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Parsing the CFPB's Recent Rescission of Its Abusiveness Policy Statement

On March 11, 2021, the Consumer Financial Protection Bureau (CFPB) announced the rescission of its January 24, 2020 Statement of Policy Regarding Prohibition on Abusive Acts or Practices. The rescission statement can be seen as both a messaging document intended to signal that the CFPB under new leadership will aggressively use its authority to prosecute alleged abusive acts or practices and an agency action subject to judicial review under the Administrative Procedure Act (APA).

Background on the Abusiveness Policy Statement

Section 1031(a) of the Dodd–Frank Act provides that the CFPB may use its authority to prevent a covered person or service provider from committing or engaging in an "unfair, deceptive, or abusive act or practice" (UDAAP) under federal law in connection with any transaction with a consumer for a consumer financial product or service or with the offering of a consumer financial product or service. Section 1031(d) of the Dodd–Frank Act sets forth general standards for when the CFPB may declare an act or practice abusive.

After hosting a symposium to examine the meaning of the abusiveness standard, on January 24, 2020, the CFPB issued its "abusiveness policy statement." The abusiveness policy statement found that nearly a decade after the Dodd–Frank Act became law, "[u]ncertainty remains as to the scope and meaning of abusiveness," and this uncertainty "creates challenges for covered persons in complying with the law."

In support of these findings, the CFPB noted that:

- Congress defined the abusiveness standard in Dodd–Frank Section 1031(d) in general terms but did not attempt to include a complete list of abusive practices.
- Congress did not further elaborate on the meaning of the terms used in the abusiveness standard.
- There is relatively limited legislative history discussing its meaning.
- The abusiveness standard does not have the long and rich history of the "deception" and "unfairness" standards.
- Of the 32 enforcement actions the CFPB has brought that included an abusiveness claim, 30 of those actions had both an abusiveness and an unfairness or deception claim, many of which arose from the

same course of conduct, making it difficult to discern from those actions unique fact patterns only the abusiveness standard would apply to.

- Substantial concerns had been raised about the uncertain meaning of the abusiveness standard, including in comments submitted to the CFPB going back to its early days, in response to the call for evidence, and during the June 2019 Symposium on Abusive Acts and Practices, where most academics and practitioners with expertise in UDAAP issues urged the CFPB to take action to clarify the abusiveness standard to help entities comply with the law.

In light of this uncertainty – and to foster greater certainty about the meaning of abusiveness – the abusiveness policy statement established a framework consisting of three principles that would guide the CFPB's discretionary exercise of its supervisory and enforcement authority to address abusive acts or practices.

First, in accordance with its statutory mandates and priority of preventing harm to consumers from unlawful acts or practices, the CFPB announced its intention to focus on citing or challenging conduct as abusive if it concludes that the harms to consumers from the conduct outweigh the benefits to consumers. In other words, if a challenged practice produces a net benefit to consumers, the CFPB announced it would focus its scarce supervisory and enforcement resources elsewhere to better address other conduct that harms consumers. In support of its intended focus on the effects of conduct on consumers, the CFPB noted that the approach is consistent with the FTC's approach to unfairness and deception.[1] The CFPB also states that this approach ensures that its supervisory and enforcement decisions are consistent across matters.

Second, for purposes of articulating acts or practices that violate the abusiveness standard, the CFPB announced its intent to allege "stand-alone abusiveness violations (i.e., violations that are not accompanied by related unfairness and deception violations)" in a manner designed to clearly demonstrate the nexus between the cited facts and its legal analysis of the claim and to generally avoid alleging an abusiveness violation that relies on all or nearly all the same facts as an unfairness or deception violation. In other words, the CFPB announced that it would refrain from engaging in "double-pleading" in actions where a single course of conduct may provide the factual basis for simultaneous allegations of abusive and unfair or deceptive acts or practices. The CFPB also announced its intent to develop model pleadings and updates to its UDAAP examination procedures to provide greater specificity and clarity on the abusiveness standard. The CFPB also stated that it believed its approach to pleading would provide more clarity and guidance to the public on the factual basis for determining that a covered person violated the abusiveness standard.

