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They're Just Not That into You: A Brief Summary of How Federal Courts Have Treated the CFPB's Interpretations of Statutes and Regulations

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Since its creation in 2011, the Consumer Financial Protection Bureau ("CFPB") has exercised its broad authority to regulate a wide swath of the consumer financial services industry.¹ While the CFPB has the authority to engage in formal notice-and-comment rulemaking and adjudicatory proceedings, the CFPB more frequently makes its positions known to the public through consent decrees, *amicus* briefs, and unofficial guidance, among other avenues. These informal positions—often relied upon by private litigants in civil actions—raise a host of questions about how much deference they are owed by the courts. Indeed, the question of how much deference, if any, a court should afford a CFPB position often becomes a point of contention and debate.

To date, the deference courts have provided to CFPB positions has been mixed.² Courts have been willing to defer to the CFPB when it has offered empirical and other data to support its consumer-oriented interpretations. However, courts have not afforded deference to interpretations of statutes that are unambiguous, regulations that simply re-state the text of the statute, or interpretations contained in *amicus* briefs or consent decrees. Under *Chevron*,³ courts are not required to defer to agency interpretations if the underlying statute is unambiguous and requires no agency interpretation. The CFPB has recently advocated for *Chevron* deference by asserting that clear statutory text is nonetheless ambiguous, while at the same time pushing interpretations that diverge from those issued by predecessor agencies, such as the U.S. Department of Housing and Urban Development ("HUD"). Whether the CFPB is successful in its efforts to obtain *Chevron* deference in re-interpreting existing statutes could have a wide-ranging and substantial impact on the financial services industry.

The deference spectrum:

The concept of judicial deference to agency interpretations is best viewed as a continuum with total deference at one end and none at the other.⁴ The amount of deference a court

¹ For summaries of the CFPB's actions during its first years of operation, see the following articles prepared by K&L Gates attorneys: http://www.klgates.com/files/Publication/1777bade-f301-4e33-8242-941cbdf5a67d/Presentation/PublicationAttachment/9b26f04c-ebd6-4930-9032-9868a4297e38/CFPB_Enforcement_Actions_03012015.pdf and <http://www.consumerfinancialserviceswatch.com/2015/07/happy-birthday-cfpb/>.

² Most of the reported judicial decisions that discuss the deference to be given to a CFPB interpretation are in the context of private, civil litigation matters.

³ *Chevron USA, Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984).

⁴ As some commentators have noted, the determination of whether deference applies is not purely objective and will be governed to a certain extent by the court's ultimate opinion regarding the dispute. See, e.g., MICHAEL HERZ, CHEVRON IS DEAD; LONG LIVE CHEVRON, 115 Colum. L. Rev. 1867, 1878 (2015) ("Like most people, judges will protect their turf. Moreover, even after all these years, strong readings of Chevron remain counterintuitive; judges' learned intuitions do not

They're Just Not That into You: A Brief Summary of How Federal Courts Have Treated the CFPB's Interpretations of Statutes and Regulations

may give an agency position generally is guided by several Supreme Court benchmarks briefly summarized below:⁵

- **Chevron deference** is the most deferential standard, applicable to an agency's interpretation of a statute administered by that agency where the statute is silent or ambiguous regarding the issue in question.⁶ *Chevron* deference only applies if Congress delegated authority to the agency to make rules carrying the force of law, and the interpretation is made pursuant to that authority—e.g., by engaging in notice-and-comment rulemaking or by formal adjudication.⁷ If Congress has expressly delegated authority and *Chevron* deference otherwise applies, an agency interpretation is considered controlling and *binding* in judicial proceedings “unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.”⁸ If Congress has implicitly delegated authority to the agency, courts are “obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.”⁹ Accordingly, when *Chevron* applies, courts will typically defer to an agency's formal interpretation of an ambiguous statute, even if it is not the best or most persuasive reading of the statute.¹⁰
- **Auer¹¹ deference** is similar to *Chevron* deference, but applies where an agency is interpreting its own regulation rather than a statute.¹² *Auer* deference would be accorded to CFPB pronouncements only when the regulation at issue is ambiguous and the interpretation reflects the agency's “fair and considered judgment on the matter in question” and is not “plainly erroneous or inconsistent with the regulation” or simply a “post hoc rationalizatio[n]” advanced by an agency seeking to defend past agency action against attack.”¹³
- **Skidmore¹⁴ deference** addresses how much weight to give to an agency interpretation that is not a formal adjudication, a notice-and-comment rulemaking, or an interpretation of the agency's own regulation. It is less formulaic than either *Chevron* or *Auer* deference. *Skidmore* deference is typically considered in

generally lead them to defer on questions of law. ... The point is only that, as with justiciability doctrines, the nature and structure of the judiciary guard against overdoing deference, and the danger will almost always be that courts go too far in the other direction.”).

