the CFPB alleged that the covered entity sent billing notices for, and demanded payments on, financing agreements voided by state law due to them exceeding usury limits or the lender failing to have proper licensing requirements. The entity informed consumers, expressly or impliedly, that "the entire loan balances were owed to them, that they were legally authorized to collect the associated payments, and that the consumers were legally obligated to pay."[53] The CFPB stated that, in general, consumers do not know or understand the impact licensing and usury laws have on their loans or other agreements.[54] Thus, the CFPB declared that by taking advantage of the consumer's lack of understanding of these laws, with full knowledge that the law voided the loans, the entity engaged in an abusive practice.[55]

Similarly, the Bureau brought one of its two stand-alone

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[50] *Id.* at ¶ 60.

[51] *Id.* at ¶ 61.

[52] In numerous instances, the CFPB has alleged a practice was abusive because the entity tried to collect uncollectable loans that violated state usury limits or licensing requirements to which the entity was prevented by law from collecting. *See, e.g.*, *Colfax Capital Corp.*, CFPB No. 2014-CFPB-0009, at ¶ 39 (July 29, 2014), complaint, *Consumer Fin. Prot. Bureau v. Think Fin., LLC.*, No. 4:17-cv-00127-BMM (D. Mont. Nov. 15, 2017); complaint at ¶ 151, *Consumer Fin. Prot. Bureau v. Golden Valley Lending, Inc.*, No. 1:17-cv-03155 (N.D. Ill. Apr. 27, 2017); complaint at ¶¶ 138–43, *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 1:15-cv-05211-CM, 2015 WL 4638325 (S.D.N.Y. July 31, 2015); complaint, *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 1:13-cv-13167, 2013 WL 11106649 (D. Mass. Dec. 16, 2013).

[53] *Colfax Capital Corp*, CFPB No. 2014-CFPB-0009, at ¶ 39 (July 29, 2014).

[54] *Id.* at ¶ 42.

[55] *Id.* at ¶¶ 43–44.

abusive allegations against Zero Parallel for distributing leads, or consumer information, to lenders whom Zero Parallel knew made loans more than that permitted by state law.[56] As a result, consumers paid interest rates in excess of state usury limits and lenders either could not distribute certain loans after paying for the lead or the lender could not collect the loan upon default because such loan violated state law. The Bureau alleged that Zero Parallel violated the prohibition on abusive practices because their actions took "unreasonable advantage of . . . a lack of understanding on the part of the consumer of the material risks, costs, or conditions of a product or service."[57]

Interestingly, Zero Parallel had no contact with consumers, but merely distributed their information to lenders. *Zero Parallel* represents an expansion of the abusive power to third parties. Further, since *Zero Parallel* was an abusive allegation without an unfair or deceptive claim, legal scholars debate on whether *Zero Parallel* makes the abusive power distinct from unfair and deceptive claims or if it merely represents the Bureau's discretion to liberally bring actions under any of the three enforcement powers.[58] In either situation, *Zero Parallel* shows that the Bureau will use the abusive power to extend liability to third party lead generators who act as a middleman in transactions at the expense of the consumer and, possibly, the lender. Accordingly, the scope of the power is broad, and the Bureau will penalize both the entity attempting to collect invalid loans *and* those assisting or aiding them to the detriment of the consumer.

Finally, category two actions may involve omissions by the entity allowing the business to gain an unfair advantage.[59] For

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[56] *Zero Parallel, LLC*, CFPB No. 2017-CFPB-0017, at ¶¶ 17, 21–24 (Sept. 06, 2017).

[57] *Id.* at ¶ 23; *see also* 12 U.S.C. § 5531(d)(2)(A) (2010).

[58] The author of this Article notes that in its press release the CFPB ordered Gasparyan, Zero Parallel's owner, to "ensure that lead generators do not *deceive* consumer." *Id.* This leads the author to believe that the CFPB could have alleged a claim under the deceptive or unfair powers against Zero Parallel or Gasparyan. Press Release, CFPB, *CFPB Takes Action Against Zero Parallel for Steering Consumers Toward Bad Deals* (Sept. 06, 2017) (on file with CFPB) (emphasis added). *See also* Roquemore, *supra* note 7, at 204 (stating, "it is likely that the CFPB could have brought a successful unfairness claim against Zero Parallel").

[59] *See Cash Express, LLC*, CFPB No. 2018-BCFP-0007 (Oct. 24, 2018); *Fort Knox Nat'l Co.*, CFPB No. 2015-CFPB-0008 (Apr. 20, 2015) (alleging the defendants conduct of failing to disclose specific fees and not notify servicemen when they incurred such fees was abusive because it took unreasonable advantage of service members' lack of understanding); complaint at ¶¶ 72–84, *Bureau of Consumer Fin. Prot. v. Certified Forensic Loan Auditors, LLC*, No. 2:19-cv-07722 (C.D. Cal. Sept. 6, 2019) (alleging that the defendants "concealed material facts

example, in *Cash Express, LLC*, the entity's primary venture was cashing payday checks while loaning cash to individuals as a payday loan.[60] In its alleged abusive practice, when a consumer visited the entity's store for cash-checking, the entity would instruct its employees to determine whether the consumer also owed the entity money from any prior payday loan.[61] All of Cash Express' loans contained disclosures that Cash Express may exercise a right of set-off.[62] To obtain the payday loan, Cash Express required the consumer to sign an acknowledgment.[63] Later, if a delinquent consumer entered the store to cash his or her check, Cash Express instructed its employees to take the check, preventing the customer from leaving the store with it.[64] Cash Express instructed its employees to not inform the consumer that it was going to exercise its right of set-off under the prior loan before taking the check.[65] After subtracting the amount owed to Cash Express, the employee would then give the consumer the remainder and explain what had occurred.[66] Because Cash Express' employees knew about the boilerplate term and many consumers did not, the CFPB alleged that by failing to disclose the business' exercise of set-off, Cash Express took unreasonable advantage of the lack of understanding on the part of the consumer.[67] This abusive conduct resulted from Cash Express' deliberate action to act before informing the consumer causing information asymmetry between the parties leading to consumer harm.

2. Material risk, cost, or condition that likely would have affected a

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regarding the Audits and litigation documents from consumers," therefore, the "consumers lacked the ability to parse the conclusions and analysis in the Audits and discover their lack of merit"); complaint at ¶¶ 64–66, *Consumer Fin. Prot. Bureau v. Freedom Debt Relief, LLC*, No. 3:17-cv-06484 (N.D. Cal. Nov. 8, 2017) (alleging that Freedom took unreasonable advantage of consumers' lack of understanding by failing to disclose to consumers enrolling in their debt-settlement program that: (1) the consumer would be required to negotiate directly with the creditor because Freedom knew that certain creditors would not negotiate with third-party debt-settlement providers, and (2) even though some consumers were individually required to negotiate their own debt settlement, they were still obligated to pay Freedom its fee).

