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An Analysis Of The CFPB's Abusiveness Claims: Part 2

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In the first part of this two-part series, we discussed the nuts and bolts of how the Consumer Financial Protection Bureau has interpreted the four prongs of the Dodd-Frank Act's prohibition on "abusive" acts or practices through CFPB enforcement cases. In this final part, we will explore the broader patterns that have emerged through those cases and what they mean for the financial services industry going forward.


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Background

As we discussed in the first part, the Dodd-Frank Act added a new definition of "abusive" acts or practices to regulators' long-standing arsenal against unfair and deceptive acts and practices (UDAPs). The Dodd-Frank Act defines abusiveness using four prongs:

- Prong (1) — "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service."

- Prong (2)(A) — "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."

- Prong (2)(B) — "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."

- Prong (2)(C) — "takes unreasonable advantage of … the reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[1]

Each of these prongs is independent of the others, and any one of them is sufficient to make an abusiveness claim.

Lessons from Statistics

Looking at the overall numbers, there are some interesting patterns in the CFPB's abusiveness actions to date. The most striking is that the agency relies on two of the abusiveness prongs — prongs (2)(A) and (2)(B) — substantially more frequently than it relies on the others. The 16 CFPB abusiveness cases brought to date contain a total of 23 abusiveness claims, as some cases involve multiple claims or reliance on more than one prong of abusiveness. Of those 23 claims, 18 — or nearly 80 percent — were based on prongs (2)(A) or (2)(B). By contrast, only two claims were based on prong (1) and only three claims were based on prong (2)(C).

In light of the stigma possibly associated with being tagged as having engaged in abusive conduct, one might expect that abusive claims would be more prevalent in litigated than in settled cases. And, indeed, six of the 16 abusiveness cases have involved contested litigation, a ratio (37.5 percent) that is more than 50 percent higher than the overall ratio of litigated CFPB enforcement actions (approximately 22 percent).

All 16 abusiveness cases involve nondepository institutions. Whether that reflects a difference in the kind of conduct the agency is observing, a disparity in bargaining power, or a difference in how the agency treats depository versus nondepository institutions is hard to tell, although as discussed below, in some instances similar conduct has been treated differently by the agency when engaged in by nondepositories.

What is "Abusive" That is Not Unfair or Deceptive?

In virtually all the abusiveness cases, the CFPB has pled that the very same conduct also constituted unfair and/or deceptive practices. That is, the cases generally do not answer the question of what conduct is abusive that wouldn't otherwise be prohibited by the old prohibitions on unfair and deceptive acts and practices. But in five cases, the CFPB pled "stand-alone" abusive claims — i.e., it alleged that certain conduct was abusive without also alleging that it was unfair or deceptive.[2] These cases might provide some insight into what conduct might be abusive that was not already proscribed as unfair or deceptive.

The first two stand-alone abusiveness claims involved factual scenarios in which the defendant was alleged to have knowledge that the product being sold to the consumer was not suitable to the consumer. The first such claim involved a debt relief provider and an allegation that enrolling consumers in a debt relief program that the defendant knew consumers were unlikely to complete (based on financial information gathered from consumers) was abusive under prongs (2)(A) and (2)(C).[3] The second such claim involved a payday lender alleged to have created and leveraged an "artificial sense of urgency" to induce delinquent payday loan borrowers with a "demonstrated inability to repay their existing loan" to take out new loans. The CFPB alleged that was abusive under prong (2)(B).[4] As in the debt relief case, this claim was predicated on the defendant's knowledge that the product being sold to the consumer is not in the consumer's interest — in this case, because of the consumer's inability to repay their existing loan. These "suitability"-type claims appear to be a common theme of the CFPB's abusiveness cases. The agency may believe that, in certain circumstances, companies have an obligation to not sell products and services that will not benefit the consumers to whom they are sold.

