

## So, What is Abusive Anyway?

June 28, 2019 | [Nicole F. Munro](#)

In mid-April, CFPB Director Kathleen Kraninger announced a symposia series aimed at facilitating a dialogue between the Bureau, consumers, and industry on CFPB policymaking. On June 25, 2019, the Bureau held its first symposium centered around clarifying the definition of "abusive acts and practices" under Section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Note that the Dodd-Frank Act authorizes the Bureau to take enforcement, supervision, and rulemaking actions concerning unfair, deceptive, or abusive acts and practices (UDAAP). The meaning of abusiveness is less developed than the meaning of unfair or deceptive, which have been defined substantially over time under the Federal Trade Commission ("FTC") Act and FTC policy statements. Industry has long claimed a lack of transparency and therefore a lack of understanding as to what constitutes an abusive act or practice.

In addition to the prepared speeches by CFPB Director Kraninger and CFPB Deputy Director Brian Johnson, the symposium, which was broadcast live, included two panel discussions. The first panel of academics was moderated by Tom Pahl, CFPB's Policy Associate Director, Research, Markets and Regulation. Panelists included Patricia McCoy, Professor of Law, Boston College Law School; Todd Zywicki, Professor of Law, George Mason University, Antonin Scalia Law School; Howard Beales, George Washington University, former Director of the FTC Bureau of Consumer Protection; and Adam Levitin, Professor of Law, Georgetown Law School.

The academic panel discussed various policy issues related to the abusive standard under the Dodd-Frank Act. Demonstrating the lack of clarity surrounding abusiveness, two panelists argued that there was overlap between the unfair, deceptive, and abusive standards. One panelist argued that abusive was separate and distinct from unfair and deceptive, and the last panelist argued that abusive was a subset of unfairness. The panel considered whether consumer harm was required to form an abusiveness claim and whether economics played a role in the standard. Assuming the abusive standard needs to be clarified, the panelists discussed the best tools at the Bureau's disposal to make that clarification.

The second panel, a practitioner panel moderated by David Bleicken, CFPB Deputy Associate Director, Supervision, Enforcement and Fair Lending, examined how the abusive standard has been used in CFPB supervision and enforcement. Panelists included industry representatives Eric Mogilnicki, Partner at Covington & Burling, and Hudson Cook Partner Lucy Morris, who previously served as the CFPB's Deputy Enforcement Director. Consumer representatives included William MacLeod, Partner at Kelley Drye, and Nicholas Smyth, Assistant Director of the Pennsylvania Office of Attorney General's Bureau of

Consumer Protection, Senior Deputy Attorney General.

In her statement, Lucy highlighted the lack of clarity with respect to abusiveness, and how the standard differs from unfairness and deception. She thought that it would take years or even decades for cases to establish the contours of CFPB authority under the abusiveness standard. Lucy suggested that cases thus far have not shown how abusiveness differs from unfairness or deception, and that the CFPB has not applied the standard consistently. Lucy thought a policy statement or additional guidance from the CFPB could explain how the Bureau uses abusiveness in supervision and enforcement without limiting the Bureau's broad legal authority to protect consumers. In conclusion, Lucy stated that "[e]xplaining the boundaries of abusiveness is not an easy task, and it's one that would benefit from a robust notice and comment process."

Other panelists also provided opening statements. In addition, the practitioner panel considered instances where the Bureau has applied the abusive standard, and how clarity might have assisted in those instances. Panelists also considered whether the CFPB should initiate rulemaking to clarify the standard. Lucy and Eric stated a rule was time-consuming and premature at this stage, suggesting that guidance or a policy statement might be more appropriate. The panel reviewed the meaning (or lack thereof) of abusiveness under current decisions, and what principles should limit its scope.

Overall, although the panels evidenced individuals with differing views crossing the aisle to work together, the symposium did little to resolve issues of transparency and clarity. After several hours of discussion, the symposium seemed to simply highlight the complexity of the abusive standard. While no issues were resolved on that Tuesday morning, the CFPB did take a much-needed first step toward transparency by engaging in a public symposium with stakeholders. We were grateful to have Lucy invited to participate and hope that Hudson Cook will continue to hold a seat at the table.

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076  
410.684.3200

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