[60] CFPB No. 2018-BCFP-0007, at ¶ 25 (Oct. 24, 2018).

[61] *Id.*

[62] *Id.*

[63] *Id.* at ¶ 26.

[64] *Id.* at ¶¶ 25–28.

[65] *Id.*

[66] *Id.* at ¶ 29.

[67] *Id.* at ¶¶ 35–36.

consumer's choice or conduct if the consumer had known . . .

The second feature of category two claims is that the action must involve a material "risk, cost, or condition that likely would have affected a consumer's choice or conduct if the consumer had known about the risk, cost, or condition."[68] The statute contains a materiality qualifier in that the covered person's action must affect a significant (material) risk, cost, or condition and not one of minor importance. The risk or cost is one that would force the individual, if aware and known, to reconsider their selection or continued use of the covered person's financial product or service.[69]

In general, materiality is fact specific. In *American Debt Settlement Solutions*, the length of time required to realize the benefits of the program and the costs of the program were material.[70] In *Colfax Capital Corp.* and other usury and licensing actions, the consumer's legal obligation to repay is material.[71] In *Cash Express, LLC*, non-disclosure of the entity's set-off right to the consumer was essential for the practice to work and, therefore, was material.[72] The central theme of this feature is that if the consumer knew of the material risk, cost, or condition, then a "reasonable consumer likely would not have made a particular decision, e.g., made a payment, selected the product, trusted advice, left funds in an account or enrolled in a program."[73]

In conclusion, this second category is subject to interpretation and contributes to many of the issues surrounding the abusive standard. First, businesses almost always possess more information about their product than the consumer. This raises questions as to the amount of disclosure necessary and the degree of persuasive advertising the company may engage in before their conduct becomes misleading and subject to the Bureau's abusive power. Next, whether a term or provision is material is entirely subjective. Materiality is dependent upon the consumer's state of mind, the adjudicator's opinion, and the

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[68] Seaman, *supra* note 26, at 292.

[69] 12 U.S.C. § 5531(d)(2)(A) (2010).

[70] Complaint at ¶ 61, *Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols*., No. 9:13-cv-80548-DMM (S.D. Fla. May 30, 2013).

[71] CFPB No. 2014-CFPB-0009, at ¶ 36 (July 29, 2014); *see also* complaint at ¶ 149, *Consumer Fin. Prot. Bureau v. Golden Valley Lending, Inc.*, No. 1:17-cv-03155 (N.D. Ill. Apr. 27, 2017) (alleging that the obligation to repay is a material term); complaint at ¶116, Consumer Fin. Prot. Bureau v. Think Fin., LLC., No. 4:17-cv-00127-BMM (D. Mont. Nov. 15, 2017) (asserting that the consumer's financial situation due to their inability to repay is material to their decision).

[72] *Cash Express, LLC*, CFPB No. 2018-BCFP-0007, at ¶ 34 (Oct. 24, 2018).

[73] *See* Seaman, *supra* note 26, at 293.

CFPB director's opinion. Finally, there is disagreement on whether the abusive power is necessary in many of these enforcement actions because many of these actions involve violations of the unfair and deceptive standards. One legal scholar even notes that "it is likely that the CFPB could have brought a successful unfairness claim against Zero Parallel."[74] Thus, the second category adds fuel to the fire of uncertainty because many individuals and businesses argue that category two abusive claims are arbitrarily enforced, thereby, prohibiting businesses from understanding the extent of the second category and the actions within and excluded by it.

C. Category Three: Takes unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service

Under the third statutory definition, the Bureau may declare an act or practice abusive if it "takes unreasonable advantage of—the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service."[75] Under this category, abusive acts or practices include: (1) "burying" pro-lender provisions in contracts, (2) pressuring or coercing the consumer into a transaction, and (3) directing consumers to select their product by providing misleading or omitting information.[76] Unlike the previous two categories, this category does not require a misunderstanding of a term or its implications, only that the company took advantage of the consumer's *inability to protect* their interests due to their status, financial predicament, or other similar situation.

1. "Burying" Pro-Lender Terms

The first type of act or practice under this category occurs where a lender provides a consumer a contract that hides a surprising

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[74] Roquemore, *supra* note 7, at 204.

[75] 12 U.SC. § 5531(d)(2)(B) (2010).

[76] The author disagrees with the argument presented by Seaman's article in that *Aequitas* stands for a fourth distinct and emerging type of act or practice under this category. In *Aequitas*, Aequitas and Corinthian Colleges did not disclose the loan process and the benefits they acquired at the expense of the student-consumers. The CFPB does not generally bring actions under the abusive standard for high-loan costs unless such the consumer reasonable relied on the covered person to act in their interest or the covered person deliberately lied to the consumer regarding uncollectable loans due to usury limits. Thus, *Aequitas* belongs under the third group under the third category relating to omissions and misrepresentations. *Aequitas* is discussed in detail below. Seaman, *supra* note 26, at 293–94; *see infra* note 95.

provision or term that a reasonable consumer would not consent to if known.[77] In *Security National Automotive Acceptance Co.*, the lender ("SNAAC") buried, in an addendum to a car leasing agreement, "a provision purporting to give SNAAC permission to contact the borrower's 'employer/commanding officer' to assist in collecting in the event of default and for other purposes."[78] The provision was non-negotiable and the service member-consumer did not have an opportunity to bargain for this provision's removal.[79] The CFPB alleged that this practice was abusive because the lender targeted service members and, without the service member's knowledge of the provision, they buried the provision in the contract in an attempt to leverage the consumer's status for their gain in the event of default. Accordingly, SNAAC took advantage of the consumer's inability to protect his or her interests in selecting the terms of their financial by hiding the provision.[80] Critical to this grouping, CFPB requires the defendant to (1) take advantage of the consumer's status, (2) bury or hide an abusive provision, and (3) take an affirmative step towards preventing the consumer from removing the provision by either refusing to negotiate its removal or by preventing the consumer an opportunity to read the agreement before consenting.[81]

2. Pressure or Coercion

The second group under this category occurs when a covered person unduly pressures or coerces the consumer into selecting or using their product or service.[82] These acts usually involve the

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[77] *See Sec. Nat'l Auto. Acceptance Co.*, CFPB No. 2015-CFPB-0027 (Oct. 28, 2015); complaint at ¶¶ 72–78; *see also Consumer Fin. Prot. Bureau v. Freedom Stores, Inc.*, No. 2:14-643, (E.D. Va. Dec. 18, 2014) (alleging that the lender's practice of extending credit to consumers whereby the lender buried a forum selection clause in the agreement and gave the consumer no opportunity to review or negotiate the clause was abusive because the clause mandated a venue a significant distance away from the consumer where a default judgment in favor of the lender would likely occur in the event of a dispute).

[78] *Sec. Nat'l Auto. Acceptance Co.*, *supra* note 77, at ¶12.

[79] *Id.* at ¶ 13.

[80] *Id.* at ¶¶ 23–29.

