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CLIENT ALERT

CONSUMER FINANCIAL PROTECTION BUREAU HOSTS UDAAP SYMPOSIUM ON “ABUSIVE” STANDARD

On June 25, 2019, the Consumer Financial Protection Bureau (“Bureau”) held a symposium to discuss whether the definition of *abusive*, as that term is used in the Dodd-Frank Act, should be clarified by a rule or other guidance. The Dodd-Frank Act prohibits any person providing a consumer financial product or service from performing unfair, deceptive, or abusive acts or practices (“UDAAP”). It also permits the Bureau to take enforcement, supervision, and rulemaking actions against those engaged in UDAAPs.

History of Abusive Standard

Federal law has long prohibited businesses from engaging in unfair or deceptive acts or practices under the Federal Trade Commission Act. Accordingly, the meaning of *unfair* and *deceptive* has been substantially developed over time (mostly by the Federal Trade Commission). Businesses are thus able to act with relative certainty regarding whether any of their practices would be considered unfair or deceptive.

However, when the Dodd-Frank Act was passed, it became the first federal law to prohibit abusive acts and practices with respect to consumer financial products and services. At the time, the absence of precedent for the abusive standard created significant uncertainty for businesses. And although the financial services industry hoped the Bureau would clarify and refine the abusive standard over

time, the Bureau’s actions only muddied the waters more. Instead of providing guidance on what the Bureau considers to be abusive, the Bureau inconsistently applied the abusiveness standard without explanation—often bringing an abusiveness claim in one case but failing to do so in another very similar case.

To address this uncertainty, the Bureau’s new leadership held a symposium to solicit feedback from the public on whether it needs to clarify the statutory definition of abusive, either by rulemaking or by some other guidance.

The symposium consisted of two panels by UDAAP experts. The first panel, made up of leading academic experts in the area of consumer financial protection, discussed whether *abusive* should be clarified from a policy standpoint. The second panel, consisting of consumer financial services attorneys and a regulator, addressed how the abusiveness definition has played out with businesses.

Academics’ Take on Abusive Standard

On the first panel was Patricia McCoy, Professor of Law, Boston College Law School; Todd Zywicki, Professor of Law, George Mason University, Antonin Scalia Law School; Howard Beales, Professor of Strategic Management & Public

Policy, George Washington University and former Director of the Federal Trade Commission's Bureau of Consumer Protection; and Adam Levitin, Professor of Law, Georgetown Law School.

Both Professors McCoy and Levitin thought that it would be unnecessary and premature for the Bureau to engage in a rule to clarify the meaning of abusive. Professor McCoy argued that the Bureau should determine whether an act or practice is abusive on a case-by-case basis and that, in her view, the purpose of the abusiveness authority is to protect consumers, not to reduce regulatory burden. Both Professors McCoy and Levitin argued that there is no evidence showing market harm because of the Bureau's abusiveness authority and that there is no evidence showing that the authority has prevented a product from going to market. Professor Levitin also pointed out that the statutory definition of abusiveness does not seem to apply to state attorneys general and that even if the Bureau were to promulgate a rule defining abusiveness, state attorneys general would not be bound by the Bureau's interpretation.

Professors Beales and Zywicki, conversely, argued that a rule was necessary. Professor Beales said that if *abusiveness* is not defined, it leaves open the possibility of a new frontier of law. Professor Zywicki similarly argued that *abusiveness* should be defined so that it is not used as a kitchen skin catch-all. A definition would provide notice to the public as to what would be considered abusive. Professor Beales said that in determining whether an act or practice is abusive, a cost-benefit analysis should be performed to determine if the rule is worth the protection it provides. For example, if the definition of abusiveness focused on the most vulnerable consumer, it might impose unacceptably higher costs on everyone else.

Practitioners' Take on Abusive Standard

Following the panel of academics was a panel of practitioners. The practitioner panelists included several consumer financial services attorneys who represented the viewpoints of consumer financial

services providers, two of which were former Federal Trade Commission or Bureau staff members. The panel also included Nicholas Smyth, Assistant Director of the Pennsylvania Office of Attorney General's Bureau of Consumer Protection.

The consumer financial services attorneys argued that the Bureau should provide guidance to the industry regarding what the Bureau considers to be abusive. They criticized the Bureau's application of the abusiveness standard, saying that enforcement actions have been inconsistent and that the Bureau has allowed courts to conflate *abusiveness* with the *unfairness* and *deceptiveness* standards by alleging that conduct is deceptive, unfair, and abusive. One attorney made the point that by not providing guidance, it looks as if the Bureau finds conduct to be abusive depending upon the identification of the defendant.

They raised the concern that if a provider was uncertain about whether a product or practice could be considered abusive, the provider would pull back from offering the product. Additionally, the consumer financial services attorneys explained that the uncertainty has made it difficult for providers to plan and has created higher costs.

The panel was asked what kind of guidance the Bureau should provide. What format should the guidance take? The consumer financial services attorneys acknowledged that, while a rule would be the "gold standard," effective guidance could also come in the form of a policy statement. They suggest the guidance explore the boundaries of abusiveness, explain when abusiveness is distinct from deceptiveness and unfairness, and state whether abusiveness is about protecting the ability of consumers to make an informed choice or protecting them from a bad choice.

State Attorney General's Take on Abusive Standard

Nicholas Smyth disagreed with the views of the other practitioners. Smyth said that the Bureau should not promulgate a rule. He argued that the abusiveness standard was clear and that no court has

had trouble interpreting the statutory definition. He further argued that there was no evidence that the abusiveness authority has stifled innovation, has led to a product or product feature from being withheld from the market, or has resulted in a rise in prices or reduction in available credit. Moreover, Smyth claimed that the Bureau had exercised discretion in bringing abusiveness cases and had not pushed the envelope. Finally, Smyth argued that, even if the Bureau ought to promulgate a rule, it had no statutory authority to further define or narrow *abusiveness*. Congress intended the definition of abusiveness to be broad, he said.

Other than moderate the discussion for both panels, Bureau staff did not reveal their thoughts on whether *abusive* was unclear or whether it required Bureau guidance. However, it is worth noting that simply holding a symposium on the subject shows a willingness to engage the public about these issues and is a welcomed step toward transparency about the research and viewpoints that the Bureau is considering. The Bureau's willingness to engage the consumer financial services industry on such issues also illustrates that Director Kraninger is beginning to follow through on her promises to end the regulation by enforcement era that created significant regulatory uncertainty under the Bureau's prior leadership.

Following this symposium, the Bureau intends to host others on various topics. As of early July, the Bureau has announced the following symposium topics: behavioral law and economics; small business loan data collection; disparate impact and the Equal Credit Opportunity Act; cost-benefit

analysis; and consumer authorized financial data sharing.

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