Two other stand-alone abusiveness claims focus on a different concept — "steering." First, in its complaint against a tax preparer, the CFPB alleged that the defendant's alleged practice of steering consumers into high-cost tax refund anticipation loans provided by the defendant, when cheaper alternatives were available, constituted "abusive steering" in violation of prong (2)(B).[5] And in a complaint against an online lead generator, the CFPB alleged that the company's practice of purchasing leads from lead generators that made representations to consumers that they (the original lead generators) would find consumers the best rate or the lowest fees, and then selling those leads to tribal or offshore payday lenders that "typically charge higher interest rates than lenders adhering to state laws" was abusive under prong (2)(A). The CFPB referred to this conduct as "steering" consumers to lenders "offering less-favorable terms than may otherwise be available to them."[6]

Although the tax preparer case was pled as a prong (2)(B) case and the lead generator case pled as a prong (2)(A) case, the underlying conduct the CFPB found problematic was similar: directing consumers to loan products containing less-favorable terms than might be available and of which defendants were presumably aware. Such alleged "steering" — which has echoes of the suitability claims discussed above — also seems to be a focus of the CFPB's.

The two abusiveness claims involving prong (2)(C) that we discussed in the **first part** of this series, in which the CFPB alleged that the defendants induced consumers' reasonable reliance on the defendants to act in the consumers' best interest, are also "stand-alone" abusiveness claims to the extent that they rely on the alleged acts of inducement. That is, while the CFPB alleged other UDAP claims in those cases, neither deception nor unfairness involve questions of reasonable reliance, and the facts relevant to such reliance are therefore not necessary aspects of those claims.

The final "stand-alone" abusiveness case involved a company's alleged payment allocation practices with respect to consumers who had multiple deferred-interest balances on their account. The CFPB asserted that the company's alleged practice of allocating payments proportionally across most, or all, account balances without regard to the expiration date of the deferred-interest promotion for each balance, coupled with the company's alleged failure to provide adequate information about how it allocated payments and the difficulty consumers allegedly encountered when seeking to direct the allocation of payments, was abusive under prong (2)(B).[7] It is not clear why the CFPB chose to plead these facts as abusive, as opposed to unfair, which, as discussed below, is how they have addressed similar payment allocation issues in the student loan context.

Indeed, with the exception of the prong (2)(C) claims involving inducement of reliance, all of the "stand-alone" abusiveness claims may well have been pled as unfairness and/or deception claims. All of the claims could arguably be alleged to constitute conduct likely to cause substantial harm to consumers not reasonably avoidable by the consumers and not outweighed by countervailing benefits to consumers or competition (the test for unfairness). And several of the claims were also based on alleged material misrepresentations or omissions of the defendant. These cases, therefore, do not necessarily shed light on the unique nature of abusive conduct. But they do suggest that suitability and steering are issues that the CFPB views as potentially abusive.

Pleading Abusiveness and Stating a Claim: A Higher Burden?

It is common for an abusiveness claim to recite the same allegations as an unfairness or deception claim that is also being asserted in the same case, but with alterations to fit the prongs of abusiveness. Sometimes, likening abusiveness too closely to unfairness or deception seems to lead drafters of CFPB complaints and consent orders into potentially troubling territory. For example, when the CFPB makes an unfairness or deception claim, it is adequate to assert that the act or practice is likely to cause substantial injury or is likely to materially mislead. But none of the prongs of abusiveness contain this kind of probabilistic assessment.

As a federal district court noted in connection with prong (2)(B), "the Bureau's burden here is to show that [consumers] were, *in fact*, unable to protect their own interests."[8] In that case, the court held that the bureau had met its burden. But on some other occasions, the bureau has framed its complaints and consent orders in probabilistic terms. For example: "Consumers are *unlikely to understand* that during the first several years of enrollment in the [product], they will pay more in fees to [the defendant] than they will save."[9] Or: "Servicemembers *may have been unaware* that Respondents were deducting [certain] fees from [their accounts]."[10] Arguably, these are just assertions that abusiveness is probable or possible and so do not properly state a claim.

Consistency (or the Lack Thereof)

The CFPB's pleading of abusiveness has been less than consistent in several respects. First, there appears to be no set format for how the agency pleads UDAAP claims in general or abusiveness claims in particular. While Emerson famously said that "a foolish consistency is the hobgoblin of little minds," consistency in pleading would serve several important purposes here. It would allow the public to better compare and thus understand what the agency thinks constitutes abusive conduct, and it would help ensure the CFPB was applying its new powers with analytical rigor. And, indeed, an examination of the CFPB's abusiveness jurisprudence to date suggests some uncertainty as to what the different prongs of abusiveness mean, how they differ from each other, or when an abusiveness claim is appropriate.