⁵ The jurisprudence regarding deference to administrative interpretations is complex, expansive, and fills many treatises and textbooks; the summaries of the various deference standards set forth in this article are not intended to be comprehensive or exhaustive but rather simply to provide background for a discussion of the deference afforded various CFPB interpretations.

⁶ *Chevron USA, Inc.*, 467 U.S. at 842-43; see also *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

⁷ *Mead Corp.*, 533 U.S. at 226-27 (holding that an “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”); *id.* at 230-31.

⁸ *Id.* at 227 (citing *Chevron USA, Inc.*, 467 U.S. at 844).

⁹ *Id.* at 229 (citing *Chevron USA, Inc.*, 467 U.S. at 842-45).

¹⁰ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.”).

¹¹ *Auer v. Robbins*, 519 U.S. 452 (1997).

¹² *Id.* at 461.

¹³ *Id.* at 461-62 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

¹⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

They're Just Not That into You: A Brief Summary of How Federal Courts Have Treated the CFPB's Interpretations of Statutes and Regulations

connection with “opinion letters...[,] policy statements, agency manuals, and enforcement guidelines” and other interpretations that “lack the force of law.”¹⁵ These types of interpretations are “‘entitled to respect’ ... only to the extent that those interpretations have the ‘power to persuade.’”¹⁶ The level of *Skidmore* deference given to an agency interpretation is assessed by looking at numerous factors enumerated by the Supreme Court, including “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.”¹⁷

How has the CFPB fared to date?

As the cases discussed below reflect, courts have not uniformly embraced the CFPB's interpretations and positions.

Chevron deference:

Courts have noted that deference could be owed to formal rules promulgated by the CFPB “in the manner contemplated by *Chevron*,” because Congress has delegated exclusive authority to the CFPB to interpret the federal consumer financial laws.¹⁸ To date, however, most of the CFPB's positions and interpretations addressed by federal courts have not been the product of notice-and-comment rulemaking or formal adjudication, and courts have generally refused to apply *Chevron* deference to CFPB statements that do not have the force of law.

For example, the Ninth Circuit recently analyzed whether to apply *Chevron* (or *Auer*) deference to statements by the CFPB in an *amicus* brief that it filed at the court's request.¹⁹ At issue was the interpretation of the terms “goods,” “facilities,” and “services” under Section 8(c)(2) of the Real Estate Settlement Procedures Act (“RESPA”). In its *amicus* brief, the CFPB argued that the terms do not include payment for ownership or equity interests,²⁰ and it urged the court to apply *Chevron* or *Auer* deference to its position.²¹ The Ninth Circuit concluded that no *Chevron* deference was due to the CFPB's interpretation,²² because the

¹⁵ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (refusing to apply *Chevron* deference to “an interpretation contained in an opinion letter” from the Department of Labor).

¹⁶ *Id.* (quoting *Skidmore*, 323 U.S. at 140).

¹⁷ *Mead Corp.*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

¹⁸ See *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, --- F. Supp. 3d ---, 2015 WL 1013508, at *12 (S.D. Ind. Mar. 6, 2015); *Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1091 (C.D. Cal. 2014). The statute through which Congress created the CFPB contains a provision providing that “the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.” 12 U.S.C. § 5512(b)(4)(B). As one of these courts noted, however, this pronouncement does not afford the CFPB any special deference; rather, it “merely prescribes that the Bureau's constructions of organic law in its subject area are to be given deference, in accordance with the well-established principles first enunciated in *Chevron U.S.A., Inc.*” See *ITT Educ. Servs., Inc.*, 2015 WL 1013508, at *12.