Third, recognizing that uncertainty about the abusiveness standard may chill or overly deter covered persons from engaging in conduct that may be beneficial to consumers, the CFPB announced that it generally does not intend to seek civil monetary penalties or disgorgement as remedies for abusive acts or practices if the covered person made a good-faith effort to comply with the law based on a reasonable – albeit mistaken – interpretation of the abusiveness standard. A "reasonable" interpretation for purposes of the abusiveness policy statement was defined as one based on the text of the abusiveness standard as well as prior precedents

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[1] In fact, as former FTC Bureau of Consumer Protection director Howard Beales noted in his symposium submission, prosecuting an act or practice that produces net benefits to consumers risks creating an unfair act or practice.

and guidance, including judicial precedent, administrative decisions, rulemakings, supervisory guidance, and past allegations of abusive acts or practices in public enforcement actions. The CFPB stated that if a covered person makes a good-faith but unsuccessful effort to comply with the abusiveness standard, it only intended to use legal or equitable remedies, such as damages and restitution, to redress identifiable consumer harm. For covered persons determined to be bad actors that were not acting in good faith in violating the abusiveness standard, the CFPB emphasized its commitment to aggressively pursuing the full range of monetary penalties.

The Rescission Statement

On March 11, 2021, the CFPB issued a press release announcing that it had rescinded the abusiveness policy statement. The formal rescission document accompanying the press release, a statement of policy executed by the acting director on March 8, 2021, does not appear to refute the central findings of the abusiveness policy statement – i.e., that the scope and meaning of abusiveness remained uncertain and this uncertainty created challenges for covered persons in complying with the law. Rather, the rescission statement concludes that the three principles set forth in the abusiveness policy statement "do not actually deliver clarity to regulated entities" and in fact "add uncertainty to market participants."

The rescission statement makes several observations of the abusiveness policy statement's principles. First, it rejects the principle, citing conduct as abusive only if the harms to consumers outweigh the benefits, asserting that the CFPB "has concluded … that there is *no basis* to treat application of the abusiveness standard differently from the normal considerations that guide the Bureau's general use of its enforcement and supervisory discretion" and that it "also did not find this principle helpful in practice."

Second, it rejects stand-alone pleading and reinstates double-pleading abusive and unfair or deceptive claims. To support this change in enforcement practice, the rescission statement states that "[n]ot asserting abusiveness claims solely because of their overlap with unfair or deceptive conduct … has the effect of slowing the Bureau's ability to clarify the statutory abusiveness standard by articulating abusiveness claims as well as through the ensuing issuance of judicial and administrative decisions," which the CFPB concludes has the "effect of hampering certainty over time." The rescission statement also states that because the stand-alone pleading principle does not allow the CFPB to assert alternative legal causes of action in a judicial action or administrative proceeding, it is "contrary to the Bureau's current priority of maximizing the Bureau's ability to successfully resolve its contested litigation."

Third, the rescission statement states:

> the policy of declining to seek certain types of monetary relief for abusive acts or practices – specifically civil monetary penalties and disgorgement – is contrary to the Bureau's current priority of achieving general *deterrence* through penalties and other monetary remedies and of compensating victims for harm caused by violations of the Federal consumer financial laws through the Bureau's Civil Penalty Fund.

Such a policy, the rescission statement asserts, is tantamount to "[d]eclining to apply the full scope of the statutory standard," which has a "negative effect on the Bureau's ability to achieve its statutory objective of protecting consumers from abusive practices."

The rescission statement then makes a general argument about the CFPB's legal authority, noting that the abusiveness standard, which is set forth in Dodd–Frank Section 1031(d), does not require the CFPB to issue the abusiveness policy statement. Further, had Congress intended to limit the CFPB's authority to apply the "full scope" of the abusiveness standard, it could have prescribed a narrower abusiveness prohibition, but it did not.

