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## The CFPB's Ambiguous "Abusive" Standard

### I. INTRODUCTION

A cloud of uncertainty rests over the Consumer Financial Protection Bureau ("CFPB"), and this uncertainty extends to more than just the future existence of the agency. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was enacted in 2010, bringing with it an abundance of financial regulation and reform.<sup>1</sup> Dodd-Frank also created the CFPB and granted to it the power to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."<sup>2</sup> This mandate includes the authority to protect consumers from "unfair, deceptive, or abusive acts or practices" (collectively "UDAAP").<sup>3</sup> The Federal Trade Commission ("FTC") traditionally had the authority to prevent and punish unfair and deceptive behavior, and as a result there is already a fairly well-established body of law on those two legal standards.<sup>4</sup> The abusive standard, on the other hand, has lacked statutory, judicial, and administrative clarity since its inception.<sup>5</sup> Until recently, the CFPB had never brought an action alleging solely abusive behavior, as the agency typically includes a claim of abuse with a claim of deception or unfairness.<sup>6</sup> However, the cloud may finally be lifting, as the CFPB recently brought two administrative proceedings based solely on allegations of abusive behavior.<sup>7</sup> These cases present the only stand-alone abuse claims, and their analysis reveals a great deal of ambiguity surrounding the CFPB's definition and application of the "abusive"

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1. *Infra* notes 2–4.

2. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1101, 12 U.S.C. § 5491(a) (2016).

3. Dodd-Frank § 1021, 12 U.S.C. § 5511(b)(2).

4. 15 U.S.C. § 45(a) (2016) (defining "unfair" and "deceptive" acts and practices, and providing examples of behavior that qualifies as such).

5. *See infra* Part II.C.

6. *See infra* Part II.B.

7. *See infra* Part III.

standard.<sup>8</sup> Ultimately, the CFPB should further define the standard in order to provide consumers and financial institutions with clarity and stability.<sup>9</sup>

This Note proceeds in five parts. Part II briefly outlines the statutory framework of the CFPB's authority, focusing on the ambiguity surrounding the abusive standard and discussing support for and criticism of the standard.<sup>10</sup> Part III discusses *CFPB v. Aequitas Capital Management, Inc.*, and the *Zero Parallel* proceeding, which represent the only two occasions the CFPB has brought a stand-alone abuse claim.<sup>11</sup> Part IV discusses *CFPB v. Navient Corporation*, and the *Flurish* proceeding, in order to determine whether the abuse claims were truly necessary in *Aequitas* and *Zero Parallel*.<sup>12</sup> Finally, Part V concludes by analyzing the problems with the abusive standard, providing specific recommendations for the CFPB and financial institutions moving forward.<sup>13</sup>

## II. "ABUSIVE" ACTS OR PRACTICES UNDER DODD-FRANK

### A. *Legislative Framework*

As previously mentioned, the CFPB inherited the unfair and deceptive legal standards from the FTC,<sup>14</sup> and was granted the power to regulate *abusive* acts or practices under Dodd-Frank.<sup>15</sup> While the unfair and deceptive standards were defined by the FTC in cases spanning several decades, the CFPB was given a clean slate with respect to the abusive standard.<sup>16</sup> In fact, the statutory language provides the only

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8. *See infra* Part III.

9. *See infra* Part V.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part V.

14. *See* Consumer Finance Monitor, *How the CFPB and the FTC Interact (Part 1)*, BALLARD SPAHR, LLC (Jul. 7, 2011), <https://www.consumerfinancemonitor.com/2011/07/07/how-the-cfpb-and-the-ftc-interact-part-i/> (describing how the Dodd-Frank Act allocates responsibilities between the two agencies).

15. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") §§ 1021, 1031, 12 U.S.C. §§ 5511(b)(2), 5531(a) (2016) (emphasis added).

16. *See* Patrick M. Corrigan, *Abusive Acts and Practices: Dodd-Frank's Behaviorally Informed Authority Over Consumer Credit Markets and Its Application to Teaser Rates*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 125, 128–29 (2015) (describing the history of the unfair and deceptive prongs as they relate to the FTC and CFPB); *see How Will the CFPB Function*

official guidance with respect to the abusive standard. Dodd-Frank defines as abusive any act or practice that:

(1) [M]aterially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.<sup>17</sup>

Similarly, the categorization of “unfair” applies to any conduct where: (1) “the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers;” and (2) “such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”<sup>18</sup>

Interestingly, Dodd-Frank does not define deceptive practices.<sup>19</sup> However, the CFPB has published examples of deceptive behavior.<sup>20</sup> In addition, the CFPB has litigated cases against financial institutions for solely deceptive behavior.<sup>21</sup> In these cases, courts ignore the lack of a statutory definition and rely on a common law definition of deception.<sup>22</sup>

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*Under Richard Cordray: Hearing Before the Subcomm. on TARP, Financial Services, and Bailouts of Public and Private Programs Before the H. Comm. on Oversight and Government Reform, 112th Cong.1, 2 (2012) [hereinafter Cordray Statement] (statement of Richard Cordray, Director of the CFPB) (referencing prior CFPB officials’ inability to answer the “simple question about the definition of abusive”).*

17. Dodd-Frank § 1031, 12 U.S.C. § 5531(d).

18. Dodd-Frank § 1031, 12 U.S.C. § 5531(c).

19. Dodd-Frank § 1031, 12 U.S.C. § 5531.

20. Published examples of deceptive behavior include inadequate disclosure of material lease terms in television advertising and misrepresentation about loan terms, such as characterizing adjustable rate mortgages as fixed rate mortgages. CONSUMER FIN. PROT. BUREAU, CFPB LAWS AND REGULATIONS, UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES 1, 7 (2012), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/102012\\_cfpb\\_unfair-deceptive-abusive-acts-practices-udaaps\\_procedures.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf) [hereinafter “CFPB CONSUMER LAWS AND REGULATIONS”].