¹⁹ *Edwards v. First American Corp.*, 798 F.3d 1172, 1179 (9th Cir. 2015).

²⁰ *Id.*

²¹ BRIEF OF AMICUS CURIAE CONSUMER FINANCIAL PROTECTION BUREAU filed in *Edwards v. First American Corp.*, Appeal No. 13-55542, ECF No. 16 (9th Cir. Oct. 30, 2013) at 2. The CFPB also stated in its brief that, “[a]s the agency currently charged with implementing and enforcing RESPA and the regulations promulgated thereunder, the Bureau has a substantial interest in, and is in the best position to offer this Court an authoritative position on, the RESPA questions presented in this case.” *Id.* at 1-2.

²² *Edwards*, 798 F.3d at 1179-80.

They're Just Not That into You: A Brief Summary of How Federal Courts Have Treated the CFPB's Interpretations of Statutes and Regulations

filing of an *amicus* brief does not constitute exercise of formal rulemaking authority,²³ and regardless, the words in the statute were unambiguous and required no agency interpretation in the first place.²⁴

In another case pending between private litigants, a district court expressly refused to give *Chevron* deference to positions taken by the CFPB and the Federal Trade Commission (“FTC”) in consent decrees.²⁵ The court noted that there is “no authority to establish that Congress gave the FTC or the CFPB rulemaking power under the Fair Debt Collection Practices Act (“FDCPA”) through the filing and settling of lawsuits against debt collectors.”²⁶

Similarly, where the CFPB was defending an amendment to Regulation Z made by its predecessor, the Federal Reserve Board,²⁷ the court refused to apply *Chevron* deference to the amendment because the statute was unambiguous and the amendment was “arbitrary, capricious, and contrary to the [agency]’s statutory authority.”²⁸

Notably, and of significant interest, in *PHH Corp. v. CFPB*,²⁹ where an appeal is pending in the D.C. Circuit Court of Appeals from a formal opinion issued by CFPB Director Cordray, the CFPB is seeking *Chevron* deference for a starkly new and different interpretation of RESPA Sections 8(a) and 8(c)(2)³⁰ from that previously issued by HUD. The CFPB grounds its argument—and attempts to give itself new leeway to reinterpret RESPA—on the proposition that the statutory text of Section 8(c)(2) of RESPA is ambiguous. The court’s deference analysis will likely turn on whether it agrees with that proposition even though neither HUD nor courts throughout the country had previously found ambiguity in the same text.

Auer deference:

Several courts have addressed the applicability of *Auer* deference to the CFPB’s interpretations of regulations promulgated pursuant to federal consumer finance laws. In two of these cases, dissenters have warned that agencies should not be permitted to over-reach their authority, and effectively expand their jurisdiction, through interpretations that they issue.

The Second Circuit gave *Auer* deference to the interpretation by the CFPB (and previously HUD) of the term “lot” in an implementing regulation of the Interstate Land Sales Full Disclosure Act (“ILSA”),³¹ 12 C.F.R. § 1010.1(b).³² The court held that deference was

²³ *Id.*

²⁴ *Id.* (“because the statutory terms are not ambiguous, no deference is merited”). Despite according no deference, the Ninth Circuit nonetheless stated that it agreed with the CFPB’s interpretation and ultimately adopted it as its holding. *Id.*

²⁵ See *Harris v. Total Card, Inc.*, 2013 WL 5221631, at *7 (N.D. Ill. Sept. 16, 2013) (court also rejected *Skidmore* deference for the consent decrees where the plaintiff did not provide “sufficient information about the FTC’s explanation of or rationale behind its position in the cases that merits deference”).

²⁶ *Id.*

²⁷ The Board of Governors of the Federal Reserve System.

²⁸ *First Premier Bank v. U.S. Consumer Fin. Prot. Bureau*, 819 F. Supp. 2d 906, 914-20 (D.S.D. 2011) (“[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”) (quoting *Livestock Mktg. Ass’n v. U.S. Dept. of Agric.*, 132 F. Supp. 2d 817, 826 (D.S.D. 2001) (quoting *Chevron*)).

²⁹ No. 15-1177 (D.C. Cir.).

³⁰ 12 U.S.C. §§ 2607(a), (c)(2).

