



**WRITTEN EVIDENCE FOR THE
CONSUMER FINANCIAL
PROTECTION BUREAU (CFPB)**

**GUIDANCE TO ADDRESS ABUSE
CONDUCT IN CONSUMER
FINANCIAL MARKETS**

JULY 2023

Evidence Submission to the Consumer Financial Protection Bureau (CFPB) on Guidance to Address Abuse Conduct in Consumer Financial Markets, issued 3 April, 2023

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The Minderoo Centre for Technology and Democracy is an academic research centre at the University of Cambridge, with world-leading expertise in the regulation and governance of emerging technologies. We submit the following evidence.

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Summary of the Submission:

This submission considers how the CFPB Policy Statement on Abusive Acts or Practices conceptualises the consumers' understanding of dark patterns, and how this conceptualisation falls short of considering how dark patterns are used to extract personal data as a form of taking unreasonable advantage.

In conclusion, we recommend that the CFPB takes a second look at the systemic use of forced action dark patterns in relation to the extraction of personal data for profiling and tailoring of bespoke information and marketing given to consumers regarding financial services and products.

1. Introduction

The Consumer Financial Protection Bureau (CFPB) released a Policy Statement on Abusive Acts or Practices (Policy Statement) on 3 April, 2023.¹ The Policy Statement sets out prohibitions on acts or practices that “materially interferes” with consumers’ ability to understand a term or condition of a consumer financial product or service, or “takes unreasonable advantage” of consumers’ lack of understanding of material risks, costs, or conditions, or of their ability to protect their interests, or of their reasonable reliance.²

CFPB Director Rohit Chopra explained that the intention was for the Policy Statement to have a similar effect as the U.S. Federal Trade Commission’s (FTC) Unfair and

¹ <https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/>.

² CFPB, *Policy Statement on Abusive Acts or Practices*, *supra* note 1, p. 4.

Deceptive Policy Statements in relation to the Wheeler-Lea Act of 1938,³ which were published in the 1980s.⁴

While the general standard for abusive conduct is set out in section 1031(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act),⁵ the exact definition of the term “abusive” has remained elusive. Thus, the Policy Statement attempts to bring clarity to this term by coalescing the CFPB’s considerable jurisprudence on the term into an easy-to use analytical framework. As Director Chopra explained when announcing the Policy Statement, the intention is to make the framework accessible also to small businesses without the need for expensive legal counsel.⁶

The Policy Statement seeks to clarify prohibited “abusive practices” under the Consumer Financial Protection Act (CFPA),⁷ enacted by U.S. Congress in the wake of the financial crisis of 2008, which was caused by a mis-selling of mortgages. This background is important as it explains why the Policy Statement is intended to address the risks of harms from market failures or the risk of acts and practices that leads to a distortion of the market.⁸ It is therefore not intended to confer directly enforceable rights on consumers. The Statement, nevertheless, sets a low bar for the number of consumers that are affected before the threshold of illegality is traversed.

2. Consumers’ Understanding, Material Interference, and Dark Patterns

The prohibition in the Policy Statement is centered around consumers’ understanding of both the terms and conditions, and the risks and costs associated with the relevant financial products or services. Thus, how information is presented to, and digested by consumers is key to test whether an act or practice is illegal.

For an act or practice to be abusive, it must amount to a material interference.⁹ The interference does not need to be an intentional act or omission that would naturally impede consumers’ ability to understand.¹⁰ Significantly, the Policy Statement places an emphasis on omissions by stating that it would be reasonable to assume interference when information was not conveyed concerning consequences of some magnitude.¹¹ The threshold for material interference is also reached when a “product or service is so complicated that material information about it cannot be sufficiently explained.”¹²

³ Amending section 5 of the Federal Trade Commission Act of 1914, 15 U.S.C. §41.

⁴ CFPB, Director Rohit Chopra Prepared Remarks at the University of California Irvine Law School, April 3, 2023 <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school/>.

⁵ 12 U.S.C. 5531(d).

⁶ CFPB, *Director Rohit Chopra’s Prepared Remarks*, *supra* note 4.

⁷ CFPA section 1036(a)(1)(B), 12 U.S.C 5536(a)(1).

⁸ CFPB, *Policy Statement*, *supra* note 1, p. 4.

⁹ *ibid*, p. 6.

¹⁰ *ibid*, p. 6.

¹¹ *ibid*, p. 6.

¹² *ibid*, p. 6.

The first part suggests that only information that pertains to matters that may produce effects of a certain magnitude will be considered, thereby suggesting that the benchmark may come close to the ‘injury’ requirement under the FTC’s Policy Statement on Unfairness, while the second part suggests that it is the complication, not the consequence that matters.

It is reasonable to read the Policy Statement as leaning towards the latter as it goes to some lengths to set out that when it comes to consumers’ cognitive abilities of comprehension, it does not employ an “average” or “reasonable” consumer test, emphasizing that it suffices that some consumers lack understanding.¹³ However, the Policy Statement does not go so far as to make this a subjective test.