[81] *See id* (stating that the SNAAC's conduct was abusive because many consumer-service members were unaware of the provision allowing contact with superiors and, even if they were aware, they could not negotiate the removal of the provision from the contract); Complaint at ¶¶ 75–76, *Freedom Stores, Inc.*, No. 2:14-643.

[82] *See* Sec. Nat'l Auto. Acceptance Co., CFPB No. 2015-CFPB-0027 (Oct. 28, 2015) (stating that SNAAC's conduct was abusive because they used a service

company possessing some outside right that gives them the ability to pressure the consumer into selecting their product. For example, in *ITT Educational Services, Inc.,* the defendant, ITT Educational Services, Inc. ("ITT"), was an educational institution that relied on high student tuition costs to fund its institution.[83] To facilitate a funding gap, ITT increased its tuition and pressured students to obtain private loans or an ITT loan.[84] The Bureau alleged that ITT knew many students lacked the resources to pay their high tuition rates and many could not receive outside private loans; therefore, ITT's high cost forced many students to accept ITT loans or forfeit their educational investment by dropping out.[85] The CFPB alleged that this practice was abusive because ITT pressured students without the ability to acquire outside loans to obtain ITT loans and if they did not pay their increased tuition rates within a certain period of time, ITT would withhold the student's transcripts or expel them due to nonpayment. ITT took advantage of a consumer's financial predicament. Accordingly, by coercing students to drop out or accept its loan within a fixed amount of time, this practice harmed student-consumers by placing pressure on them in making an informed decision in selecting a financial product; therefore, ITT's conduct was abusive.[86]

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members' status to exert "enormous pressures" by contacting their superior offices, which would not be available in the collection of civilian borrower debt); Ace Cash Express, Inc., CFPB No. 2014-CFPB-0008, at ¶¶ 12, 28–31 (July 10, 2014) (alleging the covered person took unreasonable advantage of the consumer's inability to protect their own interests in selecting a financial product or service by creating an artificial sense of urgency through excessive calls, continuing collection activity after requests to cease, and threats to report the consumer to credit bureaus or other collection services in order to induce delinquent borrowers to take out a new ACE loan); complaint at ¶ 70, *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, No. 3:16-cv-00356-WHB-JCG (S.D. Miss. May 11, 2016) (alleging the defendant took unreasonable advantage of the inability of the consumer to protect their interests by pressuring their consumers through "retaining custody of the check [financial product] to prevent consumers from leaving, processing the check without the consumer's consent, applying an AACC stamp to the back of the check during processing to impair the consumer's ability to cash the check elsewhere," and by making misrepresentations about the transaction was abusive); complaint, *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB, 2014 WL 717457 (S.D. Ind. Feb. 26, 2014).

[83] Complaint at ¶ 23, *ITT Educ. Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB, 2014 WL 717457.

[84] *Id.* at ¶¶ 97–98, 114–32.

[85] *Id.* at ¶¶ 171–73.

[86] *Id.* Additionally, the CFPB is not consistent in bringing abusive claims in this category. For example, the CFPB stated that creating an artificial sense of urgency towards a consumer for a payday loan was unfair, deceptive, and abusive, but

3. Intentional Misdirection

The final group occurs when a company or agent takes unreasonable advantage of the inability of the consumer to protect his or her interests in the selection or use of a financial product by misdirecting the consumer through omissions or misrepresentations.[87] This group is similar to the first and second categories of omissions and misrepresentations; however, under this group, a covered entity steers the consumer into choosing their product or service as a result of their status—it does not necessarily affect their understanding of the terms or implications of such product. For example, in *S/W Tax Loans, Inc.*, Thomas, an operator of H&R Block franchises,[88] deliberately targeted low-income, vulnerable consumers by referring such consumers using H&R Block to Southwest Tax Loans, a business wholly owned and operated by Thomas.[89] Thomas created Southwest Tax Loans to provide cash-strapped and vulnerable consumers with

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creating ''an artificial sense of urgency'' for a matter involving a student loan was only deceptive. *Compare* Ace Cash Express, Inc., CFPB No. 2014-CFPB-0008 (July 20, 2014) *with* complaint, Consumer Fin. Prot. Bureau v. v. Glob. Fin. Support, No. 15-cv-2440-GPC-WVG (S.D. Cal. Oct. 29, 2015).

[87] *See Wells Fargo Bank, N.A.*, CFPB No. 2016-CFPB-0015, at ¶ 21 (Sept. 8, 2016) (alleging that the "Respondent's act of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability to protect their interests in selecting or using consumer financial products or services); *Y Kings S Corp.*, CFPB No. 2016-CFPB-0001 (Jan. 21, 2016) (alleging that by failing to disclose the prices of cars until after credit approval and by misrepresenting the APR charged to its credit consumers, and by failing to disclose accurate finance charges, consumers are unable to protect their interest in selecting or using the credit transactions with the entity); *Fort Knox Nat'l Co.*, CFPB No. 2015-CFPB-0008 (Apr. 20, 2015) (alleging that the covered person's failure to adequately disclose the circumstances under which fees were charged and its failure to inform the consumer when they incurred such fees took unreasonable advantage of the consumer's inability to protect their interests; complaint at ¶¶ 70–75, *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018); complaint at ¶¶ 83–86, Consumer Fin. Prot. Bureau v. Pension Funding, LLC., No. 8:15-cv-01329, 2015 WL 4940079 (C.D. Cal. Aug. 20, 2015); complaint at ¶¶ 70–75, *Consumer Fin. Prot. Bureau v. PayPal, Inc.*, No. 1:15-cv-01426 (D. Md. May 19, 2015) (alleging that by failing to provide adequate information to consumers about how it allocated payments to and among standard and multiple deferred-interest balance the consumer could not understand how payments were applied, thereby, taking advantage of the consumer's ability to select a different product); complaint, Consumer Fin. Prot. Bureau v. S/W Tax Loans, Inc., No. 1:15-cv-00299 (D.N.M. Apr. 14, 2015).

[88] H&R Block is a tax-preparation business offering financial products. H&R Block is not a defendant in this action.

[89] Complaint at ¶¶ 10, 12, 42–44, *S/W Tax Loans, Inc.*, No. 1:15-cv-00299.

high-cost refund-anticipated loans in November and December secured by their income tax refund the following season at an annual-percentage-rate ("APR") above 240%.[90] Through this practice, Thomas did not disclose to the referred consumers that H&R Block offered similar loans to meet the client's short-term holiday needs with significantly lower APRs—around 36%.[91] Thomas also did not disclose that he and his tax preparers had a financial interest in each Southwest refund-anticipated loan the consumer took out.[92] The CFPB declared that this practice was abusive because "by failing to disclose their financial interests," Thomas and Southwest Tax Loans took advantage of low-income clients because these clients "lacked important information in evaluating whether to choose a Southwest RAL or to seek an alternative financial product to meet their short-term cash needs."[93] Accordingly, the business used the consumer's financial predicament coupled with the absence of critical information to steer the consumer into selecting their product. Thus, under the third group, even if the consumer was aware of the harmful terms or effects, they *may* still have selected that product, but since the covered person took advantage of the consumer's status and steered them into their product, such conduct was abusive.

