ALERTS

CFPB Policy Rescission Stakes Out Broad Enforcement Authority

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The Consumer Financial Protection Bureau ("CFPB") rescinded a policy statement it issued only a year ago, to emphasize that it will exert its full statutory authority to root out "abusive" practices.

The Dodd-Frank Act empowered the CFPB to regulate and prevent "unfair, deceptive, or abusive acts or practices" ("UDAAPs").[1] An act or practice is "abusive" if it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service." An act or practice is also "abusive" if it unreasonably takes advantage of a consumer's lack of understanding of the "material risks, costs, or conditions of a product or service;" the inability of the consumer to protect their own interests; or a consumer's reasonable reliance on a covered person to act in the consumer's interest.[2]

In January 2020, the CFPB issued a policy statement attempting to clarify what qualifies as abusive, identifying several factors that limited the agency's supervision and enforcement directed at abusive conduct.[3]

Now the CFPB has rescinded that statement, concluding that the policy does not "actually deliver clarity to regulated entities" and was not "helpful in practice" to the agency.[4] The new policy does more than retire the old one. Here, the CFPB sets out a new course:

- "The Bureau has determined that it should exercise the full scope of its supervisory and enforcement authority to identify and remediate abusive acts or practices."[5]

- "The Bureau ... intends to exercise its supervisory and enforcement authority consistent with the Dodd-Frank Act and with the full authority afforded by Congress consistent with the statutory purpose and objectives of the Bureau."[6]
- In particular, the Bureau's "current priority is to achieve general deterrence through penalties and other monetary remedies and to compensate victims for harm caused by violations of the Federal consumer financial laws through the Bureau's Civil Penalty Fund."[7]

The old policy does not seem to have held the agency back in its UDAAP enforcement.[8] For example, TD Bank paid $97 million in restitution and a $25-million penalty for its "deceptive and abusive" practice of allegedly charging overdraft fees on ATM and one-time debit card transactions without the customer's affirmative consent.[9] As another example, Cash Store paid nearly $1.4 million in restitution and penalties for its allegedly "deceptive" advertisement of a 50% discount it did not actually provide and its allegedly "unfair" practice of excessive phone calls.[10]

Every indication suggests CFPB enforcement will accelerate this year. Practitioners expect that the Biden administration and CFPB Director-Nominee Rohit Chopra will closely scrutinize financial products. While presumptive Director Chopra has suggested he will focus the agency on homeowner programs, student debt and overall disclosures, the agency is likely to take a fresh look at the entire industry after a perceived lull during the last administration.[11]

The CFPB has been particularly vigilant during the pandemic. Over the coming months, the agency is likely to announce the results of the investigations it began last year to curb practices that, in its view, took advantage of vulnerable consumers and businesses.[12] The agency's fresh look will also likely uncover many new practices the agency will review for UDAAP compliance.

In this regard, the CFPB's reversal on what qualifies as abusive does not change much by itself, but underscores the wave of supervision and enforcement to come. Regulated entities should revisit their policies and procedures to ensure they have strong controls in place. The CFPB intends to use its full statutory authority to protect consumers. That statutory authority gives the CFPB ample discretion to label conduct unfair, deceptive or abusive. This policy makes clear the CFPB will use the full extent of this authority to steer the industry away from practices it disfavors, including with significant monetary sanctions.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] Dodd-Frank Act of 2010 § 1031 (codified at 12 U.S.C. § 5531). The CFPB's authority only reaches covered persons to the extent they offer, or transact in, a consumer financial product or service. *Id.*

[2] *Id.* § 1031(d).

[3] In 2020, the CFPB concluded that "abusive" was not clear. Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 Fed. Reg. 6733, 6735 (Feb. 6, 2020). The policy statement at that time indicated that (1) the CFPB would limit its supervision and enforcement to instances where the harms to consumers outweighed the benefits consumers received from the challenged practice, (2) the CFPB would distinguish "abusive" from "unfair" or "deceptive" conduct and (3) the CFPB would not impose monetary sanctions for abusiveness on covered persons who made a good faith effort to comply. *Id.* at 6736-37.

[4] Statement of Policy Regarding Prohibition on Abusive Acts or Practices, at 3-4 (Mar. 11, 2021), available here.

[5] *Id.* at 6.

[6] *Id.*

[7] *Id.* at 5 (cleaned up).

[8] *See generally* CFPB, Financial Report of the Bureau of Consumer Financial Protection FY2020 (Nov. 16, 2020), available here.

[9] CFPB, Press Release, Consumer Financial Protection Bureau Announces Settlement with TD Bank for Illegal Overdraft Practices (Aug. 20, 2020), available here.

[10] CFPB, Press Release, Consumer Financial Protection Bureau Settles with Short-Term Lender for Unfair and Deceptive Acts and Practices (April 1, 2020), available here.

[11] E.g., Kate Berry & Neil Haggerty, "*Biden's CFPB Nominee Puts Loan Servicers, Credit Bureaus on Notice*," *Am. Banker* (Mar. 2, 2021), available here.

[12] E.g., CFPB, Press Release, Enforcement Work Continues With a Commitment to Protecting Consumers (May 8, 2020), available here.

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