21. *See* Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179 (9th Cir. 2016) (ruling in favor of the CFPB’s allegation of deceptive practices by the defendant).

22. *See id.* at 1192–93 (citing a common law definition for “deceptive” in light of the absence of a statutory definition).

Case law establishes that an act or practice is deceptive if: “(1) there is a representation, omission, or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material.”<sup>23</sup>

*B. “Abusive” Standard: History and Analysis*

Prior to Dodd-Frank’s enactment, the abusive standard was defended before Congress as an intentionally “flexible” standard, partially in response to harmful activities leading up to the subprime mortgage crisis.<sup>24</sup> Additionally, a more flexible standard might have been implemented to avoid the “cost-benefit” considerations present in the unfair and deceptive standards.<sup>25</sup> Instead of focusing on whether the consumer can reasonably avoid a service or product, the new standard broadens the inquiry to whether there was any exploitation of consumer biases.<sup>26</sup> However, the statutory language for abusive behavior also appears to retain the consideration of whether the financial institution exploited consumers’ inability to protect themselves.<sup>27</sup>

Aside from its exclusion of a cost-benefit component, it is difficult to distinguish the abusive standard from the unfairness standard.<sup>28</sup> Based on the statutory language alone, the lines are blurred between the abusive standard’s “inability to protect themselves” requirement and the unfairness standard’s consideration of reasonable

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23. *Id.*

24. *See Improving Federal Consumer Protection in Financial Services: Hearing Before the Comm. on Fin. Servs.*, 110th Cong. 40 (2007), <https://www.gpo.gov/fdsys/pkg/CHRG-110hhr37556/html/CHRG-110hhr37556.htm> (introducing the “more flexible” abusive standard as a possible method for increasing regulatory effectiveness in areas such as mortgage lending); *see also* S. REP. NO. 111-176, at 172 (2010) (“Current law prohibits unfair or deceptive acts or practices. The addition of ‘abusive’ will ensure that the Bureau is empowered to cover practices where providers unreasonably take advantage of consumers.”).

25. Unfair acts or practices are permissible if they are “outweighed by countervailing benefits to the consumer,” whereas abusive acts or practices are prohibited regardless of the benefit to consumers. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1031, 12 U.S.C. §§ 5531(c)–(d) (2016); *see also* *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 904–06 (S.D. Ind. 2015) (ruling that the CFPB’s “abusive” standard is not unconstitutional for vagueness, because legislative intent shows it to be an intentionally “flexible standard” and the statute provides “at least the minimal level of clarity” demanded by the Constitution).

26. Corrigan, *supra* note 16, at 128–29.

27. Dodd-Frank § 1031, 12 U.S.C. § 5531(d)(2)(B).

28. *See* Dodd-Frank § 1031, 12 U.S.C. §§ 5531(c)–(d) (including both a consideration of avoidability and reasonableness in the definitions of unfair and abusive).

avoidance.<sup>29</sup> As discussed later, these standards will become even more unclear upon application.<sup>30</sup> Ultimately, neither the statute nor the CFPB provide much clarity on how to recognize risks a given consumer can identify, what exactly constitutes material interference with consumer understanding, or when a covered institution has taken “unreasonable” advantage of consumer bias, as opposed to simply engaging in a shrewd business transaction.<sup>31</sup> While case law may solve these issues over time, there are only two instances of abuse allegations being brought apart from a claim of either deception or unfairness.<sup>32</sup> There is a high level of uncertainty surrounding the legal issues at hand, and banks and financial institutions cannot afford to wait years for judicial opinions and administrative proceedings to unfold in order to understand the extent of a given regulatory scheme.<sup>33</sup>

C. “Abusive” Standard: Criticism and Support

When questioned before Congress regarding the vague nature of the new abusive standard, former CFPB Director Richard Cordray stated, “[W]e have determined that [the definition of ‘abusive’] is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract.”<sup>34</sup> His answer is reminiscent of Justice Stewart’s statement on obscenity: “I know it when I see it.”<sup>35</sup> In regards to whether the term actually represents a distinct legal standard, the CFPB continues to claim that, although there may be overlap between standards with respect to certain conduct, the abusive standard represents a distinct

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29. *See id.* (utilizing similar concepts of reasonable avoidance and the inability to self-protect).

30. *See infra* Parts III–IV.

31. Dodd-Frank § 1031, 12 U.S.C. § 5531; *see also Cordray Statement, supra* note 16, at 69 (quoting former CFPB Director Richard Cordray as saying “we are going to have to see what kind of situations may arise where that would seem to fit the bill,” with respect to the new abusive standard); CFPB CONSUMER LAWS AND REGULATIONS, *supra* note 20, at 9.

32. *See infra* Part III.