4. *Aequitas Capital Mgmt.*

In 2017, the CFPB brought allegations solely alleging abuse against Aequitas Capital Management ("Aequitas") under this third category.[94] Under federal law, to obtain federal funding for-profit educational institutions must satisfy the requirements imposed by the "90/10" rule.[95] To meet these standards, Corinthian Colleges, Inc. ("Corinthian") increased student tuition rates and set-up its own private loan program to assist students in obtaining outside loans.[96] Later, as a result of changes in federal law prohibiting Corinthian from operating its own loan program, Corinthian elicited the assistance of

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[90] *Id.* at ¶¶ 14, 22.

[91] *Id.* at ¶¶ 13–14, 42.

[92] *Id.* at ¶¶ 13, 42, 44–46.

[93] *Id.* at ¶¶ 46–48.

[94] Complaint, *Consumer Fin. Prot. Bureau v. Aequitas Capital Mgmt. Inc.*, No. 3:17-cv-01278-MO (D. Or. Aug. 17, 2017) [hereinafter *Aequitas* Complaint].

[95] Under the 90/10 rule, for-profit institutions must derive at least ten percent of their income from sources of revenue other than federal aid such as private loan providers. *See* 20 U.S.C.S. § 1094 (2019); *Aequitas* Complaint, *supra* note 95, at ¶ 46.

[96] *Aequitas* Complaint, *supra* note 95, at ¶ 13.

Aequitas to fund, purchase, and maintain the loans of its students as part of a scheme to allow Corinthian to "present a façade of compliance with federal laws."[97] Under this scheme, Aequitas would purchase loans from students at Corinthian and, in return, Corinthian promised to repurchase any loan that remained delinquent in excess of ninety (90) days.[98] In effect, Aequitas obtained extremely profitable loans with zero risks and, even though Corinthian would never actually realize any revenue from outside funds "because the cost of buying back non-performing loans and maintaining the program would absorb any such revenue," Corinthian gained access to federal funds.[99]

Subsequently, the CFPB brought separate actions against Corinthian and Aequitas.[100] The Bureau alleged that Aequitas's participation in the scheme by funding, supporting, and maintaining the student loan portfolios took unreasonable advantage of the students. By preventing students from possessing the information necessary to protect their interests in selecting a loan, students were unable to uncover the fact that the loan program and the inflated tuition rates were "a loss leader and a ruse designed to generate Title IV federal loan revenue."[101] Consequentially, because the scheme saddled students with more debt, provided no additional benefit, and targeted students whom Aequitas knew were high-default risk, Aequitas' participation was abusive.

The CFPB's action against Aequitas stems from their failure to disclose to the financially burdened, student consumers their financial interest in the scheme. If students were aware of Aequitas participation, then they would possess the necessary information to make an informed decision. That decision may cause them to take the loans from Corinthian Colleges and Aequitas or another loan provider. Regardless of the student's choice, both entities took advantage of the consumer's status as a poor student. Accordingly, student-consumers did not have an opportunity to make that decision and the Bureau deemed such conduct abusive.

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[97] *Id.* at ¶¶ 1, 3.

[98] *Id*. at ¶ 4.

[99] *Id.* at ¶¶ 4, 10, 118

[100] On September 16, 2014, the CFPB filed a complaint against Corinthian alleging violations of the prohibition on deceptive and unfair practices. In the author's opinion, if the Bureau brought actions against Aequitas and Corinthian for the same transaction and practices, then either Aequitas should not face an abusive action or Corinthian should. *See* complaint at ¶¶ 157, 164, Consumer Fin. Prot. Bureau v. Corinthian Colls., Inc., No. 1:14-cv-07194, 2014 WL 5786691 (N.D. Ill. Sept. 16, 2014).

[101] *Aequitas* Complaint, *supra* note 95, at ¶¶ 123, 126.

Additionally, Aequitas is interesting in that the CFPB brought an action against a third party that had little to no direct contact with the consumer but were merely complicit in maintaining student accounts. Like *Zero Parallel, LLC*, some individuals argue that this may represent an expansion of the abusive power under the third category to third-parties while others assert that the Bureau could have easily declared Aequitas's actions as unfair or deceptive.[102] In either scenario, *Aequitas Capital Management, Inc.* and the other actions under the third category fail to differentiate the abusive power from the unfair and deceptive powers. *Aequitas Capital Management Inc.* provides little clarity in assisting the financial community in understanding the extent of the abusive power and the conduct the power encompasses distinguishing it from the unfair or deceptive powers.

D. Category Four: Takes unreasonable advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

Finally, the CFPB may declare an act or practice abusive if it "takes unreasonable advantage of—the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[103] This category is the least used by the CFPB. Practices typically violate the fourth statutory definition when the company acts in their own interests, rather than the consumers.[104] The primary issue under this category is whether a consumer's reliance is reasonable. Generally, the CFPB's enforcement actions show that a consumer's reliance is reasonable in two instances.[105]

First, if the company makes actual representations to the consumer to rely on its product, then the consumer's reliance is reasonable.[106] In *Navient Corp.*, a loan servicer's website told

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[102] *Compare* Seaman, *supra* note 26, at 296–97 (stating "Aequitas Capital . . . could signal the CFPB's new use of this prong of the 'abusive' standard") *with* Roquemore, *supra* note 7, at 203 (stating "the CFPB could have just as easily relied on an allegation of unfairness in the Aequitas case"). The author does note that Aequitas may extend the third category to third parties with little to no contact with consumers. This is like Zero Parallel. Thus, abusive may simply be a way to capture third parties with no contact with the consumer. *See supra* notes 56–58 and accompanying text.

[103] 12 U.S.C. § 5531(d)(2)(C) (2010).

[104] Seaman, *supra* note 26, at 296.

[105] *Id.* at 296–97.

[106] *See* complaint, *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101-RDM, 2017 WL 191446 (M.D. Pa. Jan. 18, 2017); complaint at ¶ 57,

consumers several statements that invited reliance by the consumer.[107] Such statements included, "if you're having trouble . . . We can work with you . . . let us help you make the right decision for your situation," "Our representative can help you by identifying option," and "Navient is here to help."[108] The CFPB alleged that Navient's conduct was abusive because "Navient fostered the reliance that it then exploited at the expense of" its consumers.[109]

Second, a consumer's reliance is reasonable if the company or individual is in a position that demands reliance.[110] This position could be that of a lawyer who provides financial advisory services,[111] financial aid advisors,[112] or holding oneself out as a loan counselor or advisor.[113] Thus, if one holds themselves out as reasonably competent in the financial industry such position may command reliance by the consumer for the company or individual to act in the best interests of the consumer; however, whether reasonable reliance may entail other relationships or actions, though, remains an issue not addressed by the Bureau or the courts.