Furthermore, rather than focus on the consequences of the lack of understanding, the Policy Statement conceptualizes material interference as the action (not the result) on the part of the commercial entity offering financial services and products. Thus, material interference consists of “acts or omissions that obscure, withhold, de-emphasize, render confusing, or hide information relevant to the ability of a consumer to understand the terms and conditions.”¹⁴ The Statement goes on to explain that these may be “buried disclosures, physical or digital interferences, overshadowing and various other means of manipulating consumers’ understanding.”¹⁵

These practices correspond to well-known deceptive designs or so-called “dark patterns”,¹⁶ Indeed, in announcing the Policy Statement, Director Chopra emphasized the intention for the Statement to be used to strike down “dark patterns” by name.¹⁷

While acknowledging that there are several definitions of “deceptive designs” or “dark patterns”, this submission uses the working definition set out by the OECD Committee on Consumer Policy:

“Dark commercial patterns are business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice. They often deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways, though it may be difficult or impossible to measure such detriment in many instances.”¹⁸

The OCED further classifies dark patterns in the following categories:¹⁹

1. Forced action, e.g., forcing the disclosure of more personal data than desired

¹³ *ibid*, pp. 12-13.

¹⁴ *ibid*, p. 5.

¹⁵ *ibid*.

¹⁶ The term ‘dark pattern’ is generally attributed to Dr Harry Brignull <https://www.deceptive.design/>.

¹⁷ CFPB, *Director Chopra’s Prepared Remarks*, *supra* note 4.

¹⁸ OECD, *Dark Commercial Patterns*, (OECD Publishing, OECD Digital Economy Papers, October 2022, No. 336) <https://www.oecd.org/digital/dark-commercial-patterns-44f5e846-en.htm>, p. 7.

¹⁹ OECD, *Dark Commercial Patterns*, *supra* note 17, p. 7. It should be noted that this is not a closed list.

2. Interface interference, e.g., visual prominence of options favorable to the business
3. Nagging, e.g., repeated requests to change a setting to benefit the business
4. Obstruction, e.g., making it hard to cancel a service
5. Sneaking, e.g., adding non-optional charges to a transaction at its final stages
6. Social proof, e.g., notification of other consumers' purchasing activities
7. Urgency, e.g., countdown timer indicating the expiry of a deal

The Policy Statement's prohibition on buried disclosure includes the use of fine print, complex jargon, timing, and omission of material terms and conditions,²⁰ which would correspond to the OCED's dark pattern of interface interference and urgency. Physical and digital interference similarly relates to interface interference, nagging, obstruction, and sneaking. Overshadowing also concerned interface interference. Notably, the Policy Statement does not cover forced action, conceptualized by the OECD as forced disclosure of personal data, or social proof.

3. Absence of Personal Data Extraction as Taking an Unreasonable Advantage

The absence in the Policy Statement of any reference to the hoarding of personal data as a dark pattern that would amount to abusive acts or practices is consequential when it comes to the prohibition on entity taking unreasonable advantage. Entities are prohibited from taking unreasonable advantage in three circumstances by using (1) consumers' gap in understanding, (2) inability to protect their interests due to their unequal bargaining power, or (3) their reasonable reliance.²¹

"Advantage" includes "a variety of monetary and non-monetary benefits the entity or its affiliates or partners, including but not limited to increased market share, revenue, cost savings, profits, reputational benefits, and other operational benefits to the entity."²² Social media platforms build their businesses from extracting personal data from their users and their users' networks, giving the platforms increased market share, revenue, and operational benefits. There has long been speculation that these companies are planning to sell financial products and services.²³ Thus, regardless of whether social media platform or other data-driven companies enter into the marketplace of financial services and products, the absence of a forced action dark pattern as defined by the OCED in the Policy Statement's list of material interference becomes a potential significant omission, which may undermine the effectiveness of the Statement.

²⁰ CFPB, *Policy Statement*, *supra* note 2, p. 5.

²¹ *ibid*, p. 7.

²² *ibid*, p. 8.

²³ e.g., Emily Glazer, Deepa Seetharaman, and Anna Maria Andriotis, "Facebook to Banks: Give Us Your Data, We'll Give You Our Users", *The Wall Street Journal*, August 6, 2018 <https://www.wsj.com/articles/facebook-to-banks-give-us-your-data-well-give-you-our-users-1533564049>; Lucas Mearian, "Facebook is going into the banking business with blockchain", *Computer World*, June 18, 2019 <https://www.computerworld.com/article/3403342/facebook-is-going-into-the-banking-business-with-blockchain.html>.

By focusing solely on information to the consumer rather than information flowing from the consumer, the Policy Statement is missing an important dark pattern that can lead to material interference because the information extracted from the consumer is used in profiling, assessment, and microtargeting, and is increasingly based on psychometric analysis of which the consumer is unaware.²⁴ Extracting personal data from consumers without their knowledge or consent exacerbate the unequal bargaining power that already exists in the market. While the CFPB and the Policy Statement does not and should not set out to eradicate unequal bargaining power *per se*, the absence of a recognition of how that unequal bargaining power is constructed from the extraction and exploitation of personal data is potentially problematic.

