"I'LL KNOW IT WHEN I SEE IT": DEFENDING THE CONSUMER FINANCIAL PROTECTION BUREAU'S APPROACH OF INTERPRETING THE SCOPE OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES ("UDAAP") THROUGH ENFORCEMENT ACTIONS

Stephen J. Canzona†

INTRODUCTION

The U.S. financial crisis of 2007–2009 exposed the tragic consequences that can occur when vulnerable consumers fall prey to onerous or egregious terms contained in financial services contracts.[1] This vulnerability was particularly apparent in the U.S. housing market, where a combination of factors—including deceptive marketing terms, imprudent mortgage loan underwriting, and lack of borrower awareness and education—contributed to a housing "bubble" that ultimately burst, resulting in billions of dollars in losses in mortgages and mortgage-backed securities ("MBS").[2] When the dust finally settled, consumers lost a staggering $17 trillion in household net wealth between 2007 and the first quarter of 2009, and 26.2 million Americans remained unemployed as of November 2010.[3]

Congress created the Financial Crisis Inquiry Commission ("FCIC") to examine the causes of the recent financial crisis, including fraud and abuse in the financial sector.[4] The FCIC identified "widespread failures in financial regulation and supervision," noting that regulators often "lacked the political will. . . as well as the fortitude to critically challenge the institutions and the entire system they were entrusted to oversee."[5] Indeed, Vincent Reinhart, a former Director of the Federal Reserve Board ("FRB")'s Division of Monetary Affairs conceded that "he and other regula-

---

† J.D. Candidate, Notre Dame Law School, 2019; B.S., Georgetown University, 2007. I would like to thank Professor Judy Fox for her support and guidance throughout the writing process, and the members of the Notre Dame Journal of Legislation for their diligent editing. Most of all, I would like to thank my family and friends for their constant love and encouragement. All errors are my own.

1 *See* Eric M. Aberg, Note, *The Case for UDAAP-Based Credit Card Lending Regulations: Providing Greater Financial Security for America and American Consumers*, 84. GEO. WASH. L. REV. 1029 (2016).

2 FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL INQUIRY REPORT, xvi, 6-7 (2011) [hereinafter FCIC REPORT], *available at* http:www.fcic.gov/report/ (noting that the proliferation of these products had the effect of "confounding consumers who didn't examine the fine print, baffling conscientious borrowers who tried to puzzle out their implications, and opening the door for those who wanted in on the action.").

3 *Id.* at 391-392.

4 Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21 (2009).

5 FCIC REPORT, *supra* note 2, at xviii.

tors failed to appreciate the complexity of the new financial instruments and the difficulties that complexity posed in assessing risk."[6]

Cognizant of the shortcomings in the existing regulatory framework for consumer financial products, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[7] in 2010. Significantly, the Dodd-Frank Act created a new independent federal agency, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[8] The CFPB has supervisory authority over banks and credit unions with assets over $10 billion, as well as certain nonbank financial companies.[9] Pursuant to the Consumer Financial Protection Act of 2010 ("CFPA"),[10] the CFPB also has the power to investigate and bring enforcement actions against supervised entities involving allegations of so-called "unfair, deceptive, or abusive acts or practices" ("UDAAP" claims).[11] Commentators were quick to point out that federal regulators have policed unfair or deceptive acts or practices ("UDAP") for decades. So, what's the source of the most recent controversy? Like many federal statutes, the devil lies in the details of the CFPA. In particular, UDAAP's newest term—"abusive"—has generated considerable debate. The CFPB has indicated that "the legal standards for abusive, unfair, and deceptive each are separate,"[12] but some critics have charged that the Bureau has failed to provide adequate guidance concerning what constitutes a statutorily prohibited "abusive" act or practice.[13] In spite of this criticism, the Bureau has made it clear that it will still bring enforcement actions against supervised entities if it believes their actions violated the plain language of the CFPA, even in the absence of formal rulemaking or other agency guidance.[14]

This Note weighs in on the current debate and argues that the CFPB's practice of interpreting UDAAP standards through enforcement actions strikes the proper balance between safeguarding the interests of consumers and responsible providers of financial services. Part I of this Note provides a brief history of UDAAP statutes as

---

6 FCIC REPORT, *supra* note 2, at 45.

7 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (2010).

8 12 U.S.C. § 5491(a) (2012).

9 *See* CFPB FACTSHEET – ENFORCING FEDERAL CONSUMER PROTECTION LAWS 1-2 (2016), *available at* http://files.consumerfinance.gov/f/documents/07132016_cfpb_SEFL_anniversary_factsheet.pdf (noting that "nonbanks include mortgage lenders and servicers, payday lenders, and private student lenders of all sizes, as well as larger participants in the debt collection, consumer reporting, auto finance, student loan servicing, and international money transmission markets.").

10 Pub. L. No. 111-203, tit. X, 124 Stat. 1955 (2010) (codified as amended at 12 U.S.C. § 5481–5603 (2012)).

11 12 U.S.C. § 5531 (2012).

12 CFPB, SUPERVISION AND EXAMINATION MANUAL (2017), at UDAAP 9 (hereinafter "Aug. 2017 CFPB MANUAL").

13 *See* Martin J. Bishop, *The CFPB's Powers Continue to Expand; UDAAP is Still a Potential Black Hole For Consumer Financial Services Companies*, THOMSON REUTERS NEWS & INSIGHT 4 (2012), available at https://www.foley.com/files/Publication/2c47b9d8-2cdb-4989-a556-11966f4e201c/Presentation/PublicationAttachment/e1c7cb83-7a96-4f5b-8c18-5d58dc6631af/Bishop%20Thomson%20Reuters%203%2015%2012.pdf.

14 See John Villa & Ryan Scarborough, *The Law of Unintended Consequences: How the CFPB's Unprecedented Legislative Authority and Enforcement Approach Has Invited Increasing Challenges*, BANKING & FIN. SERVS. POLICY REPORT 3 (July 2016).

a mechanism for government enforcement and explains the rationale for expanding the reach of UDAP to prohibit abusive conduct. Part II examines selected judicial and legislative challenges to the CFPB's UDAAP enforcement authority and assesses why they have largely fallen short of their intended goals. Part III outlines a case for upholding the CFPB's existing approach, arguing that the CFPB's enforcement actions and compliance bulletins issued to date provide financial industry participants with ample precedent of what constitutes unfair, deceptive, and abusive conduct and do not present substantive due process concerns.