A vast majority of the defined categories overlap with another category of the abusive power causing additional confusion as to the scope of each statutory definition and the scope of the abusive power in general. Defining the abusive power is critical for both consumers and businesses covered by the CFPB's regulatory and supervisory authority to understand the types of conduct and actions that encompass it. Legal scholars, though, continue to disagree as to

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Consumer Fin. Prot. Bureau v. Coll. Educ. Servs. LLC, No. 8:13-cv-2078T36-EAJ (M.D. Fla. Dec. 11, 2014) (alleging the company created a reasonable reliance by the consumer because the company "created the illusion of expertise and individualized advice to induce consumers to reasonably rely on the company to act in their interests"); complaint at ¶ 62, *Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols.*, No. 9:13-cv-80548-DMM (S.D. Fla. May 30, 2013) (alleging that the debt relief service promised they could settle debts within three to six months when, in many instances, they did not even begin negotiations in that period).

[107] Complaint at ¶ 38, *Navient Corp.*, No. 3:17-cv-00101-RDM, 2017 WL 191446.

[108] *Id.*

[109] *Id.* at ¶ 141.

[110] Seaman, *supra* note 26, at 297.

[111] *See* complaint at ¶¶ 13, 64, *Consumer Fin. Prot. Bureau v. Access Funding*, LLC, 270 F. Supp. 831 (D. Md. 2016) (No. 1:16-cv-03750-JFM).

[112] *See* complaint at ¶¶ 78, 174–80, *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc*., No. 1:14-cv-00292-SEB-TAB, 2014 WL 717457 (S.D. Ind. Feb. 26, 2014).

[113] *See* complaint at ¶ 57, *Consumer Fin. Prot. Bureau v. Coll. Educ. Servs. LLC*, No. 8:13-cv-2078T36-EAJ (M.D. Fla. Dec. 11, 2014).

whether the CFPB should initiate rulemaking to definitively specify actions and practices that encompass each category or whether to keep the Bureau's power broad allowing it to capture practices not otherwise foreseen or covered.[114]

THE RULEMAKING CAMPS

The rarity of abusive allegations, especially stand-alone abusive actions, arises from Dodd-Frank because (1) it fails to provide heightened penalties for violations of more than one prohibited act and (2) covered persons, in general, are aware of acts or practices that constitute unfair or deceptive practices due to an extensive enforcement history by the Bureau and the FTC.[115] Currently, those in the legal and financial communities disagree on whether the Bureau should initiate rulemaking to limit the abusive power and, if initiated, whether the rule should grant a broad or narrow mandate to the CFPB. Diverging interests and the CFPB's failure, so far, to define the power's contours, have created three camps: (1) those supporting rulemaking to narrow its scope and bring clarity, (2) those supporting a broad mandate by either providing a broad rule or by opposing the emergence of a rule altogether, and (3) those that argue the abusive power itself is irrelevant and unnecessary.

A. The Proponents to Rulemaking

Led by financial institutions and their affiliates, individuals and businesses across a wide spectrum of industries and geographic locations welcome the idea of initiating rulemaking to define the contours and limit the scope of the CFPB's abusive power. Proponents of rulemaking argue that any method other than formal notice-and-comment rulemaking, such as regulation by enforcement or issuing guidance documents, "interferes with critical tools that regulatory beneficiaries can use to hold agencies accountable for the policy choices they make."[116] Proponents fear that, in the absence of a rule,

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[114] The author hopes that after reading Part III the reader has some clarity. The defining characteristics of the abusive power are confusing because of the overlap between the various statutory definitions and the overlap with other powers. For example, misrepresentations and omissions, in some form, appear in each of the statutory categories and is clearly conduct looking to deceive consumers. This overlap makes some legal scholars question the abusive power. This confusion is addressed in Parts IV–VI.

[115] *See* 12 U.S.C. §§ 1031, 5565(c) (2010).

[116] BARR ET. AL., *supra* note 5, at 587 (quoting Nina A. Mendelson, *Regulatory*

the CFPB will continue to engage in conduct that would "regulate virtually every . . . provision of consumer credit contracts and essentially abolish many of these products."[117] Thus, several significant concerns arise if the Bureau does not proceed with rulemaking.

First, proponents assert that the statutory definition relies on broad terms such as "lack of understanding by consumers" to determine whether abusive or deceptive practices have occurred.[118] Subjective determination such as this would force banks and other covered entities to conduct "customer-specific inquiries regarding a consumer's 'financial literacy' or understanding."[119] This would result in significant time, cost, and harm to these entities. Further, proponents argue that the statutory definition is "so broad and vague that it is difficult to determine what conduct it actually prohibits."[120] Proponents assert that even former Director Cordray lacked an understanding of the conduct entailed under the abusive power when, before the House Oversight Committee, he stated that "[i]n terms of abusive specifically . . . [we are] trying to understand it, and we have determined that that is going to have to be a fact and circumstances issue."[121]

Proponents argue that the CFPB cannot wait years for courts to define the standard.[122] Because of latent ambiguity, some courts refuse to act in defining the contours of the standard so long as it can rest its opinion upon another power (i.e. the unfair or deceptive powers); therefore, businesses in the financial services industry remain unaware of conduct prohibited by the standard until the day arrives when the CFPB takes action against them.[123] Additionally, these individuals and

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Beneficiaries and Informal Agency Policymaking, 92 CORNELL L. REV. 397, 420 (2007)).

[117] Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace*, 81 GEO. WASH. L. REV. 856, 922 (2013)

[118] Daniel Press, *CEI Comments on the CFPB's Request for Information Regarding Adopted Regulation and New Rulemaking Authorities*, COMPETITIVE ENTERPRISE INST. (June 19, 2018) https://cei.org/content/cei-comments-cfpbs-request-information-regarding-adopted-regulations-and-new-rulemaking..

[119] *Id.*

[120] *Id.*; *see also* Lucas, *supra* note 15, at 750.

[121] *How will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on Tarp, Fin. Serv. and Bailouts of Pub. and Private Programs of the H. Comm. on Oversight and Gov't Reform*, (112th Cong. 69 (2012) (statement of Richard Cordray, Director, Consumer Fin. Prot. Bureau).

[122] Press, *supra* note 118.

