

CFPB Tightens Approach To 'Abusiveness' With New Policy

By Jon Hill

Law360 (January 24, 2020, 9:48 PM EST) -- The Consumer Financial Protection Bureau unveiled a new policy of restraint on Friday for how it applies its power to go after financial services providers for abusive acts and practices, a type of misconduct whose boundaries are viewed as frustratingly fuzzy by many in the industry.

In a policy statement, the CFPB said it will generally stop bringing enforcement actions where abusiveness claims are doubled up with related claims of unfairness or deceptiveness, the two other types of misconduct under the agency's authority to combat unfair, deceptive or abusive acts and practices, or UDAAPs.

The agency said it might still occasionally decide to bring overlapping claims where doing so "would help clarify the scope of the abusiveness standard," but in those cases abusiveness will be pled in a way that takes care to distinguish it from other alleged UDAAP violations.

Fines and disgorgement will also no longer be sought for abusive conduct in cases where the accused "made a good-faith effort to comply with the law based on a reasonable — albeit mistaken — interpretation of the abusiveness standard," the CFPB said.

Although restitution and other relief would still be on the table, the agency said limiting potential penalties in this way is meant to prevent uncertainty about what constitutes abusiveness from unnecessarily discouraging activity that could benefit consumers.

Similarly, the CFPB said a balancing of consumer benefits against consumer harms will guide which activities or practices get challenged as abusive. The focus will be on going after conduct that the agency deems hurts consumers more than it helps, according to the policy statement.

"I am committed to ensuring we have clear rules of the road and fostering a culture of compliance — a key element in preventing consumer harm," CFPB Director Kathleen Kraninger said in a statement. "We've developed a policy that provides a solid framework to prevent consumer harm while promoting the clarity needed to foster consumer beneficial products as well as compliance in the marketplace, now and in the future."

Friday's policy statement won't go through the notice-and-comment process associated with formal rulemakings but instead takes effect immediately. Still, the CFPB said a future rule to further define "abusiveness" isn't out of the question.

The CFPB announced it was mulling such a project in 2018 after years of complaints from industry that the agency's standard for abusive conduct isn't well defined and has been inconsistently applied, leading to business-chilling uncertainty and seemingly arbitrary enforcement actions.

The Dodd-Frank Act introduced the abusiveness concept to the federal consumer financial legal landscape a decade ago when it established the CFPB and empowered it to protect consumers from UDAAPs.

But while the law outlined a four-prong definition for what constitutes an abusive act or practice, its relative novelty means the standard isn't as developed as the standards for unfairness and deceptiveness, which the Federal Trade Commission has been alleging in cases for decades.

Just a fraction of CFPB enforcement actions have ever featured abusiveness claims, and almost all of those have done so while also claiming unfairness and deceptiveness, a point some have argued adds to the challenge of parsing out the agency's thinking on abusiveness.

Although there have been calls for the CFPB to pin down a more precise abusiveness standard through rulemaking, panelists at an agency symposium on the topic over the summer generally advised taking a less formal route to provide clarity for the time being.

The agency appears to have adopted that approach with the policy statement, but the document received mixed reviews from financial services attorneys on Friday.

"It is a helpful guide for how the bureau will enforce the abusiveness prohibition. However, this guide is not rooted in the language of the statute, which means that courts and future bureau leaders will have additional opportunities to define the abusiveness standard," said Eric Mogilnicki, a Covington & Burling LLP partner who was one of the panelists at the June symposium.

Other attorneys noted that the statement doesn't elaborate on the definition of abusiveness so much as explain how the agency will enforce it, which could still leave financial service providers in the dark on where the boundaries are until it's too late and they've been hit with an enforcement action.

The policy statement also drew sharp rebukes from consumer advocates, who argued that it ties the CFPB's hands in ways that aren't supported by law and undermines deterrence.

"Congress specifically required weighing of costs and benefits in the definition of 'unfair' but not 'abusive,' but not every case is conducive to the quantifying of costs and benefits," Lauren Saunders, associate director of the National Consumer Law Center, said in a statement.

According to Will Corbett, director of litigation at the Center for Responsible Lending, the cost-benefit analysis contemplated by the policy statement therefore limits the CFPB's abusiveness authority in a way that's incompatible with the expansion of consumer protections that Congress intended when establishing the agency.

"Nor did Congress intend for bad actors to only be cited for a violation of one law at a time," Corbett said. "Kathy Kraninger and CFPB leadership should stick to enforcing the law and not trying to rewrite it."

--Editing by Adam LoBelia.