33. *See* Tobie Stanger, *Why the Consumer Financial Protection Bureau is in Danger*, CONSUMER REPORTS (Mar. 13, 2017), <https://www.consumerreports.org/consumer-financial-protection-bureau/why-consumer-financial-protection-bureau-is-in-danger/> (describing complaints of the high costs to financial institutions resulting from CFPB regulation).

34. *Cordray Statement, supra* note 16, at 69.

35. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

legal standard.<sup>36</sup> However, while the CFPB has put forth specific examples of unfair and deceptive practices, it has yet to provide a clear example of abusive conduct.<sup>37</sup> In light of the events leading up to the subprime mortgage crisis, some view the new standard as a necessary measure in order to help promote vigilance and financial stability.<sup>38</sup> However, even supporters of the new standard concede that such a malleable standard provides the CFPB with an extraordinary amount of power.<sup>39</sup>

While there may be benefits to greater regulatory oversight, there are also risks associated with vague and arbitrary legal standards, and this is even more pronounced in the highly regulated consumer finance industry.<sup>40</sup> One factor that has fueled uncertainty surrounding the new standard is the CFPB's tendency to allege two or more standards for the same act or practice, thus blurring any lines of distinction between the terms.<sup>41</sup> As expected, it is not uncommon for defendants to challenge the abusive standard.<sup>42</sup> However, thus far courts have either embraced Congress' intentional ambiguity,<sup>43</sup> or avoided discussion of any

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36. See generally CFPB CONSUMER LAWS AND REGULATIONS, *supra* note 20 (setting forth the three UDAAP standards as separate and distinct, but providing no examples of the abusive standard).

37. See generally CFPB CONSUMER LAWS AND REGULATIONS, *supra* note 20 (providing explicit examples of unfair and deceptive practices, but failing to provide any examples of abusive practices).

38. Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's "Abusive" Standard*, 14 J. CONSUMER & COM. L. 118, 119 (2011) (arguing that "abusive" was incorporated in response to the subprime mortgage crisis, and that the term was necessary to "restore financial stability and confidence in our financial markets" at the time it was passed).

39. See Eric M. Aberg, *The Case for UDAAP-Based Credit Card Lending Regulations: Providing Greater Financial Security for America and American Consumers*, 84 GEO. WASH. L. REV. 1029, 1065–66 (2016) (conceding that there may be overlap between "abusive" and the other two standards, but arguing that the abusiveness prohibition is necessary to prevent actions which might otherwise conform with regulatory requirements, but pass "harmful costs onto consumers").

40. Robert E. Bostram et al., *Implications of the CFPB's First Annual Report Regarding the Fair Debt Collection Practices Act*, 129 BANKING L.J. 529, 534–35 (2012) (emphasizing the potential risks associated with the lack of legal precedence for the standards of what constitutes "abusive" conduct).

41. See *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 15-CV-5211 (CM), 2016 WL 7188792 (S.D.N.Y. Dec. 2, 2016) (describing the defendants' allegedly unfair, deceptive, and abusive debt collection practices).

42. *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-CV-101, 2017 WL 3380530 1 (M.D. Pa. Aug. 4, 2017) (ruling in favor of the CFPB's allegations of unfair, deceptive, and abusive practices, and denying the defendant's motion to dismiss the "abusive" allegation).

43. *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 878 (S.D. Ind. 2015).

unnecessary legal standards completely.<sup>44</sup> In one case, the court declined to discuss the defendant's objections to the vagueness of the abusive standard, because the CFPB had already satisfied the burden for deceptive conduct, which was sufficient.<sup>45</sup>

Currently, there is no CFPB rule defining the abusive authority beyond the vague statutory language, nor is there any such rule under development.<sup>46</sup> This is particularly perplexing considering the outcry from the private sector to provide further clarity.<sup>47</sup> For example, the Senior Vice President of the U.S. Chamber of Commerce urged former CFPB Director Richard Cordray to provide a more explicit definition of abusive behavior as early as 2012.<sup>48</sup> One of the foremost criticisms of the CFPB as an agency has been its "regulation by enforcement" approach, as opposed to rule-based regulation.<sup>49</sup> The outcry has started to result in pushback, and challenges to CFPB enforcement actions have risen substantially when compared to the first several years of the agency's existence.<sup>50</sup> Also, recent legislative action suggests that dissatisfaction with the agency might be gaining political traction.<sup>51</sup> Additionally, the U.S. Department of Treasury has published criticism of

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44. *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. CV15-7522-JFW (RAOX), 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (ruling that, since the defendant engaged in deceptive conduct, there was no need to consider whether the behavior was unfair or abusive).

45. *Id.*

46. CONSUMER FIN PROT. BUREAU FINAL RULES, <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules> (last visited Feb. 10, 2018); CONSUMER FIN. PROT. BUREAU RULES UNDER DEVELOPMENT, <https://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development> (last visited Feb. 10, 2018).

47. *Infra* notes 48–49.

48. Rob Blackwell, *U.S. Chamber Pressures CFPB to Define "Abusive"*, AM. BANKER, July 3, 2012 (describing a letter from the president and chief executive of the U.S. Chamber's Center for Capital Markets Competitiveness to Richard Cordray, reminding him of the CFPB's responsibility to avoid "disparate standards" of law).

