CFPB Issues Statement of Policy Regarding Prohibition on Abusive Acts or Practices

Overview: On January 24, 2020, the Consumer Financial Protection Bureau ("CFPB") ended a decade of regulatory cloudiness by announcing its formal policy regarding how it intends to apply the “abusiveness” standard in supervision and enforcement matters under the Dodd-Frank Act (the “Abusive Conduct Policy”).

UDAAP Background

Prior to the Dodd-Frank Act, unfair and deceptive acts or practices ("UDAP") were prohibited by the Federal Trade Commission Act ("FTC Act") and other laws. Substantial case law, policy statements, and enforcement actions established and clarified how the “unfair” and “deceptive” standards would be applied. As a result, for many years financial institutions and consumer financial services companies enjoyed a relatively clear understanding of how the UDAP prohibition was applied and enforced. But in 2010, the Dodd-Frank Act added a new prohibition on abusive acts or practices, and gave oversight of unfair, deceptive, or abusive acts or practices (“UDAAP”) to the CFPB. The CFPB essentially adopted the existing standards with respect to unfair and deceptive conduct, but had not issued a clear policy statement regarding the newly added prohibition against abusive conduct, despite frequent calls from stakeholders to do so. Although the Dodd-Frank Act provides minimum criteria for conduct to be deemed abusive, many stakeholders have felt that the lack of a formal policy left uncertainty as to how the CFPB may apply the abusive conduct standard.

Current UDAAP Standards

The standard for unfairness in the Dodd-Frank Act is that conduct is considered “unfair” when: (i) it causes or is likely to cause substantial injury to consumers; (ii) the injury is not reasonably avoidable by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or to competition.

Conduct is considered to be “deceptive” when: (i) a representation, omission, act, or practice misleads a consumer; (ii) the consumer’s interpretation of the conduct is reasonable under the circumstances; and (iii) the misleading representation, omission, act,
or practice is material.

The Dodd-Frank Act gives the CFPB discretion to find that conduct is “abusive,” but provides guidelines for determining whether conduct is abusive. Conduct cannot be considered abusive unless it: (i) materially interferes with a consumer’s ability to understand a term or condition of the product or service; (ii) takes unreasonable advantage of a consumer’s lack of understanding of material risks, costs, and conditions, or a consumer’s inability to protect his or her own interests, or a consumer’s reasonable reliance on the company to act in the consumer’s best interests.

Over the first few years of its existence, the CFPB has typically applied the abusiveness standard in conjunction with claims of unfairness and/or deception, often using a single set of facts to satisfy the requirements of all UDAAP claims. In the Abusive Conduct Policy, the CFPB identified 32 enforcement actions that included an abusiveness claim. In all but two of those actions, the CFPB also made claims of unfairness or deception, typically basing all claims on a single course of conduct. In order to provide more clarity to financial institutions and providers of consumer financial services, the CFPB has issued the Abusive Conduct Policy to establish the extent and manner in which the CFPB will bring claims of abusive conduct. Additionally, it is worth noting that the CFPB has not ruled out a future rulemaking to further clarify and define the abusive conduct standard.

**The Abusive Conduct Policy**

According to the new Abusive Conduct Policy, the CFPB will apply the following principles when alleging that conduct is abusive in violation of the Dodd-Frank Act:

(i) The CFPB will focus on whether harms to consumers from the conduct outweigh its benefits to consumers.

(ii) The CFPB will generally avoid combining allegations of abusive conduct with allegations of unfair or deceptive conduct arising from all or nearly all the same facts. Instead, it will focus on “stand-alone” abusiveness violations that are unaccompanied by unfair or deceptive conduct violations.

(iii) The CFPB will not generally seek monetary relief for abusive conduct when the person made a good-faith effort to comply with the abusiveness standard, except to address consumer injuries caused by the conduct.

**Outlook:** The Abusive Conduct Policy is generally favorable to financial service providers. The CFPB appears to have borrowed first principles from the established standard for unfair conduct violations, and opens the possibility of rebutting a claim of abusiveness with evidence that the conduct in question provided significant benefits to consumers. The second principle suggests that, generally, institutions will not face enforcement actions alleging all three types of UDAAPs unless additional facts and circumstances can support a claim of abusive conduct on its own. And the third principle limits the amount of penalties the CFPB will seek when the financial institution can show a good-faith effort to comply with the standard provided in the Dodd-Frank Act. Ultimately, we can probably expect fewer abusive conduct claims by the CFPB, and lower fines and penalties in those actions that do include abusive conduct claims.
Congress Inches Forward on Federal Privacy Legislation

Overview: In late 2019 and early 2020, there has been meaningful progress toward a possible comprehensive federal privacy law, but significant hurdles remain. First, the Senate Commerce, Science, and Transportation Committee held a legislative hearing on December 4, 2019 to examine competing privacy bills from the ranking Democrat and Republican members of the committee. Then, on December 18, 2019 staff of members of the House Energy and Commerce Committee circulated a discussion draft of a potential bipartisan privacy bill. Finally, in February, Sen. Kirsten Gillibrand introduced legislation that would establish a new federal privacy regulatory agency.