I. THE EVOLUTION OF THE UDAAP DOCTRINE

Unfair, deceptive, or abusive acts or practices ("UDAAPs") are direct descendants of their unfair or deceptive acts or practices ("UDAP") ancestors. Historically, the Federal Trade Commission ("FTC") has had the power to prevent nonbank entities from using "unfair or deceptive acts or practices in or affecting commerce" under § 5 of the Federal Trade Commission Act ("FTCA").[15] Similarly, U.S. banking regulators had the authority to enforce § 5 for the banking entities they supervised.[16] The Dodd-Frank Act transferred rulemaking and enforcement authority over consumer financial products from these banking regulators to the CFPB with respect to insured depository institutions or credit unions with total assets of $10 billion or greater (so-called "too-big-to-fail" banks).[17] After Dodd-Frank, prudential banking regulators retained this authority with respect to insured depository institutions or credit unions with less than $10 billion in total assets.[18] Similarly, the FTC retained its authority to "enforce those rules and to continue defining acts or practices that are unfair or deceptive with regards to non-depository institutions."[19] The Dodd-Frank Act further requires the CFPB and FTC to coordinate their efforts with respect to enforcement actions "regarding the offering or provision of consumer financial products or services."[20]

States have crafted their own consumer protection laws based on a handful of

---

15 *See* Laurie A. Lucas, Adam D. Maarec & John C. Morton, *"Abusive" Acts or Practices Under the CFPA's UDAAP Prohibition*, 71 BUS. LAW. 749 (2016) (citing the Federal Trade Commission Act § 5(a), 15 U.S.C. § 45(a)(2) (2012)).

16 *See* FED. DEP. INS. CORP., FDIC COMPLIANCE EXAMINATION MANUAL, SECTION VII: ABUSIVE PRACTICES (2015) at VII-1.1 ("hereinafter NOV. 2015 FDIC MANUAL") (identifying these banking regulators as: the Federal Deposit Insurance Corporation ("FDIC"), the FRB, the Office of the Comptroller of the Currency ("OCC") and the Office of Thrift Supervision ("OTC"), and noting these agencies may coordinate UDAP enforcement activity if a UDAP involves an entity or entities over which more than one agency has enforcement authority).

17 *See* 12 U.S.C. § 5581(b) (2012) (transferring consumer protection functions from the enumerated agencies to the CFPB).

18 12 U.S.C. § 5516 (2012).

19 Norman I. Silber, *Reasonable Behavior at the CFPB*, 7 BROOK. J. CORP. FIN. & COM. L. 87, 101 n.77 (2012). *See also* 12 U.S.C. § 5581(b)(5)(C)(ii) (2012) (clarifying that "the Federal Trade Commission shall have authority to enforce under the Federal Trade Commission Act . . . a rule prescribed by the Bureau under this title with respect to a covered person subject to the jurisdiction of the Federal Trade Commission under that Act, and a violation of such a rule by such a person shall be treated as a violation of a rule issued under section 18 of that Act . . . with respect to unfair or deceptive acts or practices.").

20 12 U.S.C. § 5514 (2012). *See also* FTC & CFPB, Memorandum of Understanding between the Consumer Financial Protection Bureau and the Federal Trade Commission (2012), http://ftc.gov/os/2012/01/120123ftc-cfpb -mou.pdf.

model acts (including the FTC Act).[21] State Attorneys General ("State AGs") often bring similar lawsuits alleging UDAP-based violations pursuant to their authority to act in the public interest and enforce state laws.[22] Alternatively, individual consumers acting as "private AGs" may initiate their own lawsuits alleging violations of state UDAP laws, subject to certain restrictions.[23] In April 2011, the CFPB and the Presidential Initiative Working Group of the National Association of Attorneys General ("NAAG") announced a Joint Statement of Principles to better coordinate law enforcement practices between federal and state officials in the consumer financial services arena.[24]

In discussing the principles underlying "unfair" and "deceptive" practices, the CFPB has noted that "[t]he Federal Trade Commission (FTC) and federal banking regulators have applied these standards through case law, official policy statements, guidance, examination procedures, and enforcement actions that may inform CFPB."[25] In this vein, the Bureau has largely adopted the FTC's definitions of these terms.[26]

1. The "Unfairness" Standard

The FTC has indicated that an act or practice is "unfair" when it: "(1) causes or is likely to cause substantial injury (usually monetary) to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition."[27] A "substantial injury" can take the form of either monetary or reputational harm.[28] In addition, consumers need only take reasonable steps to avoid injury—for example, they would not need to hire independent experts to test consumer products in advance.[29] Examples of acts or practices where a consumer *could not* reasonably avoid injury include: (1) if material information about a product, such as pricing, was missing or withheld from the consumer until after the consumer had committed to purchasing the product; (2) product disclosures that inadequately explained the terms of the act or practice to the consumer; or (3) where a consumer was coerced into purchasing unwanted products or services.[30]

---

21 NAT'L POLICY & LEGAL ANALYSIS NETWORK, CONSUMER PROTECTION: AN OVERVIEW OF STATE LAWS AND ENFORCEMENT 1 (2010), *available at* http://www.publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agconsumer-2010.pdf.

22 *Id.*

23 *See id*. at 1–2 (noting that "private lawsuits may not be able to obtain the full range of remedies available to state AGs" and that "the law may impose additional evidentiary burdens on consumers, such as requiring them to prove that they relied on the specific practice they are suing over, or that the defendant's conduct affects the public at large.").

24 Press Release, Consumer Financial Protection Bureau and National Association of Attorneys General Presidential Initiative Working Group Release Joint Statement of Principles, CFPB (Apr. 11, 2011), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-national-association-of-attorneys-general-presidential-initiative-working-group-release-joint-statement-of-principles/

25 AUG. 2017 CFPB MANUAL, *supra* note 12, at UDAAP 1.

26 *Id.* at UDAAP-1-8.

27 NOV. 2015 FDIC MANUAL, *supra* note 16, at VII-1.2.

28 *Id.*

29 *Id.*

30 *Id.*

This assessment is generally made from an ex ante perspective.[31] In other words, so long as institutions do not create *unreasonable* obstacles for consumers to make informed decisions about their products, government regulators will generally not "second guess" whether a consumer could have made a wiser decision after the fact.[32] Public policy considerations are also contemplated within this framework, though they do not serve as a primary basis for determining that an act or practice is unfair.[33] Regulators argue that the public at large is harmed by unfair acts or practices because consumers are steered into products that they otherwise would not have purchased.[34] In addition, preventing unfair acts or practices creates a more level playing field for businesses because responsible providers of products and services no longer have to compete with less scrupulous merchants.[35]

2. The "Deceptive" Standard

The FTC developed a separate three-part test to determine whether a representation, omission, or practice is "deceptive": "First, the representation, omission, or practice must mislead or be likely to mislead the consumer. Second, the consumer's interpretation of the representation, omission, or practice must be reasonable under the circumstances. Third, the misleading representation, omission, or practice must be material."[36] Unlike the standards for establishing unfairness, there is no requirement that a consumer take reasonable steps to avoid the injury or that the magnitude of the injury be weighed against countervailing public policy considerations.[37] In addition, misleading representations "may be in the form of express or implied claims or promises and may be written or oral."[38] An omission may be considered deceptive if disclosure would be necessary to prevent a consumer from being misled.[39] Further, representations and omissions are evaluated in the context of the entire advertisement, transaction, or course of dealing—rather than in isolation—to determine whether they are misleading.[40] The determination of whether an act or practice is misleading is evaluated from the perspective of the "reasonable consumer," which is an objective standard based on how a reasonable member of the target audience for that product would interpret the marketing material.[41] For example, disclosures buried in the fine print of a consumer contract are "generally insufficient to cure a misleading headline or prominent written representation."[42] Finally, the materiality of a representation, omission, or practice is assessed on the basis of whether "it is *likely*