49. See JOSEPH L. BARLOON & ANAND S. RAMAN, CFPB DEFINES 'UNFAIR,' 'DECEPTIVE' AND 'ABUSIVE' PRACTICES THROUGH ENFORCEMENT ACTIVITY, SKADDEN'S 2015 INSIGHTS - FINANCIAL REGULATION (Jan. 2015), <https://www.skadden.com/insights/publications/2015/01/cfpb-defines-unfair-deceptive-and-abusive-practice> (describing the language of the UDAAP provision as "broad and vague," which facilitates the enforcement-based regulation strategy).

50. See Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1097 (2016) ("[I]t is an empirically demonstrable fact that in its first 5 years, the Bureau was able to reach a negotiated settlement agreement with every bank subject to a public enforcement action.").

51. See Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) (seeking to limit the CFPB's UDAAP authority); see also H.R.J. 111, 115th Cong. (2017) (repealing the CFPB's Arbitration Agreements Rule); see also 12 C.F.R. Part 1040 (2017) (setting forth the CFPB's now-repealed Arbitration Agreements Rule).

the CFPB's enforcement tactics.<sup>52</sup> However, in the midst of growing confusion and uncertainty, two recent CFPB actions might suggest the agency is attempting to provide much-needed clarity to the term.

### III. RECENT DEVELOPMENTS

#### A. *Aequitas*

The CFPB brought suit against Aequitas Capital Management, Inc. (“Aequitas”) on August 17, 2017, representing the first-ever CFPB UDAAP action brought solely on allegations of abusive acts or practices.<sup>53</sup> Specifically, the CFPB alleged that Aequitas financed and provided a private student loan program in order to allow Corinthian Colleges, Inc. (“Corinthian”) to feign compliance with federal law.<sup>54</sup> In order for a for-profit school to gain access to Title IV funds, federal law requires that at least 10% of revenue come from sources other than federal student aid (commonly referred to as the “90/10 Rule”).<sup>55</sup> However, Corinthian derived more than 90% of its revenue from federal student loans.<sup>56</sup> In order to appear as if it were in compliance with this requirement, Corinthian artificially inflated its tuition costs to exceed the federal aid maximum, and convinced Aequitas to offer students high-interest tuition loans.<sup>57</sup> Aequitas carried out this scheme, knowing there was a high probability of default and that the 10% threshold would not

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52. See U.S. DEPT. OF THE TREASURY, BANKS AND CREDIT UNIONS: REPORT TO PRESIDENT DONALD J. TRUMP 82 (2017), <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf> (“In practice, the CFPB has avoided notice-and-comment rulemaking and instead relied to an unusual degree on enforcement actions and guidance documents, which the CFPB has consistently issued without opportunity for public comment, to announce new standards of conduct.”).

53. Complaint of Plaintiff, Consumer Fin. Prot. Bureau v. Aequitas Capital Mgmt., Inc. (2017) (No. 3:17-cv-01278-MO); CONSUMER FIN. PROT. BUREAU, ENFORCEMENT ACTIONS, <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/> (last visited Jan. 24, 2017).

54. Consumer Fin. Prot. Bureau v. Aequitas Capital Mgmt., Inc., No. 3:17-cv-01278-MO 1, 2 (D. Or. Aug. 17, 2017).

55. *Id.* at 3. “Title IV funds” refers to federally subsidized loans, grants, and work study programs that make is more affordable for students to attend qualified schools (Pell Grant, Federal Perkins Loan, etc.). See generally U.S. DEP’T OF EDUC., *90/10 Revenue Test*, at 2-55 (Apr. 2011), [https://www2.ed.gov/offices/OSFAP/training/fundamentals/common/files/1011FSAHbkVol2Master\\_60-62.pdf](https://www2.ed.gov/offices/OSFAP/training/fundamentals/common/files/1011FSAHbkVol2Master_60-62.pdf) (describing Title IV Funds insofar as they relate to the 90/10 institutional requirement).

56. *Aequitas*, No. 3:17-cv-01278-MO at 3.

57. *Id.* at 3–4.

be reached.<sup>58</sup> This failure occurred because Corinthian was required by law to buy back defaulted loans from the defendants, which would negate any revenue originally gained in the initial transaction.<sup>59</sup> Students were not aware of the “scheme” behind the loans, and they lacked sufficient knowledge of the inflated tuition.<sup>60</sup> Additionally, because they lacked alternative loan options to pay for the inflated tuition, the CFPB determined that the students could not adequately protect themselves.<sup>61</sup> In the only charge brought against the defendants, the CFPB alleged that this funding scheme and support of the loan program constituted an abusive act.<sup>62</sup>

The CFPB alleged that Aequitas took “unreasonable advantage of a lack of understanding” by the student consumers, “the inability of the consumer[s] to protect the[ir own] interests” in selecting the loan, and “the reasonable reliance by the consumer[s]” that the school and its loan providers would “act in the interests of the consumer[s]” on at least a general level—i.e., not create and support an artificially-inflated tuition.<sup>63</sup> According to the CFPB, this type of predatory and dishonest lending scheme constituted an abusive act under Dodd-Frank.<sup>64</sup> The behavior was deemed to satisfy the definition of “abusive” under the statute, and thus there appears to be no issue with the application of the CFPB’s new standard.<sup>65</sup> Instead, the remaining issue is whether this type of behavior must necessarily be brought under the abusive standard, or whether the CFPB could just as easily categorize it as unfair.