In some cases, this inconsistency is reflected in how similar claims are pled. Thus, for example, the steering claim in the case against a lead generator was based on prong (2)(A), whereas the steering claim in the case against a tax preparer was based on prong (2)(B). In both cases, defendants allegedly misrepresented or omitted material information from consumers about the loans they were being offered, suggesting that a prong (2)(A) claim would have been appropriate. At the same time, in both cases the consumers were allegedly incapable of protecting their interests in light of these misrepresentations or omissions, rendering a prong (2)(B) claim seemingly appropriate. It thus seems equally plausible that the pleading in these cases would have been reversed, or that both cases would have relied on the same prong or both prongs. Absent additional information from the CFPB, it is difficult to ascertain whether this apparent inconsistency is intended to reflect the agency's understanding of these different prongs, and if so, how.

Similarly, the claim that attempting to collect on loans that are allegedly void under state law (due to usury or licensing issues) is abusive was pled under prong (2)(A) in the first two of these cases the CFPB brought, but was pled under both prongs (2)(A) and (2)(B) in the third case. It may be that factual differences underpinned the CFPB's choice of prongs in all these cases, but that is not readily apparent from the pleadings themselves, and the lack of consistency in pleading format further makes a comparison difficult; that in turn makes it difficult for industry to gain an understanding of what the CFPB thinks these prongs mean.

More troublingly, apparently similar conduct has been deemed abusive in one case, but not another, on multiple occasions:

- In a complaint against an auto finance company, the CFPB alleged that threatening to contact and contacting service members' commanding officers about their debt constituted abusive conduct under prong (2)(B), notwithstanding the contractual provision authorizing such contact. But in a complaint against a retailer that was similarly alleged to have contacted service members' commanding officers about the consumers' debt — pursuant to a contractual authorization that the CFPB characterized as "buried" in the credit contracts, not explained to consumers, and that "many consumers did not know" was included in the contract — the CFPB only alleged the conduct to be unfair, and not abusive.[11]

- In a complaint against a retailer that filed all of its collections actions in Virginia pursuant to a venue selection clause in its consumer credit contracts, the CFPB alleged that conduct to be abusive. But in a consent order against another retailer that also sold goods to service members, the CFPB did not bring such a claim, notwithstanding press reports of similar practices.[12]

- Perhaps reflecting a hesitation to use its abusiveness authority with respect to depository institutions, the CFPB has not alleged that the sale of credit card add-on products by banks to consumers allegedly ineligible to reap their benefits is abusive, although it made abusiveness claims based on the ineligibility of consumers in cases against debt-relief companies and a for-profit school.[13]

- The CFPB's complaint against one company that provided mortgage payment services alleged that the company's promise of savings to consumers who enrolled in its bimonthly mortgage payment program was abusive because the defendants knew that most consumers would leave the program prior to saving money. But the CFPB's consent order against another company providing similar services, which contained similar factual allegations about the company's marketing of savings that only a small number of consumers realize, did not contain an abusiveness claim.[14]

- Finally, the CFPB alleged that a company's payment allocation practices, which allegedly presented challenges to consumers effectively allocating payments to specific deferred-interest balances on most, or all, of their accounts, constituted abusive conduct. But similar conduct allegedly engaged in by student loan servicers has been described by the CFPB in its Supervisory Highlights newsletter as the "unfair" — but not abusive — "practice of depriving consumers of an effective choice as to how to allocate these partial payments."[15] This last example is particularly troubling, as it suggests that how a practice is characterized may depend on whether the institution at issue is subject to a CFPB examination (conducted by its Office of Supervision Examinations) or investigation (conducted by its Office of Enforcement).