31 *Id*.
32 *Id*..
33 *Id*. at VII-1.3.
34 *Id*.
35 *Id*. at VII-1.2–1.3.
36 *Id*. at VII-1.3.
37 *Id*.
38 *Id*.
39 *Id*.
40 *Id*.
41 *Id*.
42 *Id*. at VII-1.3–1.4. See also *id*. at VII-1.4 n.9 (noting that "[w]hen evaluating the three-part test for deception, the four 'Ps' should be considered: prominence, presentation, placement, and proximity.").

to affect a consumer's decision to purchase or use a product or service" (emphasis added).[43] An intent to deceive is not a required element of proving that an act or practice is deceptive.[44] Rather, if it can be shown that the institution "intended that the consumer draw certain *conclusions* based upon the claim," materiality will be presumed (emphasis added).[45] Examples of acts or practices that have the potential to be deceptive include:

> [1] making misleading cost or price claims; [2] using bait-and-switch techniques; [3] offering to provide a product or service that is not in fact available; [4] omitting material limitations or conditions from an offer; [5] selling a product unfit for the purposes for which it is sold; and [6] failing to provide promised services.[46]

3. *The "Abusive" Standard*

Turning to the newest "A" in UDAAP, the CFPA defines an "abusive" act or practice as one that:

> (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 its interests 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.[47]

To date, the Bureau has not issued a formal rule elaborating the standard(s) for "abusive" conduct. Richard Cordray, the former Director of the CFPB, testified that, "for us [the Bureau] to define what abusive means [through rulemaking] feels a little presumptive, given that Congress defines what abusive means."[48] Indeed, the definition of "abusive" adopted by Congress provides several meaningful insights into the scope of its intended reach. First, "abusive" is intended to be a more flexible standard than "unfair" or "deceptive," affording regulators latitude to "address the rapid changes in the consumer financial industry."[49] Second, abusive conduct is subject to its own independent legal standard, indicating that practices that otherwise

43 *Id.* at VII-1.4.

44 *Id.*

45 *Id.*

46 *Id.* at VII-1.3.

47 12 U.S.C. § 5531(d) (2012).

48 Richard Corday, Dir., Consumer Fin. Prot. Bureau, Statement before the Fin. Serv. Comm. of the U.S. House of Representatives (Mar. 29, 2012) , https://www.c-span.org/video/?305214-1/consumer-financial-protection-bureau-semiannual-report&start=2140.

49 Tiffany S. Lee, *No More Abuse: The Dodd–Frank and Consumer Fin. Protection Act's ''Abusive''*

satisfy the three-prong tests for unfairness and deception may still be prohibited under the CFPA. Third, the abusive standard places more weight on subjective criteria; for example, it does not include an objective cost-benefit analysis. Fourth, abusive conduct generally implicates power or information imbalances between the consumer and the covered person. A covered person exploits this imbalance when he or she "uses his or her superior understanding, power, or information to secure a transaction with terms that are so unreasonable that they can be explained only by the consumer's lack of understanding, power or information."[50]

Some experts have posited that the addition of the abusive standard was meant to address deficiencies in the FTCA, as practices that rise to the level of unfairness or deception "present relatively extreme situations" that tend to limit prosecutions.[51] For example, in the mortgage lending context, lenders have successfully argued that certain transactions were "fair" because they represented a net tangible benefit to the borrower, even if the terms of the mortgage raised long-term questions about the borrower's ability to repay it.[52] Similarly, the "deceptive" test is difficult to meet because offending companies largely possess the industry data and documents necessary for consumers to establish they made a false or misleading statement.[53]

The CFPB has defended its enforcement-centered approach in part by noting that UDAAPs "can cause significant financial injury to consumers, erode consumer confidence, and undermine fair competition in the financial marketplace."[54] The CFPB's enforcement record in this regard has been prolific. Since its inception in 2011, the Bureau has provided approximately $11.7 billion in consumer relief from its supervisory and enforcement work and collected almost $440 million in civil penalties.[55] For example, in July 2015, Citibank agreed to pay almost $700 million in consumer relief and $35 million in civil monetary penalties to the CFPB to settle allegations of deceptive marketing practices and unfair billing practices related to certain credit card add-on products and services.[56]

Given the significant financial penalties at stake,[57] it comes as little surprise that

Standard, 14 J. CONSUMER & COM. L. 118, 120 (2011).

50 Eric Mogilnicki & Eamonn K. Moran, *Understanding and Applying Dodd-Frank's 'Abusive' Standard*, 104 BANKING REP. (BNA) No. 161, at 2 (Jan. 27, 2015).

51 Testimony of John C. Dugan Comptroller of the Currency before the Comm. on the Fin. Serv. of the U.S. House Representatives, 110th Cong. 34 (2007).

52 Lee, *supra* note 49, at 120.

53 *Id*.

54 CFPB, CFBP BULLETIN 13-07, PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 1 (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

55 CFPB FACTSHEET – ENFORCING FEDERAL CONSUMER PROTECTION LAWS 1–2 (2016), available at http://files.consumerfinance.gov/f/documents/07132016_cfpb_SEFL_anniversary_factsheet.pdf.

56 *See* Consent Order at 1, 36, 45 Citibank, N.A., 2015 CFPB 0015 (2015) (alleging, *inter alia*, "violations deceptive acts or practices relating to the marketing and sale of, and membership retention for, certain Respondent credit card add-on products in violation of Sections 1031(a) and 1036(a)(1)(B) of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531(a), 5536(a)(1)(B)").

57 *See* 12 U.S.C. § 5565 (2012) (providing that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty . . ." up to $1 million per day for "any person that knowingly violates a Federal consumer financial law.).

the CFPB has faced backlash from supervised bank and nonbank entities for its aggressive approach to UDAAP enforcement. Supervised entities have recently challenged the Bureau's stance in court, arguing that the terms embedded in UDAAP are unconstitutionally vague because they fail to provide fair notice of allegedly prohibited conduct, in violation of the Due Process Clause of the Fifth Amendment.[58] Congress has also responded by proposing legislation that would effectively strip the Bureau of its UDAAP rulemaking and enforcement authority altogether.[59]

II. CHALLENGES TO THE CFPB'S UDAAP ENFORCEMENT AUTHORITY

A. SELECTED JUDICIAL CHALLENGES

1. *CFPB v. ITT Educ. Servs., Inc.*

In February 2014, the Bureau filed a groundbreaking lawsuit against for-profit education giant ITT Educational Services, Inc. ("ITT"). ITT was a publicly-traded for-profit secondary educational institution that previously operated 149 locations in 38 states.[60] The Bureau argued that ITT was a "covered person" under the CFPA because it engaged in the provision of consumer financial products or services to students—specifically, by "offering or providing loans, through certain private loan programs, to its students to pay for a portion of ITT's tuition."[61]

Students were ITT's sole source of revenue. However, the average ITT student has a poor credit history and low earnings; thus, he or she can rarely pay for ITT's substantial tuition out-of-pocket.[62] As a result, students relied heavily on government loans to finance their education. In 2012, about ninety-six percent of ITT's cash receipts came from the government—either in the form of Title IV aid programs,[63] or from federal benefits for service members and veterans and state aid programs.[64] Prior to 2008, ITT students relied on third-party lenders to finance the costs of their education above those covered by loans or grants. However, in the wake of the financial crisis, these sources largely dried up. As a result, ITT began offering its students "Temporary Credits," which were loans arranged by ITT that were payable in a single lump sum payment at the end of the academic year.[65] ITT lent students

58 *See* U.S. CONST. amend. V (providing that "no person shall … be deprived of life, liberty, or property, without due process of law). *See also, e.g.*, Brief in Support of Defendant's Motion to Dismiss at 10, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., No. 1:14-CV-00292-SEB, 2015 WL 1013508 (S.D. Ind. Apr. 28, 2014) (arguing that the terms "unfair" and "abusive," both on their face and as applied, "failed to provide sufficient notice of what is proscribed and violate the Due Process Clause of the Fifth Amendment.").