#### B. *Zero Parallel*

Only six days after the filing of *Aequitas*, the CFPB brought another enforcement action alleging abusive behavior by Zero Parallel, LLC (“Zero Parallel”).<sup>66</sup> Zero Parallel is a company that receives leads involving consumers seeking payday or installment loans, and then sells

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58. *Id.*

59. *Aequitas*, No. 3:17-cv-01278-MO at 3–4.

60. *Id.*

61. *Id.* at 9–11.

62. *Id.* at 26.

63. *Id.*

64. *Aequitas*, No. 3:17-cv-01278-MO at 26.

65. *Id.*

66. Zero Parallel, LLC, 2017 CFPB 0017 1 (Sept. 9, 2017).

those leads to lenders and re-marketing companies.<sup>67</sup> The more a lender is willing to pay Zero Parallel, the more likely they are to receive a lead.<sup>68</sup> Although Zero Parallel is not a lender, it is still a “covered person” under Dodd-Frank because it provides a service to covered lenders, and thus falls under the CFPB’s regulatory authority.<sup>69</sup> Among the lenders to whom Zero Parallel actively sold leads were a number of small-dollar or installment lenders that offer consumer loans for personal, family, or household purposes.<sup>70</sup> After being connected with the borrower through Zero Parallel’s website, the lenders collected the principal loan amount, as well as interest and fees, directly from the consumer.<sup>71</sup>

A number of states have laws that limit both the type of institution that may engage in this type of payday lending, as well as the amount of collectable interest.<sup>72</sup> If a loan is found to violate these restrictions, certain states will deem the entire loan to be void and uncollectable.<sup>73</sup> With full knowledge that certain loans would be partially or wholly void under state law, Zero Parallel repeatedly sold consumer leads to lenders.<sup>74</sup> Citing the statutory definition of abusiveness under Dodd-Frank, the CFPB alleged that Zero Parallel engaged in abusive acts and practices.<sup>75</sup> According to the CFPB, this standard was satisfied because Zero Parallel “took unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, and conditions of the loans.”<sup>76</sup>

*Zero Parallel* represented an unusual proceeding in that the harm alleged was both to consumers subject to interest rates above the legal limit, and to lenders who could not collect defaulted loans in such states.<sup>77</sup> However, the scope of this Note is limited solely to the harm to

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67. Zero Parallel sold leads in all states requested by the purchaser except for New York, West Virginia, Arkansas, and Vermont. *Id.* at 4.

68. *Id.* at 5.

69. *Id.* at 1, 4; *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1002, 12 U.S.C. § 5481(6) (2016) (defining a “covered person” as: “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.”).

70. *Zero Parallel*, 2017 CFPB 0017 at 4.

71. *Id.*

72. *Id.* at 5.

73. *Id.*

74. *Id.*

75. *Zero Parallel, LLC*, 2017 CFPB 0017 1, 6 (Sept. 9, 2017)

76. *Id.*

77. *Id.* at 1–5.

consumers. According to the CFPB, Zero Parallel took unreasonable advantage of the customer's lack of understanding of relevant state law surrounding interest rates and valid lenders.<sup>78</sup> It was further alleged that Zero Parallel took advantage of the expectation by the consumer that Zero Parallel would not allow them to be connected with a loan that was legally void.<sup>79</sup> However, as in *Aequitas*, the key issue was not whether the broad definition of abuse was satisfied, but whether the standard of unfairness could have been just as easily met.

#### IV. COMPARISON AND ANALYSIS

##### A. *Aequitas and Navient: A Comparison*

A recent case highlights a serious flaw in the CFPB's "abuse" allegations in *Aequitas*. In *CFPB v. Navient Corp.*,<sup>80</sup> the CFPB made allegations of abusive behavior by defendant Navient (formerly Sallie Mae).<sup>81</sup> Specifically, the CFPB alleged that students relied on Navient to act in their best interest, and that Navient took advantage of that reliance.<sup>82</sup> Navient allegedly engaged in abusive acts and practices by "steering" students into forbearance when it was not financially beneficial to the students.<sup>83</sup> It did so simply because forbearance plans were less expensive and more convenient to administer than other repayment options.<sup>84</sup> In addition to the abuse claim, the CFPB alleged

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78. *Id.* at 6.

79. *Id.*; see also Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1031, 12 U.S.C. § 5531(d) (2016) (defining abusive behavior, in part, as that which takes advantage of a consumer's reasonable reliance on the covered entity to act in his or her best interest).

80. *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-CV-101, 2017 WL 3380530 1 (M.D. Pa. Aug. 4, 2017).

81. *Id.* at 1–2.

82. *Id.* at 2–3.

83. Forbearance plans impose high costs on the borrower, and are typically intended only for those experiencing short-term financial difficulty. For those experiencing long-term financial difficulties, an income-based repayment plan is generally more beneficial. However, Navient advised student borrowers experiencing long-term financial difficulty to enter into costly forbearance programs, eventually resulting in higher monthly payments and a greater principal loan amount. Behavior like this "steering" prompted the CFPB to bring action against the lender. *Id.*

84. *Id.*

that these “steering” practices were both unavoidable and harmful, and thus also satisfied the “unfair” standard.<sup>85</sup>

