CFPB Rescinds “Abusive” Policy Statement, Signaling Broader and More Aggressive View of “Abusive” Authority

William C. MacLeod, Alysa Z. Hutnik, Donnelly L. McDowell

March 11, 2021

In a significant but unsurprising move, the CFPB announced today that it was rescinding a policy statement issued in January 2020 that sought to tether the Bureau’s “abusive” authority to certain limiting principles. The move signals that the Bureau is likely to interpret its authority to prevent “abusive acts and practices” under the Dodd-Frank Act more broadly and use that authority to initiate new enforcement against industry.

As we previously discussed here, the Bureau’s January 2020 policy statement announced three new principles that it planned to apply relative to its abusive authority: (1) consideration of consumer harm and countervailing benefits, principles that parallel the second prong of the “unfairness” standard; (2) avoiding add-on abusive allegations when the facts are similar to unfairness or deception allegations; and (3) avoiding civil penalties or disgorgement when making abusive allegations if the covered entity made a good faith effort to comply with the law.

In announcing the rescission of the policy statement today, the Bureau asserted that the “2020 Policy Statement was inconsistent with the Bureau’s duty to enforce Congress’s standard” and noted that “the CFPB intends to exercise its supervisory and enforcement authority consistent with the full scope of its statutory authority under the Dodd-Frank Act as established by Congress.” As a refresher, in passing the Dodd-Frank Act creating the CFPB, Congress newly conferred the Bureau with authority to prohibit “abusive acts and practices,” a new authority that other consumer protection regulators like the FTC had not held. Under Dodd-Frank, an act or practice is abusive if it:

- Materially interferes with someone’s ability to understand a product or service;
- Takes unreasonable advantage of someone’s lack of understanding;
- Takes unreasonable advantage of someone who cannot protect themselves; or
- Takes unreasonable advantage of someone who reasonably relies on a company to act in their interests.

The 2020 policy statement responded to criticism from industry that this statutory standard failed to provide sufficient notice to consumers of what is likely to be considered abusive. In its statement today, the Bureau noted that it “intends to consider good faith, company size, and all other factors it typically considers as it uses its prosecutorial discretion,” but that it could not be held to a policy statement that, from the perspective of current leadership, declines to enforce the law as Congress intended.

The Bureau has generally used its abusive authority sparingly. In those few cases where it has specifically alleged abusiveness, it wasn't clear that the Bureau couldn't have brought the allegations under either an unfairness or deception theory.

Of course, it remains to be seen how the Bureau will use its abusive authority when nominee Rohit Chopra is confirmed as director, as expected. Chopra's nomination was sent to the Senate this week after the Senate Banking Committee vote resulted in a 12-12 tie. As we discussed here and here, Chopra is expected to be an enforcement minded director with an eye toward novel and creative interpretations of Bureau authority. The announcement today may foreshadow one of Chopra's initiatives and usher in a new focus on the Bureau's "abusive" authority under his leadership.

* * *