CFPB Must Clarify When Anti-Fraud Benefits Offset Harms

By **Jonathan Joshua** (January 25, 2024)



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Even the best fraud prevention tools sometimes make mistakes, incorrectly blocking legitimate transactions or allowing fraudulent transactions.

These errors can harm consumers, costing them time and money. Consumers may need to file police reports, reopen wrongly closed or frozen accounts, reinitiate stopped or returned payments, seek reversal of late or other fees incurred due to stopped or returned payments, close fraudulent accounts, dispute fraudulent transactions, and clear their credit reports.

The Consumer Financial Protection Bureau has alleged in two consent orders that U.S. Bank and Bank of America's COVID-19-era fraud prevention practices unfairly prevented consumers from accessing their unemployment benefits. The U.S. Bank order came about recently, in December 2023.

In each consent order, the CFPB implies that the banks' actions were particularly harmful to consumers because of the ongoing COVID-19 pandemic, without addressing the possible countervailing benefits that the banks' actions might have had during the pandemic.

By failing to explain its conclusion that these banks' fraud prevention efforts were not offset by potentially countervailing benefits, the CFPB missed an opportunity to provide much-needed guidance to financial institutions, which use imperfect fraud prevention methods that are designed to reduce the overall rate of errors but will, almost inevitably, make mistakes that harm consumers.

What is an unfair practice?

As summarized by the CFPB's examination manual, an act or practice is unfair if "(1) it causes or is likely to cause substantial injury to consumers; (2) The injury is not reasonably avoidable by consumers; and (3) The injury is not outweighed by countervailing benefits to consumers or to competition."[1]

The exam manual includes a bare-bones explanation of the "countervailing benefits" of harm to consumers in its examination manual, which states:

> To be unfair, the act or practice must be injurious in its net effects — that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that also are produced by the act or practice. Offsetting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition.[2]

In December 2023, U.S. Bank resolved CFPB and Office of the Comptroller of the Currency allegations that it had engaged in "unfair practices" in connection with its implementation of new fraud prevention controls during a surge of unemployment benefit account openings and increasing fraud attempts at the height of the COVID-19 pandemic.[3].

To settle these claims, U.S. Bank agreed to pay a $15 million fine to the CFPB and $5.7 million to affected consumers. U.S. Bank also paid an additional $15 million penalty to the OCC.

U.S. Bank allegedly failed to provide "a reliable and quick way to regain access" to tens of thousands of improperly frozen accounts, did not provide affected consumers with accurate instructions for unfreezing their accounts and consistently lost documents that consumers submitted per the bank's instructions. According to the order, affected consumers were unable to access their unemployment funds for as long as a month.

Similarly, in July 2022, Bank of America agreed to pay a combined total of $225 million to the CFPB and the OCC to resolve allegations that it had engaged in unfair practices by "denying prepaid debit cardholders' notices of error and freezing their prepaid debit card accounts based solely on the results of the Bank's flawed fraud filter."[4]

Here, too, the bank's alleged wrongdoing occurred during the COVID-19 pandemic and in connection with the opening and maintenance of state-provided unemployment benefits.

The CFPB highlighted in both consent orders that the banks' actions were particularly troubling because they occurred while unemployment claims increased due to the onset of the pandemic. In a December press release, CFPB Director Rohit Chopra stated:

> At a time when unemployment was close to 15%, many out-of-work Americans throughout the country had little choice but to rely on U.S. Bank for their unemployment benefits. U.S. Bank blocked access to accounts and demanded burdensome paperwork in order for consumers to regain access to their frozen benefits.[5]

The CFPB's press release regarding the Bank of America consent order similarly describes how "Bank of America engaged in unfair and abusive acts and practices that resulted in Californians not getting their unemployment benefits at the height of the pandemic, when many people needed the money the most."[6]

While the CFPB is clearly willing to consider how the pandemic may have magnified consumers' injuries, it fails to consider whether the pandemic may have justified these banks' fraud prevention efforts. The consent orders simply conclude, without any explanation or discussion, that consumers' injuries from these practices were "not outweighed by any countervailing benefits to consumers or to competition."

Does fraud prevention really not have any countervailing benefits?

The unemployment rate in February 2020 was 3.8%, representing 6.2 million unemployed Americans. By May 2020, the unemployment rate was 13%; 20.5 million Americans were unemployed.[7] It's not surprising that these banks were suddenly and unexpectedly required to open a rapidly increasing number of unemployment benefits accounts for these newly unemployed consumers.

The criminals didn't let up, though. In fact, the U.S. Government Accountability Office estimates that between $100 billion and $135 billion of pandemic-era unemployment benefits were obtained fraudulently.[8]

Over just a few months, these banks' unemployment account opening volume was likely twice as high as they had projected. At the same time, many of their employees may have

contracted COVID-19, while many others were likely trying to develop and implement remote work procedures, all while trying to combat criminals' continuing efforts to fraudulently access consumers' unemployment benefit accounts.

