

CFPB Clarifies Standard for Determining “Abusive” Practices

Donnelly L. McDowell

January 24, 2020

The CFPB [announced](#) today a [policy statement](#) outlining three new principles that it intends to apply when evaluating whether practices are “abusive” under the Dodd-Frank Act. The Dodd-Frank Act marked the first time that a federal or state regulator was granted the authority to regulate broadly “abusive” acts and practices. While Dodd-Frank provided a general standard that must be met for a practice to be considered “abusive,” many stakeholders have argued that the standard does not provide sufficient guidance regarding when a business practice (subject to CFPB jurisdiction) will be considered abusive.

The Policy Statement identifies three new principles that the CFPB intends to apply when evaluating if business practices are abusive:

- Consideration of consumer harm and countervailing benefits. The Bureau here emphasized that its overarching mission is to prevent consumer harm. The principle here parallels the second prong of the “unfairness” standard codified in the FTC Act in 1994 after the FTC’s Unfairness Policy Statement sought to reign in the Commission’s use of its unfairness authority. The similarity in substance and procedure is notable.
- Avoiding “add-on” abusive allegations. The Bureau noted that it plans to avoid alleging an abusiveness allegation when the underlying facts rely on all or nearly all of the same facts as an unfairness or deception allegation. Conversely, where the Bureau alleges a standalone abusiveness count, “it intends to plead such claims in a manner designed to demonstrate clearly the nexus between the cited facts and the Bureau’s legal analysis of the claims.”
- No civil penalties or disgorgement for abusiveness allegations where entity acts in good faith. The Bureau indicated that it does not plan to seek civil penalties or disgorgement when it makes a standalone abusiveness allegation if the covered person made a good faith effort to comply with the law based on a reasonable interpretation of the reasonableness standard. It may, however, still pursue monetary relief in the form of restitution. At the same time, the Bureau also emphasized “that it is committed to aggressively pursuing the full range of monetary remedies against bad actors who were not acting in good faith in violating the abusiveness standard.”

The Bureau expressly noted that it was leaving open the possibility of engaging in a future rulemaking to further define the abusiveness standard. Notably, under administrative law principles, a rulemaking would be harder to overturn down the road in the event that a new CFPB elected to chart a different course and a more expansive definition of abusiveness.