The above comparisons are necessarily simplistic, based on the limited facially similar facts available in the public record. But they do suggest a possible lack of consistency in the agency's approach to this important issue. Such a lack of consistency is perhaps understandable given the newness of the abusiveness authority and the challenge in identifying what conduct is abusive. But as the agency matures and develops a body of abusiveness cases, greater consistency and providing more information about why certain conduct is deemed abusive would help the CFPB achieve its presumed goal of educating industry as to the meaning of this new prohibition.

Tool Choice and the Use of Enforcement

To date, abusiveness is almost exclusively a phenomenon of CFPB enforcement actions and, to some extent, state attorney general enforcement actions. Although the CFPB has authority to define abusive practices by regulation,[16] it has not yet done so. The bureau has referred to abusiveness as one of several possible bases for rule-makings concerning debt collection and payday lending, but it is unknown whether the final rules will rely on this authority.[17] The bureau has also published supervisory guidance that mentions that certain forms of marketing of credit card promotional offers may be abusive.[18] However, there is little on the public record that suggests that CFPB examiners cite abusiveness violations outside the enforcement context. The CFPB's Supervisory Highlights newsletter alludes to the fact that the CFPB's exam work eventually led to a public enforcement action against a single payday lender for abusive practices.[19] But otherwise there is little sign of the abusiveness doctrine in the hundreds of pages of Supervisory Highlights published so far.

The four federal prudential regulators all have authority to bring abusiveness claims against banks and credit unions with total assets of $10 billion or less, to the exclusion of the CFPB. But none of these agencies' public examination manuals or regulatory compliance handbooks appear to refer to the abusiveness doctrine. Instead, these sources refer to unfairness and deception only. Federal prudential regulators routinely cite unfair and deceptive acts or practices in their public enforcement actions, but have never cited abusive acts or practices.

Determining what constitutes abusiveness, therefore, has been almost wholly confined to CFPB enforcement actions. There is nothing inherently wrong with that so long as the legal standard is applied fairly and consistently to similar conduct. Over time, the federal courts will have their say. But until then, it is the CFPB's pleadings in enforcement actions that will continue to define the scope of what constitutes abusive conduct.

Takeaways About Abusiveness

So what does it all mean and what can we learn from how the CFPB has handled its abusiveness authority to date? For the most part, the abusive conduct alleged by the CFPB has also been alleged to be unfair and/or deceptive, or could have been. With the possible exception of the prong (2)(C) cases, therefore, there is still no clear answer to the question of what might constitute abusive conduct that wasn't already proscribed by the traditional UDAP prohibition. That said, some insights can be gleaned from these cases.

First, given the lack of clear distinction between abusiveness and unfairness or deception, it appears that bringing an abusiveness claim is a way for the agency to make a statement of moral disapproval. Many of the abusiveness cases involve consumers whom the CFPB views as especially vulnerable — students, seniors, members of the military, payday loan borrowers, and those seeking debt relief assistance. None involved instances where the CFPB recognized “responsible business conduct,” which is a CFPB policy to reward companies that engage in self-policing, self-reporting, remediation and cooperation.[20] And none involved depository institutions, which the agency may see as less likely to deliberately seek to harm consumers. It thus appears that nondepository institutions that sell financial products and services to seemingly vulnerable consumers are more likely to be tagged with the “abusive” label. That, of course, provides little by way of clarity as to what conduct might be considered to cross the “abusive” line.

Second, many of the abusiveness claims turn on allegedly deceptive statements (or omissions) that companies made (or failed to make) to consumers. It is those statements that are deemed to constitute the “taking unreasonable advantage” required for the prong (2) abusiveness claims (or, in rarer circumstances, the “material interference” required for a prong (1) claim). But it is not clear if the CFPB has any more of a developed sense today of when such allegedly deceptive conduct crosses the line into abusiveness than it did four-and-a-half years ago, when it first gained this authority, since no discernable pattern has emerged of when an abusiveness count is added to these cases.

Third, it is clear that prongs (2)(A) and (2)(B) are those most frequently relied upon, although the distinction as to which of those prongs should apply to what specific conduct is not at all clear. As discussed in the **first part** of this series, in many instances it appears that the CFPB could have just as easily selected the other prong. The alleged “lack of understanding” underpinning prong (2)(A) claims can also be alleged to constitute an “inability to protect a consumer’s interests” under prong (2)(B). And many of the prong (2)(B) cases in fact rely upon alleged misrepresentations or omissions that could have formed the basis for a prong (2)(A) claim. That said, prong (2)(A) seems to most closely parallel deception claims, while prong (2)(B) seems to most closely parallel unfairness claims.

