

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Caren Enloe](#) leads Smith Debnam's consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: [Consumer Financial Services Litigation and Compliance](#) dedicated to consumer

## Bureau Sheds Light on its Abusive Acts or Practices Standard in New Statement of Policy

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The CFPB has issued a Statement of Policy that seeks to "convey and foster greater certainty above the meaning of abusiveness" and provide a framework for its exercise of supervisory and enforcement authority as to abusive acts or practices. Under Dodd-Frank, the CFPB has supervisory and enforcement authority over abusive acts or practices in connection with consumer financial products or services. The Policy reflects an effort by the CFPB to resolve uncertainty as to the scope and meaning of abusiveness in the content of its enforcement actions.

### Here's what you need to know:

- Historically, the Bureau has included in its enforcement actions an abusiveness claim with its unfair and deceptive claims, but not alleged any specific course of action distinguishing the two claims. Because of this dual pleading, little clarification has been provided by the Bureau previously as to the abusiveness standard.
- **The Policy sets forth three pillars:**
  - First, in its supervision of covered entities and enforcement actions, the Bureau will only challenge conduct as being abusive if it concludes the harm to consumers outweighs the conduct's benefit. The Bureau further makes clear that the balancing test will consider not only quantitative analysis but also qualitative analysis.
  - Second, the Bureau will generally avoid challenging conduct as abusive that relies upon the same set of facts as claims for unfair or deceptive. In other words, it will not "pile on." Instead, where it pleads stand-alone abusiveness, it intends to clearly plead such claims in a manner that will clearly demonstrate the nexus between alleged facts and the Bureau's analysis of the claim.
  - Finally, the Bureau sets out what may be termed as a sort of "safe harbor" for those who are in good faith attempting to comply with the abusive standard. In those instances, the Bureau indicates it will not seek certain monetary relief based upon abusiveness where the good faith can be demonstrated. The Bureau makes clear, however, that this is not an affirmative defense. What this means, in essence, is that it will be imperative for covered entities to demonstrate

financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

through their compliance management system their good faith attempt to adhere to the standard and if that can be demonstrated, the Bureau will be less likely to seek certain civil monetary penalties. What it does not mean is that the Bureau will not seek relief – the Statement of Policy makes clear that the Bureau still intends to seek legal and/or equitable remedies, including damages and restitution.

- While the Statement of Policy should be viewed positively by the consumer finance industry, readers should be aware that it is simply that - a statement of policy and does not carry the legal import of a published rule. Moreover, as a Statement of Policy, it is subject to amendment or revocation at any time, particularly in times of political change.

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