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Policy Statement published in *Federal Register* (85 FR 6733, [click here](#))

To: Clients and Friends

From: David F. Dulock

Subject: CFPB Issues Policy Statement on Abusive Acts or Practices

On January 24, 2020, the Consumer Financial Protection Bureau (CFPB) issued a Policy Statement regarding the statutory “abusiveness standard”¹ in its supervision and enforcement matters. In the Supplementary Information accompanying the Policy Statement, the CFPB states it “has concluded that there is uncertainty as to the scope and meaning of the abusiveness standard ...” and that “[i]n light of this uncertainty, [it] has decided to provide greater clarity on how [it] plans to implement and apply the abusiveness standard in its supervisory and enforcement work.” The CFPB also states in the Supplementary Information that the Policy Statement does not foreclose the possibility of future rulemaking by the CFPB to further define the abusiveness standard.

The Policy Statement is applicable on January 24, 2020. To read or download the Policy Statement and Supplementary Information, please click on [View full statement](#).

Below is a brief summary of the Policy Statement:

- “Consistent with the priority it accords to the prevention of harm, the [CFPB] intends to focus on citing conduct as abusive in supervision and challenging conduct as abusive in enforcement if the [CFPB] concludes that the harms to consumers from the conduct outweigh its benefits to consumers (including its effects on access to credit).”
- In enforcement, when “a single course of conduct may provide the factual basis for allegations of unfair, deceptive, or abusive acts or practices[,] ... the [CFPB] intends generally to avoid alleging an abusiveness violation that relies on all or nearly all the same facts as an unfairness or deception violation. Footnote 28, however, states: “In limited circumstances, the [CFPB] intends to allege both an abusiveness violation and a related unfairness or deception violation where it would help clarify the scope of the abusiveness standard. Where the [CFPB] alleges both an abusiveness violation and a related unfairness or deception violation, the [CFPB] intends to allege the abusiveness violation with sufficient detail to distinguish it from the related unfairness or deception violation.”
- “The [CFPB] nevertheless intends to allege ‘stand-alone’ abusiveness violations (*i.e.*, violations that are not accompanied by related unfairness or deception violations) where doing so would be consistent with the abusiveness standard and this Policy Statement. Where the [CFPB] alleges ‘stand-alone’ abusiveness violations, it intends to plead such claims in a manner designed to demonstrate clearly the nexus between the cited facts and the [CFPB]’s legal analysis of the claims.”

¹ Section 1031(d) of the Dodd-Frank Act (12 U.S.C. 5531(d)): “The [CFPB] shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—(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.”

- “In its supervision activity, the [CFPB] similarly intends to provide more clarity as to the factual basis for determining that a covered person has violated the abusiveness standard. In citing covered persons during examinations for having engaged in abusive acts or practices, the [CFPB] intends to apply the same approach as set forth above with regard to pleading abusiveness in enforcement actions. In addition, in future editions of Supervisory Highlights, the [CFPB] intends to describe the basis for abusiveness citations with greater clarity”
- In enforcement actions, “to ensure that uncertainty regarding the abusiveness standard does not impede beneficial conduct, the [CFPB] generally does not intend to seek certain monetary remedies for abusive acts or practices if the covered person made a good-faith effort to comply with the law based on a reasonable—albeit mistaken—interpretation of the abusiveness standard. ... However, if a covered person makes a good-faith but unsuccessful effort to comply with the abusiveness standard, the [CFPB] still intends to seek legal or equitable remedies, such as damages and restitution, to redress identifiable consumer injury caused by the abusive acts or practices that would not otherwise be redressed. Absent unusual circumstances, the [CFPB] does not intend to seek civil penalties or disgorgement if a covered person made good-faith efforts to comply with the abusiveness standard.” Footnote 31, however, provides the following caution: “Although the covered person’s good-faith efforts to comply would be relevant to whether the [CFPB] seeks monetary remedies, it would not be an affirmative defense to an alleged violation.”
- “Similarly, in supervisory actions, the [CFPB] will apply the same standard [*i.e.*, the covered person makes a good-faith effort to comply with the law based on a reasonable, but mistaken, interpretation of the abusiveness standard] when requesting action as a result of violations in Matters Requiring Attention or other supervisory requests.”
- “In determining whether a covered person made a good-faith effort to comply with the abusiveness standard, the [CFPB] intends to consider all relevant factors, including but not limited to the considerations outlined in CFPB Bulletin 2013-06 regarding Responsible Business Conduct. [[View Bulletin](#)] A ‘reasonable’ interpretation for purposes of this Policy Statement is one based on the text of the abusiveness standard set forth in the Dodd-Frank Act, as well as prior precedent and guidance, including judicial precedent, [CFPB]’s administrative decisions, rulemakings, supervisory guidance, and past allegations of abusive acts or practices in public enforcement actions.”

We advise our clients not to rely solely on this memorandum but to read the Policy Statement and accompanying Supplemental Information.

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