Parsing the Rescission Statement

There are at least two lenses to use to evaluate the rescission statement. The first lens views it as a messaging document – that is, a signal to the market. In this regard, the CFPB's effort is largely successful because there is no mistaking that the CFPB intends to aggressively enforce the abusiveness standard and desires maximum possible flexibility to do so.

However, it does raise the question of whether Acting Director Dave Uejio's March 8 decision to rescind the abusiveness policy statement will need to be reconciled with commitments that Rohit Chopra had made to Senators only six days prior during his nomination hearing before the Senate Committee on Banking, Housing, and Urban Affairs. For example, when asked by Senator Thom Tillis (R-NC) about the abusiveness standard, Chopra stated "I take from your question that it's important, that it's clear and we do what we can to make sure that what the law requires is understandable." Also, when Senator Tim Scott (R-SC) questioned him about providing clear rules of the road to regulated entities before being charged with breaking them, Chopra committed to the transparency of the CFPB's supervision and enforcement programs and also committed that "the CFPB and every federal agency should be … making it clear to market participants what's expected of them." Taken at face value, these public statements suggest that Chopra is committed to providing clear rules of the road to market participants rather than engaging in so-called "regulation by enforcement." If this is the case, then the CFPB's rescission of abusiveness guidance for market participants appears inconsistent with that commitment. If the Senate confirms Chopra as director, the CFPB may be expected to issue new guidance on the scope and meaning of the abusiveness standard.

The second lens to use to evaluate the rescission statement, however, views it as a formal agency action subject to the APA. Reviewing courts can set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. However, the scope of review is narrow. An agency must provide the essential facts upon which its decision was based and explain what justified its determinations with actual evidence beyond a conclusory statement. Courts must determine only whether the agency examined the relevant data and articulated a satisfactory explanation for its decision. A court may not substitute its judgment for that of the agency, nor may it create its own justifications to support an agency's decision beyond the reasons presented by the agency.

With this standard of review in mind, consider first the rescission statement's main conclusions that the three principles set forth in the abusiveness policy statement "do not actually deliver clarity to regulated entities" and in fact "add uncertainty to market participants." Surprisingly, nowhere in the rescission statement does the CFPB provide any factual evidence to support these conclusions. For instance, the CFPB provides no evidence that it sought, received, or considered the input of regulated entities and market participants to determine, based on their experience with the abusiveness policy statement, whether it actually delivered

clarity or added certainty to the abusiveness standard. Moreover, the CFPB cites no evidence that it did not. Instead, the CFPB relies exclusively on its *own purported experience* in applying the abusiveness policy statement, while failing to articulate what that experience was or how that experience informed its conclusions.[2] Consequently, the rescission statement's broad conclusions appear to be untethered to any factual predicate, in contrast to the abusiveness policy statement's specific enumeration of six separate pieces of evidence to support its main findings.

The rescission statement's rejection of cost-benefit analysis is no better. The CFPB offers no support for its assertion that there is "no basis" for the principle and does not offer a rationale for rejecting the bases provided in the abusiveness policy statement. Additionally, the CFPB neglects to offer evidence showing how the principle did not deliver clarity to regulated entities or added uncertainty to market participants.

