

CFPB Rescinds Trump-Era Guidance Regarding “Abusive Acts and Practices” Standard

WRITTEN BY

Keith J. Barnett | Carlin A. McCrory | Timothy A. Butler | Troy K. Jenkins | Matthew White

On March 11, the Consumer Financial Protection Bureau (CFPB) [announced](#) that it is rescinding a January 2020 policy statement that limited the “abusive acts and practices” standard created by the 2010 Dodd-Frank Act. By rescinding the policy statement, the CFPB — under the direction of Acting Director Dave Uejio — signals a return to the more aggressive enforcement and rulemaking stance that characterized the agency under the Obama administration.

With the 2010 Dodd-Frank Act, Congress gave the CFPB broad authority to prohibit “unfair, deceptive, or abusive acts or practices.” The unfairness and deception standards were largely carried over from the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices.” But the abusiveness standard was something of an innovation, and in fact the Dodd-Frank Act was the first federal law to prohibit “abusive” acts or practices with respect to all consumer financial products and services.

But the Dodd-Frank Act did not clearly define the abusiveness standard, and the CFPB’s enforcement and supervisory efforts to date have not created a clear standard. That has frustrated many companies subject to the CFPB’s broad enforcement and supervisory authority, which argue that the uncertainty created by the abusiveness standard chills innovation and creates unnecessary compliance burdens.

Responding to those concerns, the CFPB’s January 2020 policy statement identified three principles that would govern the abusiveness standard.

- **Focus on Consumer Harm.** The CFPB’s January 2020 policy statement indicated that the agency would focus on consumer harm, challenging conduct as abusive only if the harms caused by the conduct outweigh its benefits. That limitation mirrored a limitation Congress imposed on the unfairness standard. And it suggested that the CFPB would not challenge conduct that harmed a vulnerable subset of consumers if the conduct otherwise provided substantial benefits to consumers.
- **Avoid Duplicative Claims.** The CFPB’s January 2020 policy statement indicated that the agency would avoid duplicative pleading, challenging conduct as abusive only when the conduct did not fall within the broad scope of its authority to prohibit unfair or deceptive conduct. That limitation was intended to bring “more certainty” to the abusiveness standard over time by forcing both the CFPB and the courts to distinguish between conduct that falls within the scope of the abusiveness standard and conduct that falls within the scope of the unfairness or deception standards.
- **Seek Monetary Relief Only from Bad Actors.** The CFPB’s January 2020 policy statement indicated that the agency would not seek monetary remedies in actions alleging standalone abusiveness claims if the target of the action “made a good faith effort to comply with the law based on a reasonable — albeit mistaken — interpretation of the abusiveness standard.” That limitation recognized that, despite the CFPB’s policy statement, the abusiveness standard was still not clearly defined, such that companies subject to the CFPB’s authority were

making “decisions about whether to engage in conduct notwithstanding uncertainty.”

In rescinding its January 2020 policy statement, the CFPB — now under the leadership of Acting Director Dave Uejio — said that the Trump-era policy statement did “not actually deliver clarity to regulated entities” and, to the contrary, added “uncertainty to market participants.”

And perhaps more concerning to industry groups, the CFPB’s policy shift signals a return to the more aggressive enforcement and rulemaking stance that characterized the agency under the Obama administration. Indeed, in rescinding its prior guidance, the CFPB noted that, by stating that the agency would not seek civil penalties or disgorgement for certain abusive acts or practices, the Trump-era policy statement “undermined deterrence and was contrary to the CFPB’s mission of protecting consumers.” And it also noted that it was committed to exercising “the full scope of its supervisory and enforcement authority.”

All said, companies subject to the CFPB’s broad enforcement and supervisory authority should prepare: Under the Biden administration, the CFPB will be an aggressive enforcement agency. This, coupled with the continuing efforts of an active FTC, should prompt regulated entities to review and update their written, risk-based compliance programs.

Troutman Pepper regularly defends companies before the CFPB and also regularly assists clients in building out and maintaining their compliance programs.