

# Regulatory and Enforcement Alert

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## CFPB Rescinds Policy Statement on Meaning of “Abusive”—Signaling a Shift Towards a More Aggressive Enforcement Approach

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In one of its first formal acts since the beginning of the Biden Administration, the Consumer Financial Protection Bureau (CFPB) this week announced the rescission of a January 2020 policy statement that sought to define “abusive acts and practices” by applying certain limiting principles. This significant move highlights a reversal of the Bureau’s prior policy of restraint in pursuing abusiveness claims and foreshadows a more aggressive CFPB approach to enforcement more generally.

The Dodd-Frank Act, which created the CFPB, gave the Bureau the authority to punish firms for violating the longstanding federal prohibition on “unfair” or “deceptive” acts or practices, while also introducing a new “abusive” standard. Dodd-Frank’s definition of abusiveness includes whether a company’s policy materially interfered with a consumer’s ability to understand terms and conditions of a financial product or service and whether a company took advantage of that misunderstanding. But this definition drew criticism for being vague and failing to provide sufficient notice as to what rose to the level of abusive.

In an apparent effort to define the concept last year, then-CFPB director Kathy Kraninger unveiled a Policy Statement that announced three new principles that the CFPB would apply relative to its authority to pursue abusive acts and practices: (1) consideration of whether the harm to consumers from the conduct outweighed the benefits; (2) avoidance of add-on abusiveness claims where the conduct is alleged to be unfair or deceptive; and (3) declination to seek civil penalties or disgorgement where the respondent made a good-faith effort to comply with the abusiveness standard.

In explaining its decision to reverse the Kraninger Policy Statement, the Bureau noted that based on its review and practical experience, “the principles set forth in the Policy Statement do not actually deliver clarity to regulated entities” and in fact hinder the Bureau’s ability to achieve its statutory objective of protecting consumers from abusive practices.

“Going forward, 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,” the Bureau said in a press release. “The CFPB intends to consider good faith, company size, and all other factors it typically considers as it uses its prosecutorial discretion.” Nevertheless, we can expect as the CFPB under the Biden administration begins

to flex its resources and “discretion,” the prior criticism that the standard for abusiveness is hazy—and thus the application inconsistent and unpredictable—to resurface.

The move to rescind the policy comes as President Biden’s choice to lead the Bureau, Rohit Chopra, moves closer to anticipated confirmation by the full Senate following a deadlocked 12-12 vote on his confirmation by the Senate Banking Committee. Although it remains to be seen precisely how the new CFPB leadership will apply the abusiveness standard in supervision and enforcement matters, the announcement is consistent with expectations of a more aggressive enforcement program and increased regulatory scrutiny.

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