

Practice Update

CFPB Issues Policy Statement Regarding Abusiveness

January 31, 2020

By William P. Heller

On Friday January 24th, the Consumer Financial Protection Bureau (CFPB) issued a statement regarding how it will use its supervision and enforcement authorities to pursue abusive acts and practices by providers of consumer financial products and services.[1] This policy statement does not clarify the types of conduct the CFPB finds abusive. It establishes restrictions on how the CFPB will apply its abusiveness authority in future supervision and enforcement matters.

Summary of Key Policy Statement Details

The CFPB's stated purpose is to "provide greater clarity" on how it intends to implement and apply the abusiveness standard.[2] Rather than clarifying what CFPB considers abusive, the policy statement sets forth three restrictions on how CFPB will pursue abusive conduct:

- The CFPB intends only to cite conduct as abusive when the harms to consumers from the conduct outweigh its benefits to consumers. The CFPB says this will allow it to focus resources on conduct that harms consumers.
- The CFPB will generally avoid challenging conduct as abusive that relies on all or nearly all of the same facts that the CFPB alleges are unfair or deceptive.[3] The CFPB expects to provide

Related People

William P. Heller

Related Work

Consumer Financial Services, Data and Technology (CFS+)

Related Offices

Fort Lauderdale

more clarity in future enforcement and supervisory materials.

- The CFPB generally does not intend to seek civil penalties or disgorgement for abusiveness violations if a covered person made good-faith efforts to comply with the standard.

CFPB's Rationale

The Dodd-Frank Act allows the CFPB to pursue unfair, deceptive, and abusive acts and practices.[4] The policy statement expresses how, unlike abusiveness, both “unfairness” and “deception” are longstanding legal doctrines with a “long and rich history” providing industry context and examples of what is unfair or deceptive.[5] The FTC’s 1980 policy statement explains the unfairness standard and has informed the many subsequent actions by the FTC and CFPB.

By comparison, the CFPB states that although Dodd-Frank provides “some indication” on an abusiveness standard, there is little legislative history or explanation found in prior actions regarding the standard. The policy statements notes that 30 of 32 prior actions citing abusive conduct also included allegations of unfairness and how it is hard to distinguish between standards for each in those cases. The Bureau also noted it is proceeding to rescind its 2017 payday loan rulemaking, which found certain lending practices to be abusive. CFPB recounted substantial concern from industry stakeholders that the lack of clarity about abusiveness makes it hard to comply and creates uncertainty. The CFPB agrees there is uncertainty that is “not beneficial.”[6]

Industry Impact

The policy statement does not clarify what conduct the CFPB finds abusive. It only limits how the Bureau will use its abusiveness authority. The CFPB expects this will “foster consumer beneficial products as well as compliance in the marketplace.”[7] In the

short run, it seems CFPB is not looking to “push the envelope” with abusiveness claims.

The long run value of the policy statement is uncertain. Industry will not be able to fully understand the CFPB’s view of abusiveness until it publishes enforcement actions or supervisory guidance applying the standard. Further, this is not a rulemaking—a policy statement can be rescinded without notice and without public comment. The pending Supreme Court challenge to the CFPB’s constitutionality could affect all CFPB promulgations, including this policy statement.

We will continue monitoring developments on the abusiveness standard. Please let us know if you have any questions about the policy statement or the CFPB’s abusiveness authority.

[1] See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-regarding-prohibition-abusive-acts-practices/>.

[2] Policy statement at 9.

[3] Policy statement at 12.

[4] Dodd-Frank section 1031 defines abusiveness as conduct that: “(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect 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.”

[5] Policy statement at 3-4.

[6] Policy statement at 8.

[7] CFPB Policy on Abusiveness Press Release <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-regarding-prohibition-abusive-acts-practices/>.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.