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Practice Update

CFPB Rescinds Policy Statement Regarding Abusiveness

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On March 11, 2021, the Acting Director of the Consumer Financial Protection Bureau rescinded the CFPB's January 24, 2020 policy statement that had established certain restrictions on how the CFPB will apply its abusiveness authority. The repeal removed restrictions imposed by the policy statement regarding how the CFPB would exercise its abusiveness authority.

Overview of the Now-Rescinded Policy Statement

As we explained in our previous alert, the now-repealed policy statement had set forth the following restrictions on how the CFPB would pursue abusive conduct:

- The CFPB would only cite conduct as abusive when the harms to consumers from the conduct outweighed the conduct's benefits to consumers, with the expectation the CFPB could focus resources on conduct that harms consumers.
- The CFPB would generally avoid challenging conduct as abusive when it relied on all or nearly all of the same facts that the CFPB determined was unfair or deceptive.
- The CFPB generally would not seek civil penalties or disgorgement for abusiveness violations if a

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covered person made good-faith efforts to comply with the standard.

The CFPB had issued these restrictions because, in its view at the time, the abusiveness prong of its Dodd-Frank Act authority lacked clarity, as compared to the more defined "unfairness" and "deception" authorities, both of which are longstanding legal doctrines with extensive history providing industry context and examples. The CFPB had said it expected the policy statement to "foster consumer beneficial products as well as compliance in the marketplace."

Reasons for Rescission

In announcing rescission of the prior statement, the CFPB explains it determined the policy statement was inconsistent with its duties to protect consumers and enforce and supervise violations under the Dodd-Frank Act.

The CFPB states "a policy of declining to enforce the full scope of Congress' definition of an abusive practice harms both the consumers who were taken advantage of and the honest companies that have to compete against those that violate the law."

The CFPB elaborates on its concerns with the policy statement. First, it determined the policy statement provided less certainty as to the meaning of abusiveness. Rescission Statement at 3-4. For example, the restriction on enforcement for covered persons "making a good-faith effort to comply with the abusiveness standard" seemed to exacerbate the uncertainty surrounding the abusiveness authority, only adding further discretion for the CFPB without actually providing additional guidance. *Id.* at 3. Further, refusing to pursue enforcement of conduct as abusive when it also was unfair or deceptive was detrimental to the CFPB's goal of clarifying its abusiveness authority by articulating the elements of abusiveness claims via judicial and administrative decisions. *Id.* at 3-4.

Second, the CFPB explains that it was ill-advised to restrict abusiveness only to products or services causing harms which outweigh their benefits. *Id.* at 4-5. Not only does the CFPB suggest this standard is unclear, the CFPB does not see a reason to implement a standard for abusiveness which was different from the normal considerations for its enforcement and supervisory discretion—including good faith and company size, among others. *Id.*

Third and finally, the policy statement's restriction on civil penalties, in the view of the Acting Director, runs afoul the CFPB's duty to protect consumers. Specifically, declining to seek civil money penalties for abusive acts would arguably cause more harm by limiting deterrence and compensation for victims of such acts. *Id.*

In light of these issues, the CFPB concluded rescission would actually better serve its purpose of protecting consumers and would help clarify the abusiveness standard in applying the full scope of its authority under the Dodd-Frank Act.

Next Steps

This rescission is not surprising given steps the CFPB has recently taken to reverse decisions made by the prior administration. Taken together, these decisions indicate an intention by the CFPB to be more aggressive in exercising its supervision and enforcement authorities. The Acting Director has also explained that the CFPB is prioritizing (i) providing relief for consumers facing pandemic-related hardships and (ii) racial equity. The Acting Director expects the CFPB to use all of its authorities to further these two priorities. We will continue to provide updates when CFPB provides more details on its policy and enforcement goals.

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