59 *See, e.g.,* H.R. 2612, 112 Cong. (2011) (amending the Dodd-Frank Act to repeal the Bureau's authority to "(1) prohibit unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for, or the offering of, a consumer financial product or service; and (2) promulgate regulations to prevent such practices.").

60 Complaint for Injunctive Relief and Damages at 2, CFPB v. ITT Educ. Serv., Inc., No. 1:14-CV-00292-SEB, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015).

61 *Id.* at 17.

62 *See id*. at 5 (noting that a two-year associate's degree program at ITT costs approximately $44,000).

63 *See* Higher Education Act of 1965, 20 U.S.C. § 1070 (2012).

64 Complaint for Injunctive Relief and Damages at 25, CFPB v. ITT Educ. Serv., Inc., No. 1:14-CV-00292-SEB, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015).

65 *Id.* at 6.

approximately $100 million to $150 million per year in Temporary Credit from 2009 to 2011.[66] The Bureau alleged that ITT knew that the majority of its Temporary Credit recipients would be unable to repay the lump sum payments within nine months.[67] Nevertheless, ITT allegedly coerced students into incurring Temporary Credit obligations but provided minimal disclosures about the terms of the program.[68] In addition, ITT staff allegedly mischaracterized the Credits as a source of "funding" to cover costs above those covered by loans or grants and told students that they did not need to be repaid.[69]

ITT created two private loan programs in 2008 intended to serve as a vehicle for students to pay off their Temporary Credit (the "Private Loan" programs).[70] Ostensibly, these programs were created: (1) to reduce the amount of Temporary Credit outstanding; (2) convert the Credits into immediate income; and (3) help ITT avoid lending students any further amounts from its own accounts after their first year.[71] However, these Private Loans carried high fees and high interest rates, had fewer options to reduce monthly payments than federal loans, and were not dischargeable in bankruptcy absent a special showing of undue hardship.[72]

The Bureau alleged that ITT violated the CFPA's prohibition against abusive practices by taking "unreasonable advantage of ITT students' inability to protect their interests in selecting or using the ITT Private Loans."[73] It cited ITT's aggressive tactics to coerce students into taking out the Private Loans, including the threat of expulsion, as evidence of ITT's intent to exploit its students' financial vulnerabilities.[74] The Private Loan program was also characterized as abusive because it took unreasonable advantage of ITT students' reasonable reliance on ITT to act in their interests.[75] ITT's Financial Aid staff allegedly employed high pressure sales tactics to push students into taking on high-risk loans they knew they could not repay in order to improve the appearance of ITT's financial statements and boost ITT's stock price.[76] ITT allegedly took advantage of students in other ways as well. Publicly, ITT held itself out as an institution that could help students obtain more desirable jobs and higher incomes. However, the Bureau alleged that ITT published misleading employment data that "did not represent realistic outcomes for most ITT students."[77]

Similarly, the Bureau charged that ITT's Private Loan program practices were unfair under the CFPA because they interfered with students' ability to make informed, uncoerced choices.[78] As ITT students generally possessed limited financial

---

66 *Id.* at 112.
67 *Id.* at 28.
68 *Id.* at 105–07.
69 *Id.* at 108.
70 *Id.* at 114.
71 *Id.* at 114–15.
72 *Id.* at 123–28.
73 *Id.* at 172.
74 *Id.* at 8.
75 *Id.* at 181.
76 *Id.* at 172.
77 *Id.* at 33.
78 *Id.* at 160.

means, they had no meaningful choice in deciding whether to select ITT's Private Loans to finance their education. Further, the Bureau noted that, "[g]iven the virtual non-transferability of ITT credits, most students were forced to either take the ITT Private Loans or forfeit their entire investment."[79]

ITT challenged the Bureau's Complaint on several grounds. It disputed the Bureau's characterization of its practices as unfair and abusive and argued that the CFPB failed to provide sufficient notice of what conduct was proscribed by these terms.[80] As a result, ITT argued that the Bureau's UDAAP claims under the CPFA should be dismissed as unconstitutionally vague.[81] ITT further asserted that the CFPA's mandate to prohibit unfair and abusive practices in the consumer finance industry was unconstitutional because it amounted to sweeping, standardless delegation of legislative authority to the CFPB.[82]

The U.S. Supreme Court previously addressed the "void for vagueness" doctrine in the civil context involving another administrative agency, the Federal Communications Commission ("FCC"). In *F.C.C. v. Fox Television Stations, Inc.*, the Court noted that this doctrine:

> addresses at least two connected but discrete due process concerns: [1] Regulated parties should know what is required of them so they may act accordingly; and [2] precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.[83]

As a general matter, the District Court in *ITT*, citing *Fox*, indicated that it would "refuse to apply a statutory standard only where it is so amorphous that reasonable observers have no choice but to 'guess at its meaning[,] and differ as to its application.'"[84] The court also clarified that the degree of vagueness tolerated by the Constitution, as well as "the relative importance of fair notice and fair enforcement," depends in part on whether the statute imposes criminal or civil penalties, noting that "less clarity is demanded of laws or regulations that are enforced through civil action rather than prosecution."[85] Further the court reasoned that, as the CFPA regulates economic activity—as opposed to a protected constitutional interest like free expression—it is subject to a more lenient vagueness test.[86]

The court held that the CFPA's prohibition of "unfair or deceptive acts or practices" was not unconstitutionally vague, noting that these terms were largely adopted

79 *Id.* at 171.

80 *See* Brief in Support of Defendant's Motion to Dismiss at 10-12, CFPB v. ITT Educ. Servs., Inc., No. 1:14-CV-00292-SEB, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015).

81 *Id.* at 11.

82 *Id.* at n.9 (citing Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 472 (2001) in arguing that "notions of 'unfairness' and 'abusiveness' also fail to lay down an 'intelligible principle to which the [Bureau] is directed to conform'").

83 FCC v. Fox TV Stations, Inc., 567 U.S. 239, 240 (2012).

84 CFPB v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878, 900 (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

85 *Id.* at 900 (citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982)).

