

CFPB Issues Policy Statement on 'Abusiveness': A Step in the Right Direction?

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On January 24, the CFPB issued a Policy Statement to provide clarification on how it will apply the "abusiveness" standard in supervision and enforcement matters. As you may know, the Dodd-Frank Act provides that the CFPB may use its supervisory and enforcement authority to prevent a covered person or service provider from committing or engaging in unfair, deceptive, or abusive acts or practices, called "UDAAPs".

However, even though the Dodd-Frank Act provides a definition of "abusive" and sets forth general standards for when the Bureau may declare that an act or practice is abusive, uncertainty remains as to the full scope and meaning of abusiveness in a practical setting.

In the Supplementary Information of the Policy Statement, the Bureau noted that through the Fall of 2019, it has brought 32 enforcement actions that included an abusiveness claim. Of those 32 enforcement actions, only 2 actions contained just an abusiveness claim; the remaining 30 of those 32 actions had both an abusiveness and an unfairness or deception claim (e.g., dual-pleading). Therefore, it's been extremely difficult to determine what act or practice may be considered abusive that also isn't unfair or deceptive.

In connection with supervision matters, the Bureau has issued 18 editions of its Supervisory Highlights since 2012, but they've rarely described citations of abusive acts or practices in a manner that would provide guidance as to how the Bureau concluded the statutory language used applied to the conduct at issue.

This Policy Statement was a result of the Bureau's Spring 2018 "Call for Evidence" actions and its June 2019 Symposium on Abusive Acts or Practices, where some Symposium participants suggested that the Bureau issue a policy statement or other guidance on the abusiveness standard. The Bureau explained that Symposium participants' feedback has been an important part of the process as to whether it should use its rulemaking or other tools to provide clarity about the general meaning of the abusiveness standard and its scope.

Under the Policy Statement, which was effective on its issuance, the CFPB will apply the

following principles during supervision and enforcement matters. First, the CFPB intends to focus on citing conduct as abusive in supervision or challenging conduct as abusive in enforcement if it concludes that the harms to consumers from the conduct outweigh the benefits to consumers.

Second, the CFPB will generally avoid challenging conduct as abusive that relies on all or nearly all of the same facts that the Bureau alleges are unfair or deceptive. This addresses the sort of dual-pleasing issues discussed above. Where the CFPB decides to include an alleged abusiveness violation, it intends to plead such claims in a way designed to clearly demonstrate the nexus between the cited facts and the Bureau's legal analysis of the claim. In its supervision activity, the CFPB similarly intends to provide more clarity as to the specific factual basis for determining that a covered person (or service provider) has violated the abusiveness standard.

Third, the CFPB generally does not intend to seek certain types of monetary relief for abusiveness violations where the covered person was making a "good-faith effort" to comply with the abusiveness standard. In determining whether a covered person made a good-faith effort to comply with the abusiveness standard, the Bureau intends to consider all relevant factors, including the considerations outlined in its Responsible Business Conduct Bulletin. This Bulletin was intended to describe the types of "responsible conduct" that might lead the Bureau to be more lenient in the context of an enforcement action. The Bureau explained that a "reasonable" interpretation for purposes of the Policy Statement is one that is based on the text of the abusiveness standard set forth in the Dodd-Frank Act, prior precedent and guidance, including judicial precedent, the Bureau's administrative decisions, rulemakings, supervisory guidance and past allegations of abusive acts or practices in public enforcement actions. Unfortunately, this is the same prior precedent and supervisory guidance that the Bureau critiqued as not being descriptive enough to discern from the challenged actions unique fact patterns to which only the abusiveness standard would apply.

The CFPB left open the possibility of engaging in a future rulemaking to further define the abusiveness standard. The Bureau also indicated it intends to develop model pleadings and updates to its UDAAP examination procedures in order to provide greater specificity and clarity as to the abusiveness standard. Finally, in future editions of their Supervisory Highlights, the Bureau will describe the basis for abusiveness citations with greater clarity. All positive moves.

Although the Policy Statement is a step in the right direction, it would've been more helpful if the Bureau had described, with specific examples, the types of practices it considers abusive. The Policy Statement also provides for subjective, judgmental decisions to be made by the Bureau (i.e., citing conduct as abusive if the Bureau concludes that the harms to consumers from the conduct "outweigh its benefits" to consumers). Those subjective standards provide very little guidance to the industry. Finally, as this Policy Statement isn't a rule, it could easily be removed, changed and replaced tomorrow by new leadership at the Bureau. Let's hope the Bureau uses its rule-making authority to provide some concrete guidance and examples to the industry on the abusiveness standard.

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