[123] *See Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. CV-15-7522-JFW, 2016 WL 4820635, at *11 (C.D. Cal. Aug. 31, 2016) (holding that "[b]ecause the

businesses argue that without the ability to know or understand acts or practices encompassing the power, the financial services industry would need to constantly take an educated guess as to whether their product or practice violates the abusive standard. Such guesswork "will likely chill innovation and the introduction of new products."[124]

B. The Opponents of Rulemaking

Opponents of rulemaking generally support the broad powers Dodd-Frank grants the CFPB in regulating financial products. Composed of consumer advocacy groups and various consumers, this group may either support a rule that retains the Bureau's broad powers or oppose rulemaking altogether. In contrast to the proponents of rulemaking, this group argues that the CFPB must possess broad authority under the UDAAP powers that would allow the Bureau to adapt to changing conditions within the financial industry. To support their claim, they argue that Congress explicitly designed Dodd-Frank to grant the CFPB such broad authority to protect consumer interests.[125] Opponents argue that Congress' intentionally included the abusive term to resolve consumer protection failures leading up to the financial crisis of the late-2000s and such broad status is necessary to maintain consumer confidence and protect the interests of consumers.[126] Without a broad mandate, businesses may engage in harmful conduct toward consumers. While the unfair and deceptive prongs may aid the Bureau in preventing such conduct, the Bureau must retain its broad authority under the abusive prong "to prevent harmful practices not effectively addressed by the deceptive-and-unfair-practices prohibition."[127]

In response to rulemaking's proponents, opponents argue that

Court concludes that CashCall and Delbert Services' conduct was deceptive, the Court finds it unnecessary to address whether their conduct was also unfair and abusive").

[124] Zywicki, *supra* note 118, at 922.

[125] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 99 (2008) (calling for a new consumer financial protection agency with "broad rulemaking and enforcement authority over consumer credit products [to] eliminate regulatory gaps and contradictions . . . [and] halt the state and federal regulatory competition that undercuts consumer safety").

[126] Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's "Abusive" Standard*, 14 J. CONSUMER & COM. L. 118, 119 (2011).

[127] Peterson, *supra* note 16, at 1070; *see also* S. Rep. No. 111-176, at 172 (2010) (stating that "[c]urrent law prohibits unfair or deceptive acts or practices. The addition of 'abusive' will ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers").

while the abusive power is broad, courts have held that the statutory definitions are not *legally* vague.[128] In *ITT Educational Services Inc.,* the court ruled that "because agencies and courts have successfully applied the term as used in closely related consumer protection statutes and regulations—we [the court] conclude that the language in question provides at least the minimal level of clarity that the due process clause demands of non-criminal economic regulation."[129] Consumer advocates urge that the statute is not unconstitutionally vague as entities have the minimal level of clarity necessary to not engage in abusive acts or practices. Accordingly, they argue that because businesses have *some* clarity, the notion that businesses cannot avoid abusive conduct has no merit. They have the requisite knowledge to not engage in abusive conduct.

Further, consumer advocates argue that "new legal standards are frequently drafted and enacted into law."[130] In enacting the prohibition on unfair and deceptive practices under the Federal Trade Commission Act, Congress intentionally "drafted the language broadly to allow regulators and courts to continue to refine its definition and provide flexibility to close regulatory gaps."[131] The abusive power's broad authority gives it flexibility to adapt to marketplace conditions, while balancing competing interests of private businesses and consumers.[132] Consumer advocates argue that the abusive standard will continually develop, thereby providing greater clarity in due time while retaining some degree of flexibility to adapt.

Finally, consumer advocates assert that any rule narrowing the power would result in a reduction of the standard's effectiveness to the degree that the abusive standard would become synonymous with unfair and deceptive while also providing covered entities a "roadmap for what they can get away with."[133] Allowing such practice, consumer advocates argue, would benefit businesses at the expense of the consumer. Thus, many consumer advocates assert that by narrowing the Bureau's power to prohibit abusive practices, the current administration would act contrary to the views of Congress in enacting the CFPA and its broad regulatory grant of power to the CFPB to

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[128] *See* Consumer Fin. Prot. Bureau v. ITT Educ. Servs., 219 F. Supp. 3d 878, 906 (S.D. Ind. 2015).

[129] *Id.*

[130] Lee, *supra* note 126, at 121.

[131] *Id.*; *see* 15 U.S.C.S. § 41 (1961).

[132] Lee, *supra* note 126, at 121.

[133] Evan Weinberger, *Abusiveness Claims Brought by CFPB may be Fading Away,* BLOOMBERG L. NEWS (July 30, 2018), https://www.bna.com/abusiveness-claims-brought-n73014481244/.

regulate the financial industry.

C. The Irrelevant View

The final camp does not necessarily represent any specific industry or types of people; however, this view stands in stark contrast to the others. Those aligning with this view seem unconcerned about any potential rulemaking because they argue the abusive power is irrelevant.[134] These individuals believe that "[a]busive basically means nothing more than unfair or deceptive."[135] Thus, many individuals argue that any action that is abusive is also unfair or deceptive and rulemaking under the abusive prong will not have any effect on the Bureau's power to act under the other prongs.[136]

In support of this view, individuals argue that in bringing allegations of unfair, deceptive, or abusive practice, "the Bureau [doesn't] seem bound by the definitions of any of the terms, and simply label[s] practices to be UDAAP violations without worrying about applying the elements of a statutory test."[137] Generally, these individuals are critical of *Aequitas Capital Management Inc.* and *Zero Parallel*, alleging that the CFPB could have brought these actions under the unfair or deceptive prohibitions.[138] These individuals assert that the CFPB arbitrarily brought these two actions, within three weeks of each other, as stand-alone abusive allegations to bring clarity to the abusive power, but in reality, the cases only further muddied the waters

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[134] *See* Adam Levitin, *CFPB "Abusive" Rulemaking?*, CREDIT SLIPS (October 17, 2018), https://www.creditslips.org/creditslips/2018/10/cfpb-abusive-rulemaking.html (stating "If I were advising a financial institution client, I'd say that there was little to worry about with the new 'abusive' power").

[135] *Id.*

[136] *Id*. (stating the abusive "power has been little more than a belt to go with the suspenders of 'unfair and deceptive'").

[137] Christopher J. Willis, *The CFPB's Proposed "Abusive" Rulemaking: Much ado About Nothing*, CONSUMER FINANCE MONITOR (October 18, 2018) https://www.consumerfinancemonitor.com/2018/10/18/the-cfpbs-proposed-abusive-rulemaking-much-ado-about-nothing/.

[138] Roquemore, *supra* note 7, at 203 (stating that "Given the striking similarity of fact patterns between the two cases [*Aequitas Capital Mgmt.* and *Navient*] and the clear satisfaction of the statutory language, the CFPB could have just as easily relied on an allegation of unfairness in the Aequitas case" and "Given the similar fact patterns between the cases [*Zero Parallel* and *Flurish*] and the straightforward application of the statutory language, it is likely that the CFPB could have brought a successful unfairness claim against Zero Parallel"); *see Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101-RDM, 2017 WL 3380530 at 1 (M.D. Pa. Aug. 4, 2017); *Flurish, Inc.*, CFPB, No. 2016-CFPB-0023, 2016 WL 6646132 (Sept. 27, 2016).

and showed that the "abusive and unfairness standards are interchangeable."[139]

Opponents to this view arise from those supporting and opposing rulemaking. This view, opponents argue, neglects basic principles of statutory construction and the legislative history of the abusive power. First, this view ignores the statutory canon of "verba cum effectu sunt accipienda" or the surplusage canon.[140] The surplusage canon states that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[141] To equate abusive to unfair and deceptive would render the power a mere surplusage rendering its intentional addition to the original powers insignificant and making the abusive power inoperative. Accordingly, detractors of this view argue that equating the abusive power to another term for unfair or deceptive would ignore the power's entire legislative history. In the late-2000s, Congress intentionally added the abusive power to be "flexible" to ensure that the Bureau "is empowered to cover practices where providers unreasonable take advantage of consumers."[142] Thus, opponents to this view assert that the irrelevant view is contrary to basic principles of statutory interpretation as well as the legislative history of the power and, therefore, the abusive power must mean something different than unfair and deceptive, even though opponents to the irrelevant view may disagree as to the scope of the Bureau's abusive power.