The fact pattern of *Navient* bears a striking resemblance to that of *Aequitas*. Both cases involved lending to students that was beneficial to the defendant at the expense of the consumer, and in both cases the student borrowers materially relied on information provide by the defendant to their detriment.<sup>86</sup> However, in the *Aequitas* case involving the scheme to inflate tuition, the CFPB relied on only the “abuse” allegation.<sup>87</sup> On the other hand, in the *Navient* “steering” case, the CFPB relied on both the abusive and unfairness standards.<sup>88</sup> Upon close analysis, that key difference is difficult to reconcile. In *Navient*, the only difference between the “abusive” and “unfair” allegations was the consideration of whether the benefits to students outweighed the harm (under the unfairness standard).<sup>89</sup> The benefits to students in that case did not outweigh the harm, and the standard for unfairness was clearly met.<sup>90</sup> Accordingly, it is unclear why allegations of unfairness were not brought in *Aequitas* as they were in *Navient*.<sup>91</sup>

Applying the statutory definition of unfairness to the facts of *Aequitas*, the act or practice was likely to cause substantial financial injury to consumers that was not reasonably avoidable by consumers, as the students had no way to know of the unlawful scheme existing between Corinthian and *Aequitas*.<sup>92</sup> In addition, countervailing benefits certainly did not outweigh the injury to students.<sup>93</sup> In fact, students could not possibly benefit from a scheme where their tuition was raised and high-interest loans were implemented to profit from their inability to pay the

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85. *Navient*, No. 3:17-CV-101, 2017 WL 3380530 at 51–52.

86. *Id.*; see *Consumer Fin. Prot. Bureau v. Aequitas Capital Mgmt., Inc.*, No. 3:17-cv-01278-MO 1, 2 (D. Or. Aug. 17, 2017) (“[S]tudents had no way of knowing was only for a sham tuition charge solely to gain access to Title IV funds.”).

87. *Aequitas*, No. 3:17-cv-01278-MO at 26.

88. *Navient*, No. 3:17-CV-101 at 50–51.

89. *Id.*

90. *Navient*, No. 3:17-CV-101, 2017 WL 3380530 at 50–51; Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1031, 12 U.S.C. § 5531(c) (2016).

91. *Aequitas*, No. 3:17-cv-01278-MO at 2; *Navient*, No. 3:17-CV-101, 2017 WL 3380530 at 50–51.

92. *Aequitas*, No. 3:17-cv-01278-MO at 9–11 (“[S]tudents had no way of knowing was only for a sham tuition charge solely to gain access to Title IV funds.”).

93. *Id.*

higher rate.<sup>94</sup> In addition, *Navient* preceded *Aequitas*, and thus would have supported the application of the unfairness standard to student loan practices.<sup>95</sup>

Given the striking similarity of fact patterns between the two cases and the clear satisfaction of the statutory language, the CFPB could have just as easily relied on an allegation of unfairness in the *Aequitas* case.<sup>96</sup> That fact does not bode well for the doubters of the CFPB's new standard of abuse under Dodd-Frank. Relying solely on analysis of *Aequitas*, the abusive standard is not necessary.<sup>97</sup> As far as *Aequitas* is concerned, the CFPB is more than properly equipped with only the unfairness and deception standards inherited from the FTC.<sup>98</sup> In addition, the unfairness and deception standards have decades of case law supporting them, whereas the "abusive" standard on its own is supported by just two cases.<sup>99</sup>

#### B. *Zero Parallel and Flurish: A Comparison*

In another payday loan action preceding the *Zero Parallel* case, the CFPB brought an action against Flurish, Inc ("Flurish").<sup>100</sup> Among other allegations, the CFPB alleged that Flurish engaged in unfair acts and practices by charging borrowers fees which they were completely unaware of prior to default.<sup>101</sup> Applying the unfairness standard, the CFPB concluded that these undisclosed fees were likely to cause substantial harm to borrowers that could not be reasonably avoided, and that the countervailing benefits provided to the consumer did not outweigh this harm.<sup>102</sup>

Once again, the two cases present a similar fact pattern. Both cases involve a "covered person" that knowingly facilitated lending

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94. *Aequitas*, No. 3:17-cv-01278-MO at 9–11; *Navient*, No. 3:17-CV-101 at 50–51; Dodd-Frank § 1031, 12 U.S.C. § 5531(c)–(d).

95. *Navient* was filed in January, 2017, and *Aequitas* was filed in August, 2017. *Navient*, No. 3:17-CV-101, 2017 WL 3380530 at 1; *Aequitas*, No. 3:17-cv-01278-MO at 1.

96. *Id.*; Dodd-Frank § 1031, 12 U.S.C. § 5531(c)–(d).

97. *Id.*

98. *Id.*

99. *Supra* Part III.

100. *Flurish, Inc., d/b/a LendUp*, 2016-CFPB-0023 1 (Sept. 27, 2016) (consent order).

101. *Id.* at 9.