86 *Id.* at 902 (citing Illinois v. Alta Colleges, Inc., No. 14-C-3786, 2014 WL 4377579, at *3–4 (N.D. Ill. Sept. 4, 2014)).

from the FTCA, the meaning of which "has been given concrete shape by successive generations of interpretation and refinement."[87] Thus, the court rejected ITT's contention that "a reasonable business entity would be forced to guess at the term's meaning,[sic] or would be subject to [the] agency's standardless discretion in its enforcement."[88]

The court also held that the CFPA's use of the word "abusive" passed constitutional muster. The court's reasoning turned on two existing federal statutes that addressed abusive practices in connection with debt collection and telemarketing practices, respectively. The first—The Fair Debt Collections Practices Act ("FDCPA") —was enacted to "eliminate abusive debt collection practices by debt collectors"[89] and includes a non-exhaustive list of exemplars of such abusive conduct.[90] The court noted that the FDCPA had been on the books for nearly forty years and the FTC had brought over sixty enforcement actions pursuant to this provision.[91] This extensive enforcement record, in turn, "[enabled] the growth of an appreciable corpus of judicial commentary explicating the meaning of abusive treatment of consumers."[92] Similarly, the court pointed to the Federal Telemarketing Sales Rule ("FTSR"),[93] promulgated by the FTC pursuant to the Consumer Fraud and Abuse Prevention Act,[94] as further evidence that defendants in ITT's position had ample access to illustrative guidance on abusive practices.[95] The court concluded that the CFPA's clear prescriptive language regarding abusive conduct, combined with the use and interpretation of this term in other related consumer protection statutes, provided "at least the minimal level of clarity that the due process clause demands of non-criminal economic regulation."[96]

2. *CFPB v. Navient Corp.*

More recently, the Bureau filed a Complaint against Navient Corporation and two of its subsidiaries responsible for student loan servicing and collection. Navient is the largest student loan servicer in the U.S. and services loans for over 12 million borrowers, representing over $300 billion in federal and private student loans.[97] The Bureau alleged that Navient's practice of steering students experiencing financial hardship into forbearance programs—rather than income-driven repayment plans—was abusive.[98] The CFPB noted that forbearance programs, which permit eligible borrowers to make reduced monthly payments or stop making payments on their

87 *Id*. at 903.

88 *Id*. at 904.

89 15 U.S.C. § 1692(e) (2012).

90 15 U.S.C. § 1692(d) (2012).

91 *ITT*, 219 F. Supp. 3d at 906.

92 *Id*.

93 16 C.F.R. § 310.4 (2015).

94 15 U.S.C. § 6102 (2012).

95 *ITT*, 219 F. Supp. 3d at 906.

96 *Id*.

97 Complaint for Permanent Injunction and Other Relief at 2, CFPB v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Jan. 18, 2017) (No. 3.17-CV-00101-RDM), 2017 WL 191446.

98 *Id.* at 50.

loans for a defined period of time, are generally more suitable to borrowers experiencing temporary financial hardship or illness.[99] However, long-term enrollment in forbearance programs often comes at a significant cost. For example, any unpaid interest is generally added to the principal amount of the borrower's loan, which can greatly increase the borrower's monthly payment over the repayment term.[100] By contrast, income-based repayment plans afford several benefits to borrowers facing prolonged financial hardship. As the title implies, these repayment programs are generally tailored to the borrower's income and family size, with some plans offering starting payments of as little as $0 per month.[101] In addition, some of these plans include interest subsidies, where the federal government essentially pays any unpaid interest that accrues on the loan during the first three years of the repayment plan.[102] This feature mitigates the risk of "payment shock" to the borrower that can occur under a forbearance plan, where the unpaid interest is capitalized. Other income-driven plans allow for forgiveness of the remaining principal balance of the loan after the borrower makes a certain number of qualifying payments.[103]

The Bureau further argued that Navient obtained an unreasonable benefit from this practice at the borrowers' expense because forbearance plans are generally more efficient to administer and less costly than other repayment plans, which reduced Navient's operating costs.[104] Specifically, the CFPB noted that this practice took unreasonable advantage of student's reasonable reliance on Navient to help them select a repayment plan that was in their best interests.[105] In support of its position, the Bureau pointed to numerous statements on Navient's website indicating that Navient was committed to helping borrowers find the repayment option that best fits their budget.[106]

In addition, the CFPB charged that Navient's servicing practices were unfair under the CFPA.[107] The Bureau alleged that, over a period of several years, "Navient steered hundreds of thousands of federal student loan borrowers experiencing long-term financial hardship into multiple consecutive forbearances that spanned years."[108] As a result, these borrowers suffered substantial injury in the form of significantly higher loan principal balances due to accumulated accrued interest.[109] Further, the Bureau reasoned that the injury was not reasonably avoidable because Navient furnished little or inadequate information regarding alternative repayment plans; consequently, borrowers were unable to make informed decisions regarding

---

99 *Id*. at 34.

100 *Id*. at 34–35.

101 *Id*. at 30.

102 *Id*. at 31.

103 *See id*. at 32 (noting that certain public sector employees are entitled to principal forgiveness after only ten years of qualifying payments).

104 *Id*. at 42–46.

105 *Id*. at 49.

106 *See id*. at 38–39 (quoting language from Navient's website indicating that, "[w]e can help you find an option that fits your budget, simplifies payment, and minimizes your total interest cost" but alleging that Navient "routinely disregarded that commitment.").

107 *Id*. at 144–47.

108 *Id*. at 144.

109 *Id*.

the most appropriate plan for their financial situation.[110]

The Bureau also characterized certain servicing and collection practices as deceptive. These included: (1) creating the false and misleading impression that providing incomplete or inaccurate renewal applications for certain loan repayment programs would only result in processing delays, without disclosing the possibility for adverse financial implications;[111] and (2) representing that completing a "rehabilitation program"[112] would remove adverse information regarding the student loan from the borrower's credit report, but failing to disclose that the trade line reflecting late payments and delinquencies prior to default would remain.[113]

Similar to ITT, Navient brought a due process challenge to the CFPB's UDAAP enforcement authority and asserted that the Bureau "has *never* exercised its rulemaking power to 'identify[] unfair, deceptive, or abusive acts or practices under Federal law,' much less the specific conduct at issue here (emphasis supplied)."[114] Employing a nuanced textual and structural analysis, Navient argued that the text of the Dodd-Frank Act constrained the Bureau's ability to "declare" an act or practice to be unlawful in absence of formal rulemaking.[115] Without this textual limitation, Navient argued that the CFPB could essentially bring an enforcement suit against a covered entity and argue that unfairness and abusiveness mean whatever the Bureau wants it to mean.[116]

The United States District Court for the Middle District of Pennsylvania denied Navient's Motion to Dismiss in its entirety on August 4, 2017.[117] The court reframed Navient's due process challenge and stated that the relevant inquiry was not whether Navient had fair notice of the Bureau's *interpretation* of the CFPA, but rather whether it had fair notice of what the Act *requires*.[118] Here, the court drew parallels with another Third Circuit case, *FTC v. Wyndham Worldwide Corp.*[119] In *Wyndham*, the FTC alleged that the defendants' deficient cybersecurity measures failed to protect consumer data against hackers and constituted an "unfair" practice under the FTC Act.[120] Similar to Navient, Wyndham charged that the FTC had failed to promulgate a relevant rule or adjudication on the matter of unfairness, and thus the FTC Act, "as applied" to its cybersecurity practices, failed on due process

110 *Id*. at 145.