THE BUREAU CANNOT SIT IDLE

As it stands, the abusive power is confusing, overly broad, and subject to arbitrary enforcement practices. The need for clarity is evident and the CFPB should look to rein in this power. Gray areas of the law, such as the abusive standard, can result in great calamities if left unaddressed, especially in volatile industries such as the financial

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[139] Roquemore*, supra* note 7, at 204. The author disagrees slightly. While the author believes that abusive is synonymous with the unfair power to a degree, he believes the abusive power shares greater similarity to the deceptive power.

[140] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXT 174 (2012).

[141] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, pp. 181–186 (rev. 6th ed. 2000)).

[142] *See Improving Federal Consumer Protection in Financial Services: Hearing Before the Comm. on Fin. Servs.,* 110th Cong. 40 (2007), https://www.gpo.gov/fdsys/pkg/CHRG110hhrg37556/html/CHRG-110hhrg37556.htm; *see also* S. REP. NO. 111-176, at 172 (2010).

services industry. The abusive standard cannot continue in its muddied form for several reasons.

First, the abusive power is muddied water, but it is still water. The abusive power was not a term that Congress unintentionally created.[143] Congress intended the term to be flexible and to supplement the unfair and deceptive powers given to the CFPB.[144] Equating abusive to the unfair and deceptive powers would render the term meaningless, thereby, defying the intent of Congress. The irrelevant view ignores these considerations. Thus, the CFPB should initiate rulemaking to push aside the notions put forth by the irrelevant view.

Second, businesses must have clarity in the conduct the Bureau looks to prevent under the abusive power. While many individuals argue that rulemaking would provide businesses a "roadmap for what they can get away with," rulemaking may actually prevent a business from engaging in abusive conduct.[145] If a business knew the conduct that constituted an abusive act or practice, then the business could avoid engaging in such conduct. This would benefit consumers by preventing consumers from undergoing emotional, physical, and financial stress that results from abusive practices. Further, it would aid businesses by preventing them from falling victim to substantial civil penalties imposed by the Bureau. Thus, rulemaking would grant businesses clarity to steer themselves away from conducting prohibited acts or practices.

Third, the Bureau has arbitrarily used the abusive standard in its enforcement actions, thereby, preventing any clarity to the scope and extent of the conduct the power entails. The Bureau has brought certain actions under the abusive power while failing to bring abusive allegations against businesses engaged in near identical facts and practices.[146] In addition, this practice of arbitrarily enforcing the

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[143] *Improving Federal Consumer Protection in Financial Services: Hearing Before the Comm. on Fin. Servs.,* 110th Cong. 40 (2007), https://www.gpo.gov/fdsys/pkg/CHRG110hhrg37556/html/CHRG-110hhrg37556.htm.

[144] *Id.*

[145] *See* Weinberger, *supra* note 134.

[146] *Compare Ace Cash Express, Inc.*, CFPB No. 2014-CFPB-0008, (July 20, 2014) (alleging that creating a sense of urgency towards a distressed consumer considering a payday loan is abusive when none exists) *with* complaint, *Consumer Fin. Prot. Bureau v. v. Glob. Fin. Support*, No. 15-cv-2440-GPC-WVG (S.D. Cal. Oct. 29, 2015) (alleging that creating a sense of urgency for a consumer considering a student loan is only deceptive); *compare TMX Finance, LLC.*, CFPB No. 2016-CFPB-0022, at ¶ 29 (Sept. 26, 2016) (alleging deceptive and abusive practices) *with Bridgepoint Education, Inc.*, CFPB No. 2016-CFPB-0016 (Sept. 12, 2016) (alleging only deceptive practices).

abusive standard between entities engaged in similar schemes or practices cannot continue because arbitrary enforcement denies businesses the ability to understand the power's scope and contours. For example, the CFPB brought allegations against Corinthian College for violations of the unfair and deceptive standards but failed to bring an action against it for violating the abusive prong.[147] While there may be debate as to whether Aequitas violated the abusive prong or the unfair and deceptive prongs, Corinthian Colleges actively engaged Aequitas to take the loans, thereby, intertwining the two. It remains unclear as to the reasoning behind the Bureau's action of bringing an abusive claim against Aequitas yet failing to bring an abusive action against Corinthian Colleges—they both engaged in the same conspiracy and worked together. Aequitas faced an abusive claim and Corinthian Colleges faced a deceptive and unfair claim. It is possible that the Bureau was simply trying to use all three UDAAP prongs in one transaction and lacks any meaningful standard in their enforcement practices. This example serves as one instance of many in which the CFPB director and his or her subordinates arbitrarily bring abusive allegations. This conduct is not conducive to a properly functioning regulatory system as it fails to provide clarity and consistency in the Bureau's enforcement practices.

Further, the Bureau's two actions involving stand-alone abusive allegations, *Aequitas Capital Management Inc.* and *Zero Parallel,* are clear examples of uncertainty in the legal community.[148] Individuals continually disagree on whether these actions represent an expansion of the abusive power by expanding the power to entities that are peripheral to the main participants in a transaction and whom have little to no contact with the consumer.[149] Others, however, argue that these actions represent allegations that may have been brought under the prohibition on unfair and deceptive practices, but the Bureau simply brought them under abusive. These actions are fraught with uncertainty in the legal community and the CFPB should initiate rulemaking to address the extent of the power's reach and to clarify features of these actions that prevent them from claims of unfair and deceptive practices.

Finally, the Bureau cannot wait for the courts to act. In general, courts are slow. Even when they do act, courts will not define the abusive power so long as they can rest their decision upon the unfair

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[147] *See* complaint at ¶¶ 157, 164, *Consumer Fin. Prot. Bureau v. Corinthian Colls., Inc.*, No. 1:14-cv-07194, 2014 WL 5786691 (N.D. Ill. Sept. 16, 2014).

[148] *See Zero Parallel, LLC.*, CFPB No. 2017-CFPB-0017 (Sept. 06, 2017); *Aequitas* Complaint, *supra* note 94.

[149] *Supra* notes 59, 102.

or deceptive powers.[150] If the Bureau waits to act, it is unlikely that covered entities and consumers will have any clarity on the abusive power in the foreseeable future.