Further, the Statement prohibits abusive acts and practices that takes unreasonable advantage of consumers' ability to protect their interests, including but not limited to "property, privacy, or, reputational interests."²⁵ These interests are already protected elsewhere in U.S. law. On the one hand, it could therefore be said that including an interest in the protection of personal data would go beyond the scope of the CFPB's remit; on the other hand, leaving the protection of personal data unarticulated means that its extraction and use is unlikely to be considered by social media platforms as abusive, even when it is used to sell financial services and products.

The Policy Statement sets out that inability to protect one's interest could include instances where it would be impractical for consumers to take steps to protect their interests, because these were unknown or especially onerous.²⁶ This could include the lack of monetary means to do so,²⁷ or an absence of choice.²⁸ Inability could also be due to high transaction costs, such as "the time, effort, costs, or risk with extricating oneself from a relationship," which effectively causes a lock-in effect.²⁹

The extraction of personal data online is constant and ubiquitous. It is therefore relevant to note that the Policy Statement emphasizes that "the prohibition in section 1031(d)(2)(A) does not require that the entity caused the person's lack of understanding through untruthful statements or act or other actions or omissions."³⁰ "The lack of understanding can be cause by third parties and can exists even when

²⁴ See for example, Christoph Bösch, Benjamin Erb, Frank Kargl, Henning Koop, and Stefan Pfattheicher, 'Tales from the Dark Side: Privacy Dark Strategies and Privacy Dark Patterns' (2016) 4 Proceedings on Privacy Enhancing Technologies, 237-254; Ryan Calo, 'Digital Market Manipulation' (2014) 82 Geo. Wash. L. Rev. 995; Johanna Gunawan, Amogh Pradeep, David Choffnes, Woodrow Hartzog, and Christo Wilson, 'A Comparative Study of Dark Patterns Across Mobile and Web Modalities', Proc. ACM Hum.-Comput. Interact. 5, CSCW2, Article 377 (October 2021); Jamie Luguri and Lior Strahilvitz, 'Shining a Light on Dark Patterns', (2011) 21 J. of Legal Analysis, 44-104; Arvind Narayanan, Arnuesh Mathur, Marshini Chetty, and Mihir Kashiragar, 'Dark Pattenrs, Past, Present, and Future', acmqueue March-April 2020; Daniel Susser, Beate Roessler, and Helen Nissenbaum, 'Technology, autonomy, and manipulation,' (2019) 8(2) Internet Policy Rev., 1-22; and Lauren E. Willis, 'Deception by Design' (Fall 2020) 34(1) Harvard J. of L. and Tech., 115.

²⁵ CFPB, *Policy Statement*, *supra* note 2, p. 14.

²⁶ *ibid*, pp. 14-15.

²⁷ *ibid*, p. 15.

²⁸ *ibid*, p. 16.

²⁹ *ibid*, p. 17.

³⁰ *ibid*, p. 12.

there is no contractual relationship between the person and the entity that takes unreasonable advantage of the person's lack of understanding."³¹

While the wording above seems to suggest that most abusive dark patterns would be caught by the Policy Statement, the Statement can only be used in regard to the extraction of personal data when it is inferred in the definition of risk in the Policy Statement. The Statement clearly sets out that it would be abusive, and therefore illegal, to take unreasonable advantage of consumers' lack of understanding of risks, and that the risks would be "the material risks, costs, or conditions of the entity's product or service."³² The wording implies an obligation on entities offering financial services and products to set out what these risks may be, and not simply assume that consumers will be able to identify these on their own. While the Policy Statement does not rely on a test of injury, the definition of risk comes close as it encompasses potential consumer harms, including likelihood of default and loss of future benefits.³³ They may also include a loss of money, time, use, and reputational harm.

It would be highly impractical and unrealistic to expect consumers to take steps to ensure entities are not exploiting their personal data in abusive ways when presenting them with financial services and products. As the Policy Statement sets out, taking unreasonable advantage of unequal bargaining power concerns abusive acts or practices that undermine consumers' autonomy.³⁴ The way social media platforms use personal data fits Director Chopra's comments that: "Dark patterns are design tricks and other psychological tactics to confuse and manipulate people into making choices they otherwise would not have made."³⁵

We therefore recommend that the CFPB takes a second look at the systemic use of forced action dark patterns in relation to the extraction of personal data for profiling and tailoring of bespoke information and marketing given to consumers.

³¹ *ibid*, p. 12.

³² CFPB, *Policy Statement*, *supra* note 2, p. 10.

³³ *ibid* p. 11.

³⁴ *ibid*, p. 14.

³⁵ CFPB, *Director Chopra's Prepare Remarks*, *supra* note 4.

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