

Additional Clarity Could be Coming on the CFPB's "Abusive" Acts or Practices Authority—But Don't Hold Your Breath

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The main lesson from the CFPB [symposium](#) on “abusive acts or practices” is that there won’t be any clarity anytime soon. In response to long-lasting concerns from the financial services industry that the indefinite scope and meaning of what amounts to an “abusive” act or practice generates uncertainty and impedes innovation, the agency publicly announced in its Fall 2018 Unified Agenda that it was considering rulemaking or “other activities” to help clarify the meaning of this statutory term. According to CFPB Director Kathy Kraninger, the symposium presented an opportunity to consider whether rulemaking or informal guidance on “abusive acts or practices” would be appropriate, and if so, how that concept should be defined.

The symposium panels reflected a range of views, and the mix of perspectives show why a consensus on this issue is unlikely to emerge in the near term. In the first panel, composed of four academics, Professors Patricia McCoy and Adam Levitin, representing the point of view of the progressive left, expressed skepticism over the value of additional formal or informal agency guidance. They noted that “abusive” acts or practices have only once been the basis for a standalone claim by the CFPB and that, in their view, no financial product release has been “chilled” by the absence of a more precise definition. Instead, they argued that the agency should retain maximum flexibility to develop its standards over time in response to evolving industry practices. Echoing industry concerns, Professors Howard Beales and Todd Zywicki argued that regulation or a policy statement would afford predictability to financial services providers and also help to establish agency priorities. Another point of contention on the academic panel was the content of any potential regulation or policy statement—in particular, the panelists split over whether consumer harm should be an express requirement of any abusive act or practice.

The second panel was composed of private sector representatives (attorneys from Kelley Drye, Covington, and Hudson Cook) and one state government representative (Nicholas Smyth from the Pennsylvania Attorney General's Office, which also has enforcement authority under this provision of the Dodd-Frank Act). The law firm attorneys consistently noted that the lack of certainty drives up compliance costs and results in inconsistent application and enforcement. These panelists did not agree, however, on whether additional clarity should be achieved through regulation or other means. Mr. Smyth disagreed on all fronts, arguing that compliance burdens have been exaggerated, that the law can be interpreted by courts according to its plain meaning, and that enforcement agencies have acted with appropriate discretion in bringing cases.

Law Clerk Sarah Bashadi contributed to this post.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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