The CFPB may be entirely correct that these banks' actions had no countervailing benefits based on the circumstances. Without knowing those circumstances, however, financial institutions are left to their own devices.

For example, without knowing how much fraud these added fraud prevention methods prevented, banks could reasonably conclude that they should not implement any new fraud prevention measures that might harm even a few consumers, regardless of the overall consumer benefits.

If a financial institution, through no fault of its own, experiences a surge of new public benefit account openings while an accompanying fraud surge leaves them without adequate staff to help legitimate consumers unfreeze their accounts, does the CFPB expect the financial institution to risk consumer harm by allocating untrained personnel to the task, or should the financial institution risk injuring consumers by not allocating additional personnel?

We don't know, because the CFPB didn't give us any information.

Failing to prevent fraud can also be illegal and unfair.

Financial institutions can't turn a blind eye to fraud, either. They have specific legal obligations to prevent and mitigate consumer harms from fraud. For instance:

- Fraud can pose safety and soundness risks to banks.[9]
- The Federal Trade Commission's Red Flags Rule requires financial institutions that offer credit or deposit accounts to maintain a comprehensive program designed to prevent, detect and mitigate the effects of identity theft.[10]
- Financial institutions have specific legal obligations regarding handling consumer notices of billing disputes, unauthorized transactions, fraudulent or erroneous electronic funds transfers, credit reporting, debt collection and more.

What's more, the CFPB has asserted that failing to prevent fraud or other illegal activities can be unfair if consumer harm is likely to result.

In a 2022 Consumer Financial Protection Circular, the CFPB asserted that "inadequate security for the sensitive consumer information collected, processed, maintained, or stored by the company can constitute an unfair practice" because it is "likely to cause substantial injury to consumers that is not reasonably avoidable by consumers."[11]

The circular asserts that:

> Where companies forgo reasonable cost-efficient measures to protect consumer data, like those measures identified below, the Consumer Financial Protection Bureau (CFPB) expects the risk of substantial injury to consumers will outweigh any purported countervailing benefits to consumers or competition.

Yet again, however, the CFPB provides no explanation or analysis of how it arrived at these

conclusions, leaving financial institutions without any concrete way to weigh the likely benefits of an action against the likely harm to consumers or to competition.

The CFPB should provide guidance.

The CFPB is rightly tasked with preventing unfair practices that harm consumers, but the legal definition of an unfair practice requires considering the countervailing benefits of those practices.

Financial institutions might reasonably conclude from the CFPB's enforcement actions that it is better for them to calibrate their fraud prevention methods to allow the opening of multiple fraudulent accounts over taking any action that might harm consumers, regardless of the overall amount of consumer harm that is being prevented or enabled. Or, perhaps, they might reasonably conclude that the CFPB will penalize them no matter what and not even try to minimize consumers' injuries.

Criminals' endless ingenuity requires financial institutions to constantly upgrade their fraud prevention tools. The CFPB should encourage financial institutions to adopt fraud prevention methods that they reasonably believe will, overall, reduce the likelihood of injury to consumers, even if those methods might hurt some consumers.

As is, however, financial institutions that expect to be penalized for causing consumer harm without any consideration of the overall benefit of their actions will simply and understandably prioritize avoiding consumer harms, even if greater consumer harms will result.

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[1] Unfair, Deceptive or Abusive Acts or Practices (UDAAPs), October 2012. https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures_2023-09.pdf.

[2] Id., at pages 2-3

[3] https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-us-bank-to-pay-21-million-for-illegal-conduct-during-covid-19-pandemic/.

[4] https://www.consumerfinance.gov/about-us/newsroom/federal-regulators-fine-bank-of-america-225-million-over-botched-disbursement-of-state-unemployment-benefits-at-height-of-pandemic/.

[5] https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-us-bank-to-pay-21-million-for-illegal-conduct-during-covid-19-pandemic/.

[6] https://www.consumerfinance.gov/about-us/newsroom/federal-regulators-fine-bank-of-america-225-million-over-botched-disbursement-of-state-unemployment-benefits-at-

height-of-pandemic/.

[7] https://www.pewresearch.org/short-reads/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/.

[8] Unemployment Insurance: Estimated Amount of Fraud during Pandemic Likely Between $100 Billion and $135 Billion, U.S. General Accounting Office, September 2023. https://www.gao.gov/products/gao-23-106696.

[9] Office of the Comptroller of the Currency, OCC Bulletin 2019-37, Operational Risk: Fraud Risk Management Principles, July 24, 2019. https://www.occ.treas.gov/news-issuances/bulletins/2019/bulletin-2019-37.html.

[10] 16 CFR 681.1.

[11] Consumer Financial Protection Circular 2022-04, Aug. 11, 2022. https://www.consumerfinance.gov/compliance/circulars/circular-2022-04-insufficient-data-protection-or-security-for-sensitive-consumer-information/.