Without rulemaking, the Bureau's practice of regulation by enforcement will only continue. This practice would serve only to continually harm covered entities, consumers, and the legitimacy of a Bureau fraught with claims of unconstitutionality.[151] In conclusion, rulemaking would provide all interested participants a degree of clarity while promoting consumer and business interests.

RULEMAKING RECOMMENDATIONS

Any potential rule must satisfy certain criterion that provides businesses the ability to prevent themselves from engaging in abusive conduct. Such rulemaking, though, must also grant the Bureau a degree of flexibility to continually shape and define the standard to fulfill its statutory purposes. This section intends to lay out a few recommendations the Bureau should take in defining such standard but does not intend to be exhaustive as the author does not have the requisite knowledge and expertise that other legal scholars and the Bureau possess. Essentially, the Bureau must rein in its abusive power and define its scope; however, such rule must retain a degree of broadness that allows the Bureau to protect consumers from harm. It is time to begin scouring the waters to make it clean.

First, any potential rule, at a minimum, must distinguish abusive allegations from those under the unfair and deceptive powers. There is significant case law describing unfair and deceptive conduct; therefore, (ideally) covered entities should know the types of conduct prohibited under these powers. The proponents of the irrelevant view argue that because the Bureau always enforces abusive allegations along with unfair or deceptive practices, the abusive standard is

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[150] *See supra* note 123 and accompanying text.

[151] *See* C. Boyden Gray, *Extra Icing on an Unconstitutional Cake Already Frosted? A Constitutional Recipe for the CFPB*, 24 GEO. MASON L. REV. 1213 (2017). While this Article was pending publication, the CFPB joined in a brief in support of certiorari as the respondent in *Seila Law LLC v. Consumer Fin. Prot. Bureau*. *See* Brief for the Respondent in Support of a Writ for Certiorari, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 (U.S. Sept. 17, 2019). In its brief, the Solicitor General and the CFPB argue that the structure of the CFPB is unconstitutional because of the CFPB's for-cause removal requirement. Given this, in *Seila Law LLC*, both sides are arguing against the constitutionality of the agency. The Supreme Court granted certiorari on October 18, 2019. If the Supreme Court rules that the CFPB is unconstitutional then the abusive question no longer needs addressing because the CFPB will not exist. Time will tell.

meaningless.[152] By clearly stating the differences between abusive and the other powers, the Bureau would provide needed clarity to the definition. Thus, any potential rule must define the scope and extent of the abusive power as well as distinguish that power from the prohibition on unfair and deceptive practices.

Second, any potential rule should provide examples of conduct that does not constitute an abusive practice. This would allow businesses to engage in a compare-and-contrast analysis. Importantly, the CFPB must clearly state: "*This list is not exhaustive*." A non-exhaustive list of examples of conduct that is, and is not, abusive would highly benefit businesses and consumers alike. This information would benefit businesses by providing them examples so that they can compare their practice to the stated examples. Such a list of examples would allow a business to engage in a compare-and-contrast analysis to determine for itself whether its practices are abusive. Further, consumers would benefit because a non-exhaustive list would merely function as suggestions to businesses of conduct to avoid. The Bureau would retain a degree of flexibility under a non-exhaustive list allowing it to utilize its power to protect consumers from abusive conduct. If a business engages in a compare-and-contrast analysis and incorrectly determines that their conduct is not abusive, the Bureau may then bring an abusive allegation to enjoin the business from continuing the practice. Thus, a rule that provides examples of non-abusive and abusive acts or practices would promote the interests of all individuals and businesses in the financial services industry without the Bureau having to continue to define the abusive standard through real-world examples of enforcement.

Finally, any potential rulemaking must weigh the interests of covered persons against the interests of the consumer. While the statutory definition does not mandate balancing the competing interests, such a balancing standard would highly benefit businesses, consumers, and the CFPB in preventing arbitrary and capricious enforcement of the standard. On one hand, the CFPB must give businesses the freedom of innovation and the ability to create new financial products and services that would advance the financial industry and not "chill innovation and the introduction of new products."[153] On the other hand, any potential rule must retain a degree of flexibility allowing the Bureau to fulfill its purpose of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and

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[152] Levitin, *supra* note 134.
[153] Zywicki, s*upra* note 117, at 922.

services are fair, transparent, and competitive."[154] The CFPB should look to balance business interests against consumer interests when deciding whether to declare an act abusive in any rulemaking. Any rule, though, should always grant initial presumptive weight in favor of the consumer. If any doubt arises whether an act or practice is abusive or not, the Bureau should give greater weight to the consumer's interest and declare the covered entity's practice as abusive. Weighing such competing interests would provide the Bureau the flexibility it requires to fulfill its purpose while giving the financial industry the space it needs to grow and flourish.

Conclusively, a proposed rule that distinguishes abusive from unfair and deceptive conduct, provides examples of abusive conduct, and one that weighs the covered entity's interests against the more important consumer interest would give clarity to covered entities that would provide them a basis to avoid engaging in abusive practices. Further, such a rule under the abusive power would give consumers the ability to avoid entities engaged in abusive conduct, thereby, ensuring that only non-abusive practices may flourish. Any rulemaking must provide direction; however, it should not grant businesses free-range to engage in harmful consumer activities. With the appropriate resources, the CFPB should engage in rulemaking because greater clarity would benefit consumers and businesses alike.

CONCLUSION

In late-2018, acting CFPB Director Mulvaney announced his intent to request comments for information regarding potential rulemaking concerning the prohibition on unfair, deceptive, and abusive acts or practices.[155] It is unclear whether Mulvaney's successor, current CFPB Director Kraninger, will continue to drive towards the initiation of rulemaking to clarify the abusive power.[156] This Article has shown that an analysis of the Bureau's actions under the abusive power is difficult to characterize, constantly overlapping with the other UDAAP prongs (especially the deceptive prong), and is confusing. The abusive power must mean something, but legal

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[154] 12 U.S.C. § 5511(a) (2010).

[155] *Supra* note 1.

[156] Lydia Beyoud & Evan Weinberger, *CFPB Chief Touts Prevention of Consumer Harm Over Enforcement*, BLOOMBERG LAW (Apr. 17, 2019, 11:42 AM), https://www.bloomberglaw.com/ (search article title). Although the CFPB's action against Certified Forensic Loan Auditors shows the Kraninger administration's willingness to use the abusive power, an issue remains on whether she will actively pursue rulemaking to clarify or limit the power.

scholars are uncertain of the scope of that power as well as the distinguishing characteristics that separate it from the unfair and deceptive powers. The Bureau must engage in rulemaking to define these contours granting covered entities some clarity. In drafting a rule, the Bureau should distinguish abusive from the other UDAAP prongs while supplying businesses the clarity necessary to prevent themselves from engaging in such conduct. Without further clarity on the topic, the Bureau's practice of regulation by enforcement will continue to puzzle the financial industry causing continual harm toward businesses and consumers alike. This era of regulation by enforcement must end.