102. *Id.*; Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1031, 12 U.S.C. § 5531(c) (2016).

practices where consumers were unaware of a latent financial risk at the time they entered into the loan agreement.<sup>103</sup> Comparison of the cases begs the question: Why was unfairness not alleged against Zero Parallel, as it was against Flurish? Applying the statutory unfairness standard, Zero Parallel engaged in an act or practice that was likely to cause substantial injury to borrowers, as its actions resulted in or were likely to result in higher interest rates and legally void loans.<sup>104</sup> Also, the injury was not reasonably avoidable by consumers, as it would be unreasonable to assume consumers are aware of state law with respect to loan interest caps and who constitutes a valid lender.<sup>105</sup> In addition, considering the CFPB described Zero Parallel's behavior as taking unreasonable advantage of consumers, it is unlikely that the agency would allege that the injuries were outweighed by countervailing consumer benefits.<sup>106</sup> Given the similar fact patterns between the cases and the straightforward application of the statutory language, it is likely that the CFPB could have brought a successful unfairness claim against Zero Parallel.<sup>107</sup> Moreover, the action against Flurish would have provided precedent for such a claim.<sup>108</sup>

## V. RECOMMENDATIONS AND CONCLUSION

As demonstrated by analysis of the only two stand-alone abuse cases, the abusive and unfairness standards are interchangeable, and the CFPB's future use of the new standard remains unclear.<sup>109</sup> As it currently stands, there is no persuasive reason for retaining the "abusive" standard.<sup>110</sup> Even for purposes of imposing penalties, the standard serves

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103. See generally *Zero Parallel, LLC*, 2017 CFPB 0017 1 (Sept. 9, 2017) (describing Zero Parallel's actions as taking unreasonable advantage of the consumers' lack of understanding); see generally *Flurish*, 2016-CFPB-0023 1 (describing Flurish's actions as being likely to mislead consumers, and finding that Flurish did not provide consumers with all of the relevant information).

104. Dodd-Frank § 1031, 12 U.S.C. § 5531(c); *Flurish*, 2016-CFPB-0023 at 9.

105. *Id.*

106. Dodd-Frank § 1031, 12 U.S.C. § 5531(c); *Flurish*, 2016-CFPB-0023 at 9 (Sept. 27, 2016) (consent order); see also *Zero Parallel*, 2017 CFPB 0017 at 6 (alleging abusive behavior wherein the defendant "took unreasonable advantage" of the consumer's lack of understanding).

107. *Id.*

108. *Id.*

109. *Supra* Parts III–IV.

110. *Supra* Parts III–IV.

no apparent purpose.<sup>111</sup> While the CFPB can impose a penalty of up to \$1 million for every day that a financial institution knowingly violates federal consumer financial law, there is no statutory language to suggest that a financial entity charged with unfairness and abuse would receive harsher sanctions than an entity charged with unfairness alone.<sup>112</sup> Ultimately, the standard appears to generate a great deal of criticism and confusion without any apparent benefit to the CFPB or to consumers.<sup>113</sup>

While it is possible this ambiguity could lead to confusion and harm to financial institutions, several considerations might limit the impact of such an effect. Initially, *Aequitas* and *Zero Parallel* involve financial activities that are extremely controversial and politically relevant.<sup>114</sup> Payday lending and student borrowing abuse are highly contentious and hotly debated issues.<sup>115</sup> Consequently, by limiting its application of the abusive standards to these issues, the CFPB is able to further its policy initiatives in these developing areas of law.<sup>116</sup> The widespread support for further regulation of these controversial financial activities is likely to minimize any negative connotations surrounding the use of the vague abusive standard.<sup>117</sup> In addition, such enforcement actions largely avoid stepping on the toes of the largest financial institutions, who might be more prone to challenge allegations of

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111. There is no statutory indication of a higher penalty for financial institutions violating multiple UDAAP standards, as opposed to just one standard. See Dodd-Frank § 1031, 12 U.S.C. § 5565(c)(2)(C) (allowing a maximum penalty of \$1 million per day as long as the violation of CFPB law continues).

112. *Id.*

113. See *supra* Section II.C; see also *supra* Parts III–IV.

114. Lisa Servon, *Are Payday Loans Harmful to Consumers?*, 36 J. POL'Y ANALYSIS & MGMT. 240, 240 (2017) (describing payday loans as “perhaps the most hotly debated” consumer finance topic today); see also Laurie A. Lucas & Christopher L. Peterson, *Developments in Federal Student-Lending Law: Harbingers of Change?*, 72 BUS. LAW. 465, 465 (describing the growing popular discontentment with the student loan system).

115. *Id.*

116. See *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 81 Fed. Reg. 47864 (July 22, 2016) (to be codified at 12 C.F.R. pt. 1041 (2016)) (setting forth the finalized law surrounding payday lending, and categorizing certain payday lending activities as unfair and abusive); see also CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN: STRATEGIES FOR CONSUMER-DRIVEN REFORM 2–3 (2017), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_annual-report\\_student-loan-ombudsman\\_2017.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf) (describing the CFPB's expansive regulation of student loans, with the agency handling over 50,700 student loan complaints between 2011 and 2017, and returning \$750 million to student borrowers).

117. Servon, *supra* note 114; Lucas & Peterson, *supra* note 114.

abuse.<sup>118</sup> Historically, banks have been reluctant to contest any CFPB action, but a stand-alone abuse allegation might present an opportunity.<sup>119</sup>

As one Supreme Court opinion so accurately stated, “[b]anking is one of the longest regulated and most closely supervised of public callings.”<sup>120</sup> As a result, clarity and precision of law in the area of finance are extremely important.<sup>121</sup> Consequently, such a blatant fluidity of legal standards is extremely worrisome for several reasons. First, financial institutions strive to be creatures of efficiency, and the CFPB should seek to minimize the gray area of law as much as possible by removing intentional ambiguity in order to increase oversight.<sup>122</sup> Second, in light of recent criticism of the CFPB and talk of “defanging” the agency, the CFPB should clearly convey its benefits and standards of enforcement to the public.<sup>123</sup>