111 *Id*. at 155–56.

112 *See id*. at 117 (explaining that these programs allowed federal student loan borrowers whose loans were in default status to restore their loans to active repayment status if they successfully made nine consecutive on-time payments over the course of ten months).

113 *Id*. at 119–20.

114 Brief in Support of Defendant's Motion to Dismiss at 13–14, CFPB v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Jan. 18, 2017).

115 *See, e.g.*, 12 U.S.C. § 5531 (2012) ("The Bureau shall have no authority under this Section to *declare* an act or practice abusive with the provision of a consumer financial product or service, unless the act or practice." (emphasis added)).

116 CFPB v. Navient Corp., No. 3:17-CV-00101-RDM, 2017 WL 3380530, at *6 (M.D. Pa. Jan. 18, 2017).

117 *See id*.

118 *Id*. at *8.

119 799 F.3d 236 (3d Cir. 2015).

120 *Id*.

grounds.[121] In absence of an FTC rule or adjudication that merited agency deference, the FTC in *Wyndham* relied on "ordinary judicial interpretation of a civil statute" to interpret the FTC Act "in the first instance" and decide whether it prohibited the alleged conduct.[122] The District Court in *Navient*, citing the Third Circuit's decision in *Wyndham*, held that Navient's fair notice argument failed as a matter of law and clarified that "[f]air notice is satisfied . . . as long as the company can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute."[123]

B. Recent Legislative Challenges

Almost immediately after the Bureau "went live" in July 2011, it faced legislative challenges that threatened to clip the wings of its enforcement powers. For example, H.R. 2612, sponsored by Florida Rep. Connie Mack IV (R-FL), sought to repeal the CFPB's ability to promulgate regulations relating to UDAAPs and prohibit the Bureau from bringing enforcement actions to prohibit the same.[124] Although this rather targeted bill failed to emerge from committee hearings, a more comprehensive proposal to overhaul the CFPB has gained more traction as of late. The Financial CHOICE ("Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs") Act of 2016,[125] introduced by House Financial Services Committee Chair Rep. Jeb Hensarling (R-TX), spanned over five hundred pages in length and contained a series of proposed changes to the Bureau's structure and functions. While a comprehensive discussion of the CHOICE Act is beyond the scope of this Note, the Act was broadly designed to provide regulatory relief from certain Dodd-Frank requirements to bank and nonbank financial institutions.[126] For starters, the Act effectively proposed to "re-brand" the CFPB as the "Consumer Financial Opportunity Commission" ("CFOC").[127] But the list of its "amendments" to Dodd-Frank went far beyond mere cosmetic changes. Indeed, the corresponding changes to the Bureau's mandate provide instructive cues as to the anti-consumer, pro-industry sentiment that permeates much the rest of the Bill.[128] Some sections reflect an inherent distrust of the Bureau's perceived power, particularly amidst charges that it is an un-

121 *Id*. at 253–54.

122 *Id*.

123 CFPB v. Navient Corp., No. 3:17-CV-00101-RDM, 2017 WL 3380530, at *8-9 (M.D. Pa. Jan. 18, 2017) (citing FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 256 (3d Cir. 2015)).

124 H.R. 2612, 112th Cong. (2011).

125 Financial CHOICE Act of 2016, H.R. 5983, 114th Cong. (2016).

126 *See* Sean M. Hoskins, Cong. Research Serv., R44631, The Financial Choice Act in the 114th Congress: Policy Issues 2–12 (2016).

127 Financial CHOICE Act of 2016, H.R. 5983, 114th Cong. § 311 (2016).

128 *Compare* 12 U.S.C. § 5511(a) (2012) ("The Bureau shall seek 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 that markets for consumer financial products and services are fair, transparent, and competitive.") *with* Financial CHOICE Act of 2016, H.R. 5983, 114th Cong. § 316 (2016) (modifying the Bureau's mandate in enforcing Federal consumer financial law to be "for the purpose of strengthening participation in markets by covered persons, without Government interference or subsidies, to increase competition, and enhance consumer choice.").

constitutional entity insulated from any meaningful checks by the Executive or Legislative branches.[129] To that end, H.R. 5983 proposed to replace the single-Director structure of the CFPB with a multimember commission, similar to the current leadership of the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC").[130] This version of the CHOICE Act also repealed the Bureau's ability to prohibit abusive practices, although consumers would still retain limited protections against UDAPs perpetuated by covered entities.[131]

In the spring of 2017, House Republicans announced plans to introduce an updated version of the bill, dubbed the CHOICE Act "2.0," that promised to build on existing attempts to amend, repeal, or replace key Dodd-Frank provisions.[132] Similar to its predecessor, the new bill proposed another facelift to the Bureau's name.[133] But whereas CHOICE "1.0" at least tacitly acknowledged the important supervisory role the Bureau plays over bank and nonbank institutions, its progeny proposed to dismantle the Bureau's supervisory and examination functions altogether.[134] Among other shortcomings, this feature would severely limit the Bureau's ability to prospectively limit potential harm to consumers—for example, by identifying compliance issues found in the course of routine examinations.[135] Significantly, the rebranded CLEA would also lose *all* of its UDAAP rulemaking and enforcement capabilities under CHOICE 2.0. While the bill passed the House in June, largely along party lines, its ultimate fate remains unclear. Some industry commentators have posited that elements of the comprehensive bill will be partitioned and considered separately, or that Senate Republicans will need to come up with their own version of the CHOICE Act, with at least some bipartisan support.[136] Apparently lost among partisan attempts by Republican lawmakers to mischaracterize the Bureau as an omnipotent bureaucracy are headline-grabbing statistics reminding all Americans of the significant rights the Bureau has vindicated on their behalf. For example, according to data published by the Bureau, the CFPB brought over 125 enforcement actions that utilized UDAAP through July 2017 (roughly sixty-five percent of total enforcement actions).[137] As a result, over 26.3 million consumers have been entitled to over $10.8 billion in consumer relief through monetary redress, debt cancellation, or principal reduction.[138] Regardless of the perceived shortcomings of the Dodd-Frank Act more

129 *See, e.g.*, Brief in Support of Defendant's Motion to Dismiss at 8–10, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., No. 1:14-CV-00292-SEB, 2015 WL 1013508 (S.D. Ind. Apr. 28, 2014) (arguing, *inter alia*, that the Bureau's structure, which is led by a single Director who may only be removed for cause, violates the Constitution's separation of powers).

130 *Id*. at 19–22.

131 Financial CHOICE Act of 2016, H.R. 5983, 114th Cong. (2016).

132 Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

133 *See* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 711 (2017) (converting the Consumer Financial Protection Bureau (CFPB) into the Consumer Law Enforcement Agency).

134 Marc Labonte et al., Cong. Research Serv., R44839, THE FINANCIAL CHOICE ACT IN THE 115TH CONGRESS: SELECTED POLICY ISSUES 28–30 (2017).

