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Business as usual at CFPB despite Mulvaney threats

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The Consumer Financial Protection Bureau (CFPB) continues to prosecute bad actors in much the same way as they did before acting director Mick Mulvaney took over from Richard Cordray. This is despite loud claims to the contrary and suggestions that the bureau would cease to function in its previous guise.

While the number of enforcement actions actually brought by the CFPB has dropped since Mulvaney assumed the position in November 2017, the substance of those actions and the types of claims that are being made has remained much the same.

"The nature of the claims and the legal arguments that they are making are basically the same as they were before, even in areas where Mulvaney has suggested that he thought that the bureau was acting improperly, overreaching or not providing fair notice to companies about what is or what isn't prohibited," said [Mayer Brown](#) partner Ori Lev.

KEY TAKEAWAYS

- **The CFPB continues to prosecute bad actors in much the same way as they did before Acting Director Mick Mulvaney took over from Richard Cordray;**
- **The substance of those actions and the types of claims that are being made has remained much the same;**
- **This will have significant ramifications if you are a company that is subject to CFPB jurisdiction, who may well have thought that because Mulvaney had taken over they would not have to worry about UDAAP claims;**
- **One of the changes suggested is to give more clarity to the market place by defining exactly what is abusive practice, or not, in contradiction to previous assertions about this.**

According to Lev, the fact this is happening is surprising. It may be that while he was making his announcements, the career staffers at the CFPB that were already working on these cases continued to do so, maintaining their own views and convincing somebody, whether it be Mick Mulvaney or the political appointee overseeing enforcement, that these claims are appropriate.

"I don't know if Mulvaney thinks people aren't paying attention, but to me it's an odd dissonance between what he is saying and what he is doing in terms of the kind of claims he is bringing," added Lev.

This will have significant ramifications for companies that are subject to CFPB jurisdiction, who may have thought that because Mulvaney had taken over they would not have to worry about unfair, deceptive and abusive acts and practices (UDAAP) claims, and only worry about technical compliance with regulatory obligations.

Abusive behaviour

One of the most recent attempts by Mulvaney to reshape the Bureau is to issue a rulemaking that redefines what constitutes the word abusive with regard to UDAAP claims. Cordray had allowed for this to be fairly flexible and determined on a case-by-case basis.

Mulvaney has expressed a view that too much of the enforcement agenda in the prior regime was what he has called regulation by enforcement - that is, using enforcement actions to develop new legal standards or to extend the law. He believes that regulation by enforcement is not appropriate and that instead enforcement should be more limited to violation or potential violations of clear standards and that changes to the law are best brought about by militant combat rulemaking.

The prohibition on unfair deceptive and abusive acts and practices has been in place since Dodd-Frank was enacted and the creation of the CFPB. Most of the actions that the Bureau has filed alleging that a particular practice is unfair deceptive or abusive have either focused on unfair and deceptive, both of those terms have more clearly understood definitions and parameters.

"There is not necessarily any retreat from going after conduct deemed to be unfair or deceptive, but what is new is an indication that the additional prong, the abusiveness prong, should be defined through rulemaking rather than through enforcement," said Joe Barloon, partner at Skadden.

"This is interesting because it is difficult to determine or conceive of conduct that would be deemed to be abusive but not unfair or deceptive," he added. "It will be interesting to see if the Bureau is able to delineate a particular conduct of practices that is neither unfair nor

"What is new is an indication that the additional prong, the abusiveness prong, should be defined

deceptive, but is somehow still abusive."

through rulemaking rather than through enforcement"

The CFPB took the position in court that it isn't required to provide companies with advanced notice of what constitutes an unfair or deceptive act or practice, but instead can provide very broad standards and then interpret them through whatever method they feel is appropriate, subject only to judicial review.

"The Republican administration is putting out rules defining what abusive practice is under Dodd-Frank," said [Keith Noreika](#), partner at Simpson Thacher. "One of the key things that the CFPB (or the Bureau of Consumer Financial Protection (BCFP)) can regulate is barring unfair deceptive and abusive practices, so that section is an additional authority that traditionally hasn't been part of the US legal landscape, and only in the past have unfair and deceptive not abusive."

Change in tact

The last administration worked on a definition through enforcement actions in a 'know it when they saw it' kind of manner, by taking an enforcement action and then building up precedent. "There is a lot of political resistance to that, and rightly so in that it doesn't allow you the freedom to plan business or affairs, firms become targets waiting to get hit for something that they thought was fine, and only after the fact was it declared abusive," added Noreika.

Even though, stereotypically, Republican administrations don't put out new rules to regulate things like this, the thought is to give more clarity to the market place by defining exactly what is abusive practice, otherwise there is no assurance that business can be conducted if it is not within one of the prohibitive categories as detailed in the new CFPB rule.

This move is somewhat contradictory to the point where on the one hand there is rhetoric from Mulvaney suggesting that the CFPB is not going to do this, and will be different, and on the other, saying that companies need to know what conduct is abusive so there should be a rule, not just bring claims about it.

"Then the very next day they bring a claim that says this is abusive," said Lev. "It's may be that the right hand doesn't know what the left hand is doing, though that would be surprising. But if you look at the public statements and the claims brought, it doesn't seem like they have a cohesive approach to dealing with abusiveness."

See also

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