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CLIENT ALERT

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CFPB Further Defines Abusiveness Standard; Expresses Intent to Limit Duplicative Enforcement

In a Policy Statement effective on January 24, 2020, the CFPB addresses perceived uncertainty as to the scope and meaning of the abusiveness standard, and that the CFPB had in various enforcement actions asserted claims for unfair practices and for abusive practices based on the same conduct. The Policy Statement sets forth a clarification of the definition of the standard for abusiveness under the Dodd-Frank prohibition on unfair, deceptive or abusive acts or practices, and includes a good faith safe harbor in regard to the CFPB seeking monetary penalties or disgorgement.

The Policy Statement focuses on three areas:

I. The CFPB will seek to cite conduct as abusive, and to seek enforcement based on abusiveness, when the Bureau concludes that the harm to consumers from the conduct outweighs its benefits to consumers (including its effects on access to credit).

The Policy Statement states that “[e]xplicitly incorporating this focus into the Bureau’s supervision and enforcement decisions concerning abusiveness not only ensures that the Bureau is committed to using its scarce resources to address conduct that harms consumers, but also ensures that the Bureau’s supervisory and enforcement decisions are consistent across matters.”

II. The CFPB will generally seek to avoid alleging an abusiveness violation based on the same facts used to allege a separate unfairness or deceptiveness violation. However, the CFPB will plead “stand-alone” abusiveness claims in a manner consistent with the Dodd-Frank standard and the Policy Statement, and will seek to plead such claims “in a manner designed to demonstrate clearly the nexus between the cited facts and the Bureau’s legal analysis of the claims.” In an effort to provide similar clarity in its supervisory activities, the CFPB will seek to apply similar processes when identifying abusive acts or practices in a supervisory setting.

III. The Policy Statement expresses a concern that uncertainty over the application of the abusiveness standard may unintentionally deter parties from engaging in conduct that could be beneficial to consumers. Accordingly, the CFPB intends to apply a safe harbor 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. In those circumstances, the CFPB does not intend to seek civil penalties or disgorgement in enforcement actions, and will apply the same standard when requesting action as a result of violations in Matters Requiring Attention or other supervisory requests. The Policy Statement’s definition of a “reasonable” interpretation remains somewhat non-specific - an interpretation “based on the text of the abusiveness standard set forth in the

Dodd-Frank Act, as well as prior precedent and guidance, including judicial precedent, the Bureau's administrative decisions, rulemakings, supervisory guidance, and past allegations of abusive acts or practices in public enforcement actions."

However, even if a party violated the abusiveness standard in good faith, the CFPB intends to seek remedies such as restitution and damages when a consumer has been harmed and does not have other means of recovery.

The extent to which this Policy Statement impacts the CFPB's enforcement and supervisory conduct, and the ability of parties to engage in certain activities, will depend on how the CFPB applies this standard going forward. It will be particularly important to observe how, in regard to monetary penalty/disgorgement safe harbor, the CFPB applies the very non-specific definition of a "reasonable" interpretation of the abusiveness standard.

A copy of the Policy Statement can be found [HERE](#).

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