

The Bureau of Consumer Financial Protection will hold the first session of its Symposia Series on June 25, 2019. The Dodd-Frank Act authorizes the Bureau to take enforcement, supervision, and rulemaking actions concerning unfair, deceptive, or abusive acts and practices (UDAAP). With respect to abusiveness, section 1031(d) of the Act provides that the “Bureau shall have no authority . . . 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.”

The meaning of abusiveness is less developed than the meaning of unfairness or deception. And although other federal consumer financial laws reference either the term “abusive” or “abuse,” the Dodd-Frank Act is the first federal law to define and prohibit abusive acts and practices with respect to consumer financial products and services generally. This first symposium will focus on the prohibition on abusive acts or practices.

The symposium will have two panels of UDAAP experts. The first panel will include a discussion with leading academic experts in the area of Consumer Protection. The discussion will touch on various policy issues relating to the abusive standard under Dodd-Frank.

The second panel will examine how the abusive standard has been used in practice, and will include leading legal experts in the field.

Specific subject-matter areas likely to be discussed at the symposium include (though are certainly not limited to):

1. How can the Bureau meet its consumer protection goals without unduly hindering competition or innovation?
2. Should the Bureau engage in a legislative rulemaking to provide clarity regarding the meaning of abusiveness? If so, should the rule focus on providing general principles or engage in a more prescriptive manner? And in the instances where abusiveness has

been applied to date, how would regulatory clarification have made a difference in that application?

3. Should the abusiveness doctrine focus on the same kinds of harm as unfair or deceptive acts or practices (UDAP)?
4. What level of economic analysis, if any, is required to demonstrate or prove the elements of abusiveness?
5. Assuming economic analysis is an appropriate tool to use when considering the elements of abusiveness, e.g., “materially interferes,” or “unreasonable advantage,” is the neoclassical “consumer welfare standard” the proper methodology to use when analyzing the appropriateness of abusive rulemaking or enforcement actions? Or does behavioral economics provide a more appropriate methodology? And if economic analysis is an appropriate tool, what should the welfare standard(s) be, e.g., consumer surplus, total surplus, wealth maximization, or some other standard?
6. What legal consumer standard should be applied to abusiveness? The reasonable consumer standard, which the Bureau and FTC apply in the UDAP context or a standard more analogous with the Fair Debt Collection Practice Act’s least sophisticated or unsophisticated consumer standard, or a different standard?
7. Discuss what, if any, practical consequences the enactment of the abusiveness prohibition has had on markets for consumer financial products or services. How have providers sought to comply with the Dodd-Frank’s prohibition on abusiveness? What compliance challenges have been created by the existence of this new standard, and what effect, if any, has it had on the types of products or services offered to consumers in these markets?
8. How and why should interpretations of other enforcement tools, including the Fair Debt Collection Practices Act, Home Ownership and Equity Protection Act (HOEPA), Unfairness, or Deception Doctrine inform the Bureau’s understanding of abusive?
9. What interpretive questions should the Bureau consider as it applies the abusiveness standard to particular facts? What light may be shed on these questions by other areas of the law, and why are these areas of law relevant? In particular, are there state common law or contract doctrines that could help the Bureau define abusiveness?
10. To what bodies of case law should the Bureau look in considering how to distinguish reasonable from unreasonable advantage-taking? Why are these relevant comparisons?
11. What, if any, principles should limit the scope of abusiveness?