The one area in which some clarity may be developing is in the CFPB’s use of prong (2)(C) in cases where companies allegedly took affirmative action to induce vulnerable consumers to believe that the company will act in the consumer’s best interests in order to sell them products or services that they were unlikely to benefit from. While conclusions are difficult to draw from the small number of cases, if the pattern continues, it may provide the clearest indication of what conduct falls within the “abusive” arena.

Insofar as specific conduct is concerned, several themes are apparent. First, the CFPB has repeatedly asserted that attempting to collect on loans that are allegedly void as a function of state law is abusive conduct. As two of those cases are currently being litigated, they may provide a heretofore rare opportunity for the federal courts to opine on the appropriate reach of the abusiveness authority. Second, steering consumers into high-cost loans may constitute abusiveness, particularly if the company should know that cheaper alternatives exist. Third, in some cases selling consumers financial products or services that they cannot afford or for which they do not qualify may constitute abusive conduct. In this respect, the CFPB appears to be using its abusiveness authority to seek to impose a “suitability”-type requirement on providers of consumer financial products or services. Finally, certain debt collection conduct may constitute abusive conduct, although it is difficult to ascertain what factors drive the CFPB to conclude that certain conduct is abusive but other conduct is not.

For companies seeking to comply with this emerging area of law, a few lessons emerge. First, a compliance program targeted at preventing traditional UDAPs is likely to address potential UDAAPs as well. Because the conduct alleged to be abusive to date could similarly have been alleged to be unfair and/or deceptive (and in most cases was so alleged), focusing on avoiding those better-defined legal prohibitions will go a long way toward preventing an abusiveness claim.

Second, companies should take special care if they make statements that could reasonably be understood to induce consumers to rely on the company to act in the consumer's interest. This is especially true with respect to the three specific populations that the CFPB is charged with protecting — students, seniors, and service members. Companies should consider reviewing their marketing materials for such statements and take appropriate steps to either edit the marketing materials or ensure that the company is acting in accordance with them.

Third, institutions marketing consumer financial products or services to arguably vulnerable populations should consider reviewing their marketing materials and products and services with an eye to whether the CFPB might allege that the companies steered consumers into more expensive or riskier products or otherwise sold consumers products or services for which the consumers were ineligible or from which they were unlikely to benefit. These seem to be the primary areas of abusiveness concern for the CFPB to date, and companies should consider proactively addressing any risks they face in these areas.

Given the importance of this emerging area of the law, the CFPB should take steps to be consistent and transparent in its use of this new authority. Particularly because few institutions have so far been willing to litigate with the agency, the agency's choice of claims in its complaints and consent orders plays an important role in shaping the contours of abusiveness. With the traditional UDAP arsenal at its disposal, the CFPB can afford to take a more deliberate approach to its implementation of the abusiveness prohibition. Consistency in approach — in terms of what conduct is deemed abusive, what prong of abusiveness applies, and how claims are pled — will serve to both ensure that the agency is exercising its authority in a consistent manner, and allow industry to better understand the CFPB's expectations. Ultimately, the final word will come from the federal courts. But in the intervening years, the CFPB has a special responsibility to carefully develop this new area of law.

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[1] 12 U.S.C. § 5531(d).

[2] Determining whether an abusiveness claim is merely duplicative of unfairness or deception claims based on the same conduct or a "stand-alone" claim that is based on a different aspect of that conduct necessarily involves the exercise of some judgment. The summary below is based on our consideration of the nature of the facts alleged and the claims pled by the CFPB, but we recognize that others might

reach different conclusions with respect to some of the cases we have included or excluded from the "stand-alone" category.

[3] Complaint at 13-15, CFPB v. Am. Debt Settlement Solutions Inc., No. 9:13-cv-80548 (S.D. Fla. May 30, 2013).