³¹ 15 U.S.C. §§ 1701, *et seq.*

³² *Berlin v. Renaissance Rental Partners, LLC*, 723 F.3d 119, 125-27 (2d Cir. 2013) (citing *Decker v. Nw. Env’tl. Def. Ctr.*, -- U.S. ---, 133 S. Ct. 1326, 1337 (2013), which is a Supreme Court decision applying *Auer* deference).

They're Just Not That into You: A Brief Summary of How Federal Courts Have Treated the CFPB's Interpretations of Statutes and Regulations

warranted, because “the interpretation by the CFPB and HUD of their own regulation is reasonable,” consistent with prior interpretations, and in accordance with the “text and purpose of ILSA.”³³ In a dissenting opinion to a subsequent denial by the Second Circuit of *en banc* review, the dissenters stated that they would have withheld *Auer* deference, because the agency interpretation expanded ILSA to cover condominiums, which the dissenting judges concluded was beyond the scope of the statute.³⁴ The dissenters’ fear was that the extension of *Auer* deference effectively permitted the agency to define its own jurisdiction: “[s]ome measure of discipline is needed to keep an agency from commanding *any* level of deference when the agency creates the very jurisdiction it claims to occupy. An agency is not like a busy spider, which can stand upon its own web.”³⁵

In a Truth in Lending Act (“TILA”) case, the Seventh Circuit provided *Auer* deference to Official Interpretations of Regulation Z, which the CFPB “adopted in wholesale form” from one of its predecessors, because those interpretations were “not demonstrably irrational” regarding the “date of receipt” of mortgage payments.³⁶ Judge Easterbrook dissented, however, arguing that the CFPB’s commentary was entitled to no deference because the regulation did nothing but repeat the statutory language.³⁷ Specifically, Judge Easterbrook questioned, “[w]hy should an agency that parrots a statute in a regulation, as the Bureau did, get to make binding rules through ‘official commentary,’ that did not go through notice-and-comment rulemaking? ... Especially when the statute is implemented through litigation rather than administrative adjudication?”³⁸ Similarly, the Ninth Circuit recently rejected *Auer* deference to a CFPB interpretation of RESPA regulations, because the text in the regulations also appeared in the statute, and thus *Auer* was not triggered.³⁹

Skidmore deference:

A number of courts have afforded *Skidmore* deference to more informal statements issued by the CFPB.⁴⁰ For example, the Second Circuit provided *Skidmore* deference to an *amicus* brief that it solicited from the CFPB in another case involving ILSA.⁴¹ The court agreed with the CFPB’s interpretation that delivery of a statutorily-required report on a purchaser’s agent

³³ *Id.* at 125 (“When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation.”) (quoting *Decker* 133 S. Ct. at 1337).

³⁴ *Berlin v. Renaissance Rental Partners, LLC*, 748 F.3d 98, 99-100 (2d Cir. 2014) (Jacobs, J. dissenting from denial on *en banc* review) (“Some measure of discipline is needed to keep an agency from commanding *any* level of deference when the agency creates the very jurisdiction it claims to occupy.”). In addition, in the *Berlin* dissent to the panel decision, the dissenters found that the CFPB’s interpretation was “not the most natural one” and was contrary to prior caselaw and the language of the statute itself. See *Berlin*, 723 F.3d at 130-34 (Jacobs, J., dissenting). Justice Jacobs further stated, “we owe no deference to HUD’s interpretative guidance if it *contradicts* the statute and HUD’s regulation.” *Id.* at 133.

³⁵ *Berlin*, 748 F.3d at 99-100 (emphasis in original).

³⁶ *Fridman v. NYCB Mortg. Co., LLC*, 780 F.3d 773, 776-77 (7th Cir. 2015).

³⁷ See *Fridman*, 780 F.3d at 781-82 (Easterbrook, J., dissenting).

³⁸ *Id.*

³⁹ *Edwards*, 798 F.3d at 1180 (the “CFPB is in fact interpreting Congress’s words in the statute, so we give no deference to CFPB’s interpretation”); see also *id.* at 1180 n.4 (recognizing that “no *Auer* deference is due when the regulation at issue is unambiguous”).