The rescission statement's reinstatement of double-pleading is similarly infirm. The CFPB argues that the abusiveness policy statement's principle disfavoring double-pleading undermines its ability to successfully resolve its contested litigation. However, the CFPB offers no evidence to support this argument. It also argues that the principle "has the effect of slowing" its ability to clarify the abusiveness standard through pleadings and judicial and administrative decisions. Here, the CFPB offers no evidence that this claimed effect occurred when the abusiveness policy statement was operative (between January 24, 2020 and March 8, 2021). But even assuming the CFPB is instead referring to the principle's hypothetical future effects, evidence from its historical practice is inconsistent with this argument. The CFPB double-pleaded all except two abusiveness claims in the 10 years before issuing the abusiveness policy statement, and yet the CFPB found that uncertainty remained about the scope and meaning of abusiveness. The CFPB does not explain how returning to a pleading practice that failed to clarify the abusiveness standard before will now achieve a different result. Also, the vast majority of CFPB enforcement actions over the past decade resulted in consent orders, so it is similarly unclear how returning to a pleading practice that resulted in very few judicial or administrative decisions will do so now. Unless the CFPB decides to litigate rather than settle substantially more of its abusiveness claims (which the rescission statement does not assert the CFPB will do), the CFPB would logically provide greater clarity on the abusiveness standard over time by pleading stand-alone abusiveness claims that clearly demonstrate the nexus between the cited facts and its legal analysis of the claim, as contemplated by the abusiveness policy statement.

The rescission statement's rejection of the principle of refraining from imposing civil monetary penalties or disgorgement in certain circumstances also appears to lack evidentiary support. The CFPB offers only a conclusory statement that the principle is contrary to its priority of achieving general deterrence. However, the CFPB neglects to logically explain how such deterrence will be achieved by its rescission statement. The general goal of deterrence is to encourage market participants to act in a manner that complies with law. But a policy of imposing fines and disgorgement on good actors in the marketplace (i.e., those making good-faith efforts to comply with the law based on reasonable interpretations of the abusiveness standard) would not appear to deter these good actors, since they are by definition already trying to comply with

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[2] The CFPB does cite the opinions of a law professor and an employee of a state attorney general for the proposition that the statutory definition of abusiveness is sufficiently clear, but these opinions were offered during the abusiveness symposium, which occurred before the issuance of the abusiveness policy statement.

the law. Instead, it is bad actors in the marketplace acting in bad faith for whom the prospect of fines or disgorgement might be a deterrent. The abusiveness policy statement specifically stated that these bad actors are subject to the full range of remedies for committing abusive acts and practices, including fines and disgorgement. Accordingly, the rescission statement does not appear to deter bad actors, either. And again, the CFPB neglects to offer evidence that this principle did not deliver clarity to regulated entities or added uncertainty to market participants.

The CFPB asserts that the abusiveness policy statement is effectively a decision "[d]eclining to apply the full scope of the statutory standard," which it suggests is contrary to congressional intent. But Congress clearly articulated its intent to provide the CFPB with prosecutorial discretion in the Dodd–Frank Act. For instance, Section 1054(a) provides that "[i]f any person violates a Federal consumer financial law, the Bureau *may* … commence a civil action against such person to impose a civil penalty or to seek all *appropriate* legal and equitable relief." In addition, Section 1054(c) provides that the CFPB may "compromise or settle any action if such compromise is approved by the court." And Section 1055(c)(3) specifically provides mitigating factors the CFPB may consider in determining the amount of a civil monetary penalty to assess, which include "the good faith of the person charged" and "such other matters as justice may require." The CFPB implicitly acknowledges this statutory discretion in the rescission statement itself, stating: "The Bureau will, of course, continue to engage in typical prosecutorial discretion as appropriate and can use that discretion to marshal its resources effectively." Accordingly, in light of its statutory authority and its own admission, the CFPB's suggestion that it lacks authority to "refrain from applying the abusiveness standard even when permitted by law" is not credible.

Conclusion

There is reason to believe that the rescission statement succeeded as a messaging document but not as a formal agency action. While it remains to be seen whether the rescission statement will be challenged as arbitrary and capricious in violation of the APA, it is certain that the CFPB's new leadership will seek to aggressively use its abusiveness authority to prosecute alleged unlawful acts or practices. Regulated entities and market participants may wish to use this transition period to further update their compliance management systems and practices in anticipation of heightened UDAAP scrutiny, even in light of continued uncertainty about the scope and meaning of the abusiveness standard.

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