135 *Id*. at 25.

136 Brena Swanson, *Is the Financial Choice Act DOA in the Senate?*, HOUSINGWIRE (June 9, 2017), https://www.housingwire.com/articles/40390-is-the-financial-choice-act-doa-in-the-senate.

137 Staff of H. Comm. on Fin. Serv's., 115th Cong., THE CONSUMER FINANCIAL PROTECTION BUREAU IN PERSPECTIVE 17–19 (July 21, 2017).

138 *Id*.

generally, it would seem antithetical to the legislative process to paint over the Bureau's short, impressive history with such broad brush strokes.

III. THE CASE FOR UPHOLDING THE CFPB'S APPROACH TO UDAAP ENFORCEMENT

A. THE BUREAU HAS ISSUED SUBSTANTIVE GUIDANCE ON UNFAIR, DECEPTIVE, AND ABUSIVE PRACTICES THROUGH COMPLIANCE BULLETINS

The CFPB has published a series of bulletins that provide additional guidance for regulated entities seeking to understand the contours of the Bureau's UDAAP enforcement authority. These publications touch on a variety of topics, including: (1) consumer debt collection; (2) credit reporting; (3) consumer credit cards; and (4) pay-by-phone services.

1. CFPB Bulletin 2013-07: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts

In July 2013, the Bureau published guidance on consumer debt collection practices. The Bulletin stated that conduct which contravenes the FDCPA could also constitute a UDAAP prohibited by the Dodd-Frank Act.[139] While the FDCPA generally only applies to third-party debt collectors and debt purchasers, the Bureau clarified that *all* "[o]riginal creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act."[140] The Bureau also created a non-exhaustive list of ten practices or patterns of conduct related to the collection of consumer debts that could constitute UDAAPs.[141]

2. CFPB Bulletin 2013-08: Representations Regarding Effect of Debt Payments on Credit Reports and Scores

The CFPB published a second contemporaneous Bulletin in July 2013 detailing additional guidance applicable to creditors, debt buyers, and third-party debt collectors.[142] The Bureau expressed concern over representations made by these entities regarding the relationship between paying debts in collection and a consumer's credit report.[143] It cited observations gleaned from its recent supervisory investigations and enforcement investigations indicating that certain debt owners and debt collectors were engaging in a pattern of material misrepresentations, including: (1) representing

---

139 CFBP BULLETIN 13-07, PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 1 (July 10, 2013), *available at* https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

140 *Id*. at 5.

141 *Id*. at 5–6.

142 CFBP BULLETIN 13-08, REPRESENTATIONS REGARDING EFFECT OF DEBT PAYMENTS ON CREDIT REPORTS AND SCORES (July 10, 2013).

143 *Id*. at 1–2.

that payments on certain "obsolete debts" would remove negative information about the debt from the consumer's credit report, even though the information would likely not have appeared on the credit report had the debt remained unpaid; (2) representing that payments on debts in collection would improve the borrower's credit score, when in reality an individual's credit score is influenced by numerous factors; and (3) representing that paying debts in collection would improve the borrower's creditworthiness or likelihood of subsequently receiving credit from a lender, even though lenders often assign differing weights to information used to evaluate a borrower's creditworthiness, including credit report or credit score information.[144]

The CFPB took the position that these misrepresentations, which would likely be illegal under the FDCPA,[145] may also constitute a deceptive practice under the Dodd-Frank Act.[146] The Bureau put debt collectors on notice that it would review their internal policies and procedures in the course of its supervision activities or enforcement investigations to assess whether they are "making these types of claims and the factual basis for them."[147]

3. *CFPB Bulletin 2014-02: Marketing of Credit Card Promotional APR Offers*

In September 2014, the Bureau issued a Bulletin addressing advertising practices in connection with certain credit card promotional offers.[148] The Bulletin cautioned credit card issuers that certain solicitations offering a promotional annual percentage rate ("APR") on particular transactions over a defined period of time may constitute a deceptive and/or abusive act or practice under the CFPA.[149] The Bureau cited promotions offering consumers the ability to transfer their credit card balance at a low or zero percent APR as an area of particular concern. In some instances, consumers may benefit from these promotions by paying off higher APR credit cards or tapping into cheaper sources of credit to finance a large purchase over a period of time.[150] However, these potential benefits often come with conditions—namely, a transaction fee for accepting the offer, and a requirement that the consumer pay the full statement balance on the credit card by the payment due date.[151] If the consumer fails to pay the statement balance in full—including the amount subject to the promotional APR—he or she will lose the benefit of the "grace period" typically afforded to interest charges.[152]

---

144 *Id*. at 2–3.

145 *See* 15 U.S.C. § 1692e (2012) (declaring it unlawful for a debt collector to "use any false, deceptive, or misleading representation or means in connection with the collection of any debt.").

146 CFBP BULLETIN 13-08, REPRESENTATIONS REGARDING EFFECT OF DEBT PAYMENTS ON CREDIT REPORTS AND SCORES (July 10, 2013).

147 *Id*. at 3.

148 CFBP BULLETIN 14-02, MARKETING OF CREDIT CARD PROMOTIONAL APR OFFERS (Sept. 3, 2014).

149 *Id*.

150 *Id*. at 2.

151 *Id*.

152 The "grace period" refers a period of time after the close of a cardholder's billing cycle where she will not incur interest charges on purchases made during the billing cycle provided she pays the full balance by the payment due date.

The Bureau found that some card issuers conveyed the misimpression to consumers that the only cost of obtaining the low promotional APR was the transaction fee for accepting the offer. In addition, they did not prominently disclose the fact that consumers may incur additional interest charges on later purchases if they do not pay their balances in full (and thus restore the "grace period" for incurring these charges).[153] Further, they failed to cure these misimpressions.[154] The Bureau concluded that this misrepresentation would be material from the standpoint of the "reasonable consumer" because it pertains to a central characteristic of the product (its cost).[155] Thus, it could constitute a deceptive advertising practice under the CFPA. In addition, the Bulletin clarified the conditions under which these practices could be deemed abusive.[156]

4. *CFPB Bulletin 2017-01: Phone Pay Fees*

More recently, the Bureau addressed the potential for UDAAP violations in assessing fees for pay-by-phone services employed by certain financial services providers.[157] These entities may charge different phone pay fees depending on the payment method selected by the consumer.[158] However, in some instances, the CFPB found that these entities or their third-party service providers failed to disclose these fees or failed to inform consumers of the material price difference between available phone payment options.[159] In another case, the Bureau described a service provider that engaged in the deceptive practice of giving delinquent credit card holders the false impression that their sole payment choice was a $14.95 pay-by-phone option when there were other no-cost payment alternatives available.[160] The CFPB also indicated that "production incentives" or other incentive-based programs employed by some providers may increase the risk of these entities engaging in UDAAPs.[161] In particular, they noted that these programs, which often reward employees based on their ability to steer consumers into higher-cost payment options, create a risk that consumers will be inadequately informed about the availability of lower-cost alternatives.[162]

B. The Bureau's Recent Enforcement Actions Are consistent with the Plain Statutory Mandate Of the CFPA and are Narrowly Tailored

153 CFBP Bulletin 14-02, Marketing of Credit Card Promotional APR OFFERS 2–3 (Sept. 3, 2014).

154 *Id*. at 2.