A recently-proposed House Appropriations bill includes provisions for the overhauling of the CFPB.<sup>124</sup> If passed, this bill would substantially limit the agency’s regulatory authority, strip the agency of its UDAAP authority, and restrict its regulatory authority over payday and vehicle-title loans.<sup>125</sup> One U.S. Senator described the bill as an attempt to “reign in the rogue” CFPB.<sup>126</sup> While such a characterization of the CFPB may not be completely accurate, it speaks to how the agency

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118. See Nick Bourke, *How OCC Can Help Banks Disrupt the Payday Loan Industry*, AM. BANKER (May 23, 2017), <https://www.americanbanker.com/opinion/how-occ-can-help-banks-disrupt-the-payday-loan-industry> (describing how federal regulation has driven small-loan borrowers from banks, forcing consumers to turn to riskier loans from institutions such as payday lenders).

119. Peterson, *supra* note 50, at 1097 (highlighting the glaring lack of challenges to CFPB enforcement actions by banks).

120. *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947).

121. See Bostram et al., *supra* note 40, at 534–35 (“Careful vigilance and monitoring will be required to ensure that the CFPB’s FDCA supervisory efforts do not result in costly and unnecessary burdens for participants in the debt collection market.”).

122. See Bostram et al., *supra* note 40, at 534–35 (arguing that the ambiguity surrounding the application of the “abusive” standard could lead to the arbitrary punishment of previously lawful activities).

123. See Rob Tricchinelli, *Volcker Rule Repeal Included in Draft House Spending Bill*, BLOOMBERG BNA (June 28, 2017), <https://www.bna.com/volcker-rule-repeal-n73014460949> (describing a recent appropriations bill’s proposal “gut” the CFPB of its primary regulatory authorities as they currently exist); see also Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) (seeking to strike the UDAAP authority from current law).

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

125. Tricchinelli, *supra* note 123; see also Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

126. Tricchinelli, *supra* note 123; see also Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

is viewed by people who are seeking to limit the agency's power.<sup>127</sup> If the perplexing application of its abusive standard is any indication, perhaps reservations with the CFPB's regulatory authority are not entirely unfounded.<sup>128</sup>

The future of the abusive standard is just as unclear as its current implementation. Will the CFPB continue to primarily use the term in conjunction with the other standards, or do *Aequitas* and *Zero Parallel* mark the beginning of a new era for the standard? Will the CFPB provide a distinct purpose and definition for the term—something its director was previously unwilling to do<sup>129</sup>—or will the agency cease application of the standard entirely? Unfortunately for “covered” financial entities, these answers remain unclear. However, the CFPB should not continue to view this ambiguity and broad oversight as a benefit to its authority.<sup>130</sup> The future of the agency is uncertain, and at least one chamber of Congress has shown itself willing to act in order to restrict its authority.<sup>131</sup> In addition, there is speculation that the change in CFPB leadership could result in a less proactive agency.<sup>132</sup> If the agency adopts a less aggressive approach to regulation, this might temporarily alleviate worries with

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127. *Tricchinelli, supra* note 123; *see also* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

128. *Supra* Parts III–IV.

129. *Cordray Statement, supra* note 16, at 69 (“[W]e have determined that [the definition of ‘abusive’] is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract.”). An interesting concept, scholar Patrick M. Corrigan proposes that Congress adopt a theory of “abusive” conduct which places the burden on financial institutions to show a valid efficiency or business-related rationale for allegedly abusive behavior (other than simply exploiting consumer bias). Corrigan, *supra* note 16, at 156–57.

130. Given that accusations of “rogue” or arbitrary behavior by the CFPB have played a role in furthering legislation against the agency, more defined and narrow authority might alleviate said concerns. *See generally* *Tricchinelli, supra* note 123 (quoting one congressman and a proponent of the Financial Choice Act as saying the bill was designed to “reign in the rogue” CFPB).

131. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017); Yuka Hayashi, *CFPB Head Cordray to Step Down, Paving Way for Change at Watchdog*, WALL ST. J., Nov. 15, 2017, <https://www.wsj.com/articles/cfpb-director-richard-cordray-to-step-down-1510766617>; *see also* Am. Bankers Ass’n, *Industry Defeats Arbitration Rule*, 110 AM. BANKERS ASS’N J. 14, 14 (Jan. 2018) (describing the repeal of the CFPB’s ban on mandatory arbitration clauses as a “victory” for bankers).

132. Kate Berry, *CFPB 2018 Outlook: More Deregulation, More Upheaval*, AM. BANKER, Jan. 3, 2018, <https://www.americanbanker.com/news/cfpb-2018-outlook-more-deregulation-more-upheaval> (describing acting CFPB Director Mick Mulvaney’s change to the agency’s mission statement, adding that the agency will now pinpoint and address “outdated, unnecessary or unduly burdensome regulations.”).

respect to UDAAP overreach.<sup>133</sup> However, while the evolution of the abusive standard might halt for the foreseeable future, there is always the danger of its resurrection by a future administration. Ultimately, the CFPB only stands to benefit from bringing further clarity, precision, and stability to its legal standards.<sup>134</sup>

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133. *Id.*

134. *See* Stanger, *supra* note 33 (describing the criticism by institutions and politicians that the CFPB's overreach leads to inefficiency and greater costs).

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