[4] Consent Order at 10-11, In the Matter of Ace Cash Express Inc., File No. 2014-CFPB-0008 (July 10, 2014).

[5] Complaint at 13-15, CFPB v. S/W Tax Loans Inc., No. 1:15-cv-00299 (D. N.M. Apr. 14, 2015).

[6] Complaint at 9-11, CFPB v. D & D Marketing Inc., No. 2:15-cv-09692 (C.D. Cal. Dec. 17, 2015).

[7] Complaint at 14-15, CFPB v. PayPal Inc., No. 1:15-cv-01426 (D. Md. May 19, 2015).

[8] CFPB v. ITT Educ. Servs. Inc., 2015 WL 1013508, at *30 (S.D. Ind. Mar. 6, 2015) (emphasis added), appeal docketed, No. 15-1761 (7th Cir. Apr. 8, 2015).

[9] Complaint at 10, CFPB v. Nationwide Biweekly Admin. Inc., No. 3:15-cv-02106 (N.D. Cal. May 11, 2015) (emphasis added).

[10] Consent Order at 8, In the Matter of Fort Knox Nat'l Co., File No. 2015-CFPB-0008 (Apr. 20, 2015) (emphasis added).

[11] Compare Complaint, CFPB v. Security Nat'l Automotive Acceptance Co. LLC, 1:15-cv-401 (S.D. Ohio June 17, 2015), with Complaint, CFPB v. Freedom Stores Inc., 2:14-cv-643 (E.D. Va. Dec. 18, 2014).

[12] Compare Complaint, CFPB v. Freedom Stores Inc., 2:14-cv-643 (E.D. Va. Dec. 18, 2014), with Consent Order, In the Matter of USA Discounters Ltd., File No. 2014-CFPB-0011 (Aug. 14, 2014). See also ProPublica, Thank You for Your Service: How One Company Sues Soldiers Worldwide (July 25, 2014), available at http://www.propublica.org/article/thank-you-for-your-service-how-one-company-sues-soldiers-worldwide (describing similar forum-selection practices by USA Discounters).

[13] Compare Complaint at 13-15, CFPB v. Am. Debt Settlement Solutions Inc., No. 9:13-cv-80548 (S.D. Fla. May 30, 2013), and Complaint at 14-16, CFPB v. College Educ. Servs. LLC, No. 8:14-cv-03078 (M.D. Fla. Dec. 11, 2014), and Complaint at 30-31, CFPB v. ITT Educ. Servs. Inc., No. 1:14-cv-292 (S.D. Ind. Feb. 26, 2014), with Consent Order at 9-10, In the Matter of Synchrony Bank f/k/a GE Capital Retail Bank, File No. 2014-CFPB-0007 (June 19, 2014).

[14] Compare Complaint at 10, CFPB v. Nationwide Biweekly Admin. Inc., No. 3:15-cv-02106 (N.D. Cal. May 11, 2015) (emphasis added), with Consent Order, In the Matter of Paymap Inc., File No. 2015-CFPB-0017 (July 28, 2015).

[15] Compare Complaint at 14-15, CFPB v. PayPal, Inc., No. 1:15-cv-01426 (D. Md. May 19, 2015), with CFPB, Supervisory Highlights, Issue 9, Fall 2015, at 22, available at http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.

[16] 12 U.S.C. § 5531.

[17] Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F), 78 Fed. Reg. 67,848 (Nov. 12, 2013); CFPB, Small Business Advisory Review Panel for Potential Rulemaking for Payday, Vehicle Title, and Similar Loans: Outline of Proposals under Consideration and Alternatives Considered (Mar. 26, 2015), available at http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf.

[18] CFPB Bulletin 2014-02 at 3-4 (Sep. 3, 2014), available at http://files.consumerfinance.gov/f/201409_cfpb_bulletin_marketing-credit-card-promotional-apr-offers.pdf.

[19] CFPB, Supervisory Highlights, Issue 4, Fall 2014, at 22-23, available at http://files.consumerfinance.gov/f/201410_cfpb_supervisory-highlights_fall-2014.pdf.

[20] See CFPB Bulletin 2013-06 (June 25, 2013), available at http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.