155 *Id*. at 3.

156 *See id*. at 3–4 (indicating that, "[d]epending on all of the facts and circumstances, an issuer may take unreasonable advantage of such consumers by failing to adequately inform them of these conditions and by exploiting their lack of understanding to impose additional costs.").

157 CFBP Bulletin 17-01, Phone Pay FEES (July 31, 2017).

158 *Id*. at 2.

159 *Id*. at 1–2.

160 *Id*. at 3 (citing Citibank, N.A., No. 2015-CFPB-0015 (CFPB, July 21, 2015)).

161 *Id*. at 5.

162 *Id*.

TO ROOTING OUT ONLY THE MOST EGREGIOUS CASES OF UNFAIR, DECEPTIVE, OR ABUSIVE CONDUCT

In addition to the cases discussed in Part II, *supra*, the Bureau has promulgated extensive guidance to covered entities in the form of enforcement actions, which illustrate a consistent approach to applying UDAAP standards. In particular, these matters reflect a tailored approach by the CFPB that targets particularly egregious conduct in the financial marketplace and does not represent an abuse of the agency's own discretion.

For example, in December 2014, the Bureau took firm action against two student debt relief scams that reaped millions of dollars of illegal fees from student borrowers and made false representations regarding their services and affiliations.[163] One entity—doing business as College Education Services ("CES")—was even banned from participating in the debt relief business altogether. The Bureau alleged that CES engaged in deceptive advertising practices by materially misrepresenting that their "debt relief" services would result in lower monthly payments for student loan borrowers and failed to deliver on these promises.[164] In addition, the CFPB charged that CES' "loan counselors" engaged in abusive practices by taking unreasonable advantage of financially distressed consumers and failing to act in their best interests—often by steering them into costly loan consolidation programs rather than offering them individualized advice.[165] The other entity operated under the fictitious name, "Student Loan Processing.US" and falsely implied to consumers that it was affiliated with the U.S. Department of Education.[166] The CFPB charged that this was a material misrepresentation in violation of the CFPA's prohibition of deceptive practices.[167]

In May 2015, the popular online payment system PayPal entered into a consent decree with the Bureau in stemming from allegations relating to its online credit product, PayPal Credit.[168] The CFPB alleged that PayPal engaged in deceptive advertising practices by failing to honor advertised promotions, such as credits toward consumer purchases. More strikingly, the Bureau uncovered evidence indicating that PayPal enrolled consumers in PayPal Credit automatically and without their consent‒often when signing up for a regular PayPal account or making purchases. This was appropriately deemed to be an unfair practice under the CFPA as it was (1) clearly not reasonably avoidable by consumers and (2) was likely to cause substantial injury, as consumers may fail to make payments or incur late fees and interest on accounts that they do not know exists.

163 Press Release, CFPB, *CFPB Takes Action to End Student "Debt Relief" Scams* (Dec. 11, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-end-student-debt-relief-scams/.

164 Complaint for Permanent Injunction, Civil Money Penalties, and Other Relief at 14, CFPB v. College Educ. Servs., Inc., No. 8:14CV3078T36EAJ, (M.D. Fla. Dec. 11, 2014).

165 *Id*. at 14–16.

166 Complaint for Permanent Injunction and Other Relief at 8-9, CFPB v. IrvineWebWorks, No. 8:14-CV-1967, (C.D. Cal. Dec. 11, 2014).

167 *Id*. at 15–16.

168 Press Release, CFPB, *CFPB Takes Action Against PayPal for Illegally Signing up Consumers for Unwanted Online Credit* (May 19, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-paypal-for-illegally-signing-up-consumers-for-unwanted-online-credit/.

In perhaps the most shocking illustration of the need for the CFPB's UDAAP enforcement in recent memory, the Bureau in 2016 fined retail banking giant Wells Fargo Bank, N.A. $100 million for its highly-publicized practice of opening unauthorized deposit and credit card accounts without consumer authorization.[169] The CFPB's analysis indicated that Wells Fargo employees opened over 1.5 million unauthorized deposit accounts, often through "simulated funding," whereby funds from consumers' existing accounts were transferred to the unauthorized account.[170] These actions clearly contravened the CFPA's prohibition of abusive practices as (1) consumers could not protect their own interest in avoiding account fees or other charges as they did not have an opportunity to offer affirmative assent to these unauthorized account agreements; and (2) consumers were not afforded an opportunity to be apprised of the terms or conditions of these accounts.

While each of these enforcement actions implicates a different set of facts, a consistent pattern emerges. Namely, to date the Bureau has applied its UDAAP enforcement authority to a narrow range of conduct that: (1) is clearly proscribed by the plain meaning of the terms "unfair," "deceptive," and "abusive," as set forth in the CFPA; (2) is appropriately tailored to more extreme cases of consumer abuse, harassment, and exploitation as opposed to conduct that is "at the margins" of propriety; and (3) does not present meaningful due process concerns to responsible financial services providers.

CONCLUSION

Nearly every federal agency tasked with some form of oversight or enforcement authority operates within a sphere of compromise. For the CFPB, this compromise may be framed as a desire to facilitate consumer choice in a market economy while making it incumbent on financial providers to ensure that consumers have the information to make these choices responsibly. Providing access to consumer credit from responsible financial services providers is undoubtedly important, and that is particularly true for unbanked and underbanked Americans, who often possess limited financial or educational means.[171] Although the Bureau was vested with significant statutory authority to administer and enforce federal consumer laws, its short history illustrates that it has channeled this power responsibly in order to tackle particularly egregious practices that often targeted the most vulnerable members of society. Prohibiting UDAAPs in the consumer financial marketplace may be used both as a sword and a shield that will help restore confidence in a system that drew much deserved ire from the American public in the aftermath of the financial crisis.

Perhaps the U.S. Department of the Treasury's 2009 proposal outlining its vision

---

169 Press Release, CFPB, *Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts* (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.

170 Wells Fargo Bank, N.A., No. 2016-CFPB-0015 (CFPB, July 21, 2015).

171 *See, e.g.* FDIC, 2015 NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 1–2 (Oct. 20, 2016) (indicating that seven percent of U.S. households were unbanked in 2015, representing approximately 9 million households, and an additional almost twenty percent of U.S. households were underbanked, representing 24.5 million households).

for the CFPB best articulates this sentiment:

> *Consumer protection is a critical foundation for our financial system. It gives the public confidence that financial markets are fair and enables policy makers and regulators to maintain stability in regulation. Stable regulation, in turn, promotes growth, efficiency, and innovation over the long term.*
>
> *. . . To instill a genuine culture of consumer protection and not merely of legal compliance in our financial institutions, we need first to instill that culture in the federal regulatory structure.*[172]

172 Dep't. of the Treasury, Financial Regulatory Reform – A New Foundation: Rebuilding Financial Supervision and Regulation 56 (June 17, 2009), *available at* https://www.treasury.gov/press-center/press-releases/Pages/20096171052487309.aspx.