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CFPB Must Show Its Cards on Defining 'Abusive'

By Benjamin Saul, Kyle Tayman and Andrew Kim

The Consumer Financial Protection Bureau's current approach to carrying out new authority under the Dodd-Frank Act to punish "abusive" behavior is likely not sustainable.

Before Dodd-Frank, regulators could call out institutions for "acts or practices" deemed "unfair" or "deceptive." But the 2010 reform law added "abusive" acts or practices. That means institutions cannot engage in types of behavior that "materially interfere" with a consumer's understanding of product terms or that take "unreasonable advantage" of a customer's limited knowledge.

The bureau, however, has been reluctant to provide a set of workable guidelines for discerning abusive conduct, and recent CFPB enforcement actions issued under the new authority suggest the agency is using an overly broad definition of "abusive."

The agency has yet to write either guidance or a rulemaking on the provision despite the fact that Congress provided examples of the type of conduct it deemed "abusive." With rare exception, federal agencies are generally expected to announce new regulations mandated by legislation ahead of time – by rulemaking, not by enforcement. Congress – in granting the bureau rulemaking powers to define abusiveness – intended for the CFPB to do the same. But the bureau has expressed its intention to keep its understanding of abusiveness close to the vest, employing a case-by-case approach. That approach likely is not sustainable. Courts have consistently discouraged agencies from hold-



Benjamin P. Saul is a partner in Goodwin Procter's consumer financial services litigation practice group.

ing parties accountable based on post-hoc interpretations of rules enacted during adjudications. And, eventually, a party will challenge the bureau if it extends the reach of what is "abusive" beyond what Congress intended.

Meanwhile, trying to determine the CFPB's thinking from the release of individual enforcement actions poses challenges for the industry. For one thing, the bureau's current course carries the risk that individual orders may extend the reach of what is "abusive" beyond what was plainly intended by Congress. Until the bureau decides to use its rulemaking powers, the consumer finance industry will have to deal with continued uncertainty. Although providers of consumer financial services can take certain precautionary steps, such as avoiding practices and policies similar to the ones discussed below, it is unlikely that the bureau will provide generally applicable guidance in the near future.

One thing that is clear is Congress indi-

cated that the "abusive" prong should only be used for extreme violations.

The Senate Banking Committee's report on Dodd-Frank highlighted certain practices that it considered de facto abusive. For instance, in the credit-card arena, the committee considered "double-cycle billing, universal default, retroactive changes in interest," over-the-limit fees without consumer notice, and arbitrary rate increases to be "abusive." For debt collection, the committee thought abusive "debt collectors threatening violence, using profane or harassing language, bombarding consumers with continuous calls, telling neighbors or family about what is owed, calling late at night, and falsely threatening arrest, seizure of property or deportation."

But the few CFPB enforcement actions to date cover a wide constellation of conduct, ranging from the mundane, such as the use of contracts of adhesion and the failure to disclose payment-allocation details, to the more extreme, such as the continued use of threats of adverse consequences to enforce debt collection. Congress, however, did not intend for the "abusive" prong to cover the mundane.

So long as the bureau's patchwork approach lasts, the consumer finance industry will, in the words of the Congressional Research Service, "have to cope with the inherent uncertainty that results" from the ambiguity surrounding the meaning of the term "abusive." For now, providers would do well to ensure their practices and policies are defensible from a consumer-facing perspective, and should continue to monitor future enforcement proceedings to discern the types of conduct to avoid and modify their policies accordingly.

Benjamin P. Saul is a partner in Goodwin Procter's consumer financial services litigation practice group. Andrew Kim is an associate in the firm's litigation department and appellate litigation practice. Kyle Tayman is an associate in the firm's consumer financial services litigation practice.