

Attys Urge CFPB To Clarify 'Abusive' Standard With Guidance

By Jon Hill

Law360 (June 25, 2019, 10:14 PM EDT) -- Financial services attorneys speaking at a Consumer Financial Protection Bureau event on Tuesday said the agency shouldn't wait for the courts to flesh out a definition of what counts as an "abusive" act or practice under the Dodd-Frank Act, but advised a formal rulemaking may not be the best next step to give clarity to the industry.

At a Washington symposium organized by the CFPB, private attorneys speaking on a panel of legal experts said continued uncertainty surrounding the agency's standard for abusiveness increases compliance costs for financial services firms and may ultimately hurt consumers by discouraging innovation and driving providers out of certain market segments.

But though the CFPB has expressed interest in nailing down an abusiveness standard through a rulemaking, the attorneys had doubts about the practicality of such an effort in the near term and instead recommended that agency officials use guidance, policy statements and other less formal tools to provide clarity in the interim.

"It would not be a bad start for the Bureau to issue some guidance that explains exactly when they'll enforce, for example, the prohibition on abusive conduct," said panelist Eric Mogilnicki, a partner at Covington & Burling LLP. "Think of that as a first draft that we can discuss further in forums like this, experience, and have ripen into a rule after we're a little further along."

Tuesday's panel of legal experts was part of the first symposium in a series that the agency's director Kathy Kraninger has said will explore hot topics in consumer protection to help inform CFPB policy development. Hosted at the agency's Washington headquarters, the panel brought together four attorneys from inside and outside of government to discuss ongoing questions about how the CFPB interprets its Dodd-Frank authority to go after abusive conduct.

The landmark 2010 law introduced this authority to the federal consumer financial legal landscape when it established the CFPB and empowered it to protect consumers from so-called UDAAPs — unfair, deceptive or abusive acts or practices.

Because the Federal Trade Commission has for decades had authority to police unfair and deceptive conduct toward consumers, there's an ample body of law for financial services firms to look to understand what constitutes unfairness and deception and how to avoid catching a case.

But the same can't be said for abusiveness. Although Dodd-Frank does contain a four-pronged definition of what it means by an abusive act or practice, financial services attorneys said Tuesday that it's difficult to understand how that definition works in practice because just a fraction of CFPB enforcement actions have alleged abusiveness, and almost all of those have done so while also alleging unfairness and deception.

"The enforcement cases to date have not shown how abusiveness is different from unfairness or deception, and they have been inconsistent at times in applying different abuse prongs to similar facts and circumstances," said panelist Lucy Morris, a Hudson Cook LLP partner and former deputy enforcement director at the CFPB. "The result is that enforcement can appear arbitrary and results-oriented."

Panelist Bill MacLeod, a Kelley Drye & Warren LLP partner and former senior FTC official, said this breeds uncertainty that scares off legitimate businesses, imperiling the availability of financial products and services to "the very consumers whose vulnerability, whose stress, whose circumstances may make them in retrospect an example where perhaps an act or practice wasn't quite suitable, wasn't quite fitting to their particular circumstances."

"When you don't know what you're doing today is likely to be viewed as legal or illegal tomorrow or next year or three or four years after the next recession, you step back," MacLeod said. "You don't provide those goods or services."

In response to concerns like these that have been raised by industry, the CFPB announced last year under the leadership of former acting Director Mick Mulvaney that it would be "considering how rulemaking may be helpful to further clarify the meaning of abusiveness."

That project remains on the table as part of the agency's long-term regulatory agenda, and Kraninger said Tuesday that the CFPB would weigh input gathered from the symposium in deciding whether to pursue a rulemaking or some other option for shading in the contours of abusiveness.

But when asked how the agency should proceed, Mogilnicki argued that while such a rulemaking would be the "gold standard" and a goal to work up toward, it could take years to craft a more precise definition for a concept as complex as this one and put it through the paces of notice and comment.

"You could start with a middle ground," Mogilnicki said. "There are a lot of other tools at the Bureau's disposal, like statements of policy, bulletins and guidance. Other agencies use these very effectively."

Morris and MacLeod likewise said they believed guidance would be the better bet at the moment.

"I think it's premature to do a rule and I think the Bureau could run into a problem by getting out ahead of itself," Morris said.

Not all the panel members agreed the abusiveness standard needs further clarification, however. Panelist Nicholas Smyth, a senior deputy in the Pennsylvania attorney general's office and former CFPB enforcement attorney, argued that qualms about uncertainty and compliance costs are overblown and that the CFPB can't go back and redefine through rulemaking what Congress already defined in Dodd-Frank.

"If you try to do a rule that narrows how abusive would apply to the whole market, it would be outside

of what's permitted under [Dodd-Frank] and I think it could face legal challenge from consumer advocates or state attorneys general," Smyth said.

He added that issuing new guidance on the term would also be inconsistent with Trump administration efforts to curtail the use of guidance as a substitute for formal rulemaking. Besides, the abusiveness definition in Dodd-Frank is "actually quite clear" and hasn't led to any disagreement in the courts about how it should be understood, Smyth said.

"The meaning of abuse acts and practices will develop over time through litigation and the courts have had no trouble interpreting it," Smyth said. "The CFPB should just let them do their job."

--Editing by Amy Rowe.