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March 23, 2021

To: Clients and Friends

From: David F. Dulock

Subject: CFPB Rescinds Statement of Policy Regarding Prohibition on Abusive Acts or Practices

In the March 19, 2021 issue of the *Federal Register* (86 FR 14808), the Consumer Financial Protection Bureau (CFPB) rescinded the Statement of Policy Regarding Prohibition on Abusive Acts or Practices (Policy Statement) published in the *Federal Register* at 85 FR 6733 on February 6, 2020. The rescission of the Policy Statement is effective as of March 19, 2021.

The Policy Statement provided that the CFPB intended to apply the following three principles when exercising its supervision and enforcement authority to address abusive acts or practices:

- First, the CFPB intended to focus on citing conduct as abusive in supervision or challenging conduct as abusive in enforcement if the CFPB concluded that the harms to consumers from the conduct outweighed its benefits to consumers.
- Second, the CFPB would generally avoid challenging conduct as abusive that relied on all or nearly all of the same facts that the CFPB alleged are unfair or deceptive.
- Third, the CFPB generally did not intend to seek civil money penalties or disgorgement for abusiveness violations where the covered person was making a good-faith effort to comply with the abusiveness standard.

Among the reasons given by the CFPB for rescinding the Policy Statement:

- The CFPB concluded that the above principles set forth in the Policy Statement do not actually deliver clarity to regulated entities.
- The CFPB concluded that the principle set forth in the Policy Statement of declining under specified circumstances to seek civil money penalties and disgorgement for abusive acts or practices is contrary to the CFPB's current priority of achieving general deterrence through penalties and other monetary remedies and of compensating victims for harm caused by violations of the Federal consumer financial laws through the CFPB's Civil Penalty Fund.
- The CFPB determined that it should exercise the full scope of its supervisory and enforcement authority to identify and remediate abusive acts or practices.
- The CFPB concluded the Policy Statement's effectiveness in accomplishing its stated purposes does not justify its potential to harm consumers and the marketplace.

For these and other reasons stated by the CFPB, the CFPB is rescinding the Policy Statement and intends to exercise its supervisory and enforcement authority consistent with the Dodd-Frank Act and the statutory purpose and objectives of the CFPB.

Section 1031(d) of the Dodd-Frank Act states that the CFPB shall have no authority under this section to declare an act or practice abusive in connection with 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 the 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.

To demonstrate a violation of section 1031(d), the CFPB therefore must satisfy the specific elements of sections 1031(d)(1), 1031(d)(2)(A), 1031(d)(2)(B), or 1031(d)(2)(C).