Senate Efforts

In November 2019, Sen. Roger Wicker (R-MS), chairman of the Senate Commerce Committee, and Maria Cantwell (D-WA), the ranking Democrat on the committee, each proposed federal privacy bills. Sen. Wicker’s bill, the U.S. Consumer Data Privacy Act of 2019 (“USCDPA”), and Sen. Cantwell’s bill, the Consumer Online Privacy Rights Act (“COPRA”), share many principles. For instance, both require covered businesses to provide disclosures about how they collect, use, and disclose consumer information, and provide other consumer rights such as access, deletion, correction, and portability. Notably, both bills would authorize the Federal Trade Commission to implement and enforce the law. However, USCDPA and COPRA diverge on two key policy issues that have been the source of a partisan divide for months: preemption of state laws and a private right of action.

The Republican bill would expressly preempt any state law related to data privacy or security. By contrast, the Democratic bill would only create a “floor” for preemption, allowing states to enact laws that are stricter than COPRA. COPRA would also create a federal private right of action for a consumer to sue a covered business for violations of the Act. USCDPA contains no such private right of action. In addition to these two key policy disputes, the two bills differ in a number of other ways.

Following the circulation of drafts of these bills, the Commerce Committee held a hearing on December 4, 2019, titled “Examining Legislative Proposals to Protect Consumer Data Privacy.” The committee heard testimony from several experts and discussed, among other things, the key policy disagreements.

In February, Sen. Kirsten Gillibrand (D-NY), introduced a bill known as the Data Protection Act, which would establish an independent federal agency – modeled on the Consumer Financial Protection Bureau – to protect consumers’ data ad privacy. The Data Protection Agency would have authority to enforce data security policies and would investigate technology companies if it receives user complaints about data practices. It would also advise Congress on emerging privacy and technology issues and represent the United States in international forums related to harmonizing data protection standards. Gillibrand believes creating the Data Protection Agency is necessary in part because, she alleges, the Federal Trade Commission, which currently oversees privacy issues, “has failed to enforce its own order and has failed to act on...consumer privacy complaints alleging unfair practices.”

House Efforts

On December 18, 2019, Rep. Jan Schakowsky (D-Ill.), chairwoman of the House Energy and Commerce Committee’s consumer protection subcommittee, circulated a discussion draft of a bill that had been worked on by staff of members from both parties. The discussion draft covers much of the same ground as the Senate proposals: clear and transparent disclosures to consumers about collection, use, and sale or disclosure of their information; consumer rights to access, correct, and delete covered information; opt-out rights; and restrictions on processing and sale of covered information. Interestingly, the discussion draft would establish
a four-tier system of restrictions based on how a covered company intended to use consumer data. For instance, there would be few restrictions on the use of a consumer’s mailing address if it is to be used to ship products that the consumer purchased, whereas there would be more restrictions on the sale of information to third parties for marketing purposes. The discussion draft would also create a new Bureau of Privacy within the FTC, with authority to implement and enforce the law.

However, the draft avoids the two thorny issues of a private right of action and preemption. Schakowsky indicated that those issues have been bracketed pending further discussion. She expressed optimism about the discussion draft due to its bipartisan nature, and suggested that they would likely tackle the issues of private right of action and state law preemption late in the legislative process, once agreement over a more robust bill had been achieved.

Schakowsky characterized the discussion draft as being primarily a request for input from interested parties. A spokesperson for Rep. Cathy McMorris Rodgers (R-Wash.), the top Republican on Schakowsky’s subcommittee, similarly indicated that the draft would serve as a way to solicit feedback. The committee shared the discussion draft with stakeholders and requested feedback by January 24, 2020.

Outlook: While Members of Congress report that they are making progress in discussions over federal privacy legislation, given the current state of the discussion drafts and the increasing polarization spurred by the impeachment process and the upcoming election, it does not seem likely that a bipartisan bill will gain momentum in the short term. However, the debate over this issue sets the stage for future action on privacy legislation and puts states considering their own consumer privacy legislation on notice that federal intervention may occur.

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