⁴⁰ Additionally, some courts, although not relying on *Skidmore* or its progeny, cite informal interpretations of the CFPB with approval when they comport or are consistent with the court’s holding. See *Weast v. Rockport Fin., LLC*, --- F. Supp. 3d ---, 2015 WL 4427281, at *3 (E.D. Mo. July 17, 2015) (citing CFPB report with approval where it was consistent with Staff Commentary on the FDCPA and relevant court opinions); *Miller v. Interstate Auto Grp., Inc.*, 2015 WL 1806815, at *5-6 (W.D. Wis. Apr. 21, 2015) (noting that it was unclear how much deference to afford the CFPB’s Official Interpretations of Regulation E at 12 C.F.R. pt. 105, Supp. 1, but ultimately holding that the defendant’s position was “entirely consistent” with the CFPB’s interpretation and ruling in defendant’s favor).

⁴¹ *Rai v. WB Imico Lexington Fee, LLC*, 802 F.3d 353, 360 n.3 (2d Cir. 2015).

They're Just Not That into You: A Brief Summary of How Federal Courts Have Treated the CFPB's Interpretations of Statutes and Regulations

(rather than the purchaser) satisfied the delivery requirement, and stated “[w]e afford the CFPB’s interpretation *Skidmore* deference ‘on account of the specialized experience and information available to the agency,’ and because the ‘reasonable determination ... advanced in [its] amicus brief ... is not a post hoc rationalization.’”⁴² In reaching this conclusion, the court also weighted the CFPB’s task of “protecting the interests of consumers in financial transactions.”⁴³

Similarly, the Seventh Circuit afforded *Skidmore*-like deference to positions set forth by the CFPB and the FTC in a pair of putative class actions brought under the FDCPA.⁴⁴ The appeal raised the question of whether a debt collection letter could have misled an unsophisticated consumer into believing that time-barred debt was enforceable.⁴⁵ The court requested and received a joint *amicus* brief from the CFPB and the FTC on the issue⁴⁶ and found the positions of the CFPB and FTC persuasive, noting “[w]e are inclined to defer to the agencies’ empirical research and expertise” regarding consumers’ understanding of their legal rights with respect to time-barred debts.⁴⁷ Following the Seventh Circuit, a district court considered a similar issue in another putative FDCPA class action.⁴⁸ The plaintiff cited as authority *amici curiae* briefs and enforcement actions brought by the CFPB and FTC in connection with other actions.⁴⁹ The district court noted that while it was “not compelled to defer to the agencies’ view” because the positions were not issued pursuant to formal rulemaking, their “‘judgment is to be given great weight by reviewing courts,’ as they are often in a better position than are courts to determine when a practice is ‘deceptive’ within the meaning of the FDCPA.”⁵⁰ In denying the defendant’s motion to dismiss, the court further noted that “the factual findings of the FTC and CFPB are especially helpful when courts are asked, as this Court is, to determine how an unsophisticated consumer might construe a particular communication—a task for which empirical studies by agencies may well be more accurate than the ‘intuitions’ of federal judges.”⁵¹ These types of studies appear to fall within the sphere of agency interpretation that may be “entitled to respect” by courts if they “have the power to persuade.”⁵²

Other courts have refused to provide *Skidmore* deference to CFPB positions. In one case, an individual plaintiff sought to rely upon the CFPB’s position—stated in a pre-hearing brief filed in a separate administrative proceeding—that “proof of scienter is not required to establish an ILSA violation.”⁵³ The court held that *Skidmore* deference was not warranted

⁴² *Id.* at 360 n.3.

⁴³ *Id.* at 360 n.7.

⁴⁴ See *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020-21 (7th Cir. 2014).

⁴⁵ *Id.* at 1019-20.

⁴⁶ *Id.* at 1016.

⁴⁷ *Id.* at 1021.

⁴⁸ *Carter v. First Nat’l Collection Bureau, Inc.*, --- F. Supp. 3d ---, 2015 WL 5695273, at *5 (S.D. Tex. Sept. 11, 2015).

⁴⁹ *Id.*

⁵⁰ *Id.* (quoting *FTC v. Colgate-Palmolive*, 380 U.S. 374, 384-85 (1965)).

⁵¹ *Id.* (quoting *McMahon*, 744 F.3d at 1020); see also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568-69 (1980) (stating, in the TILA context, that “wholly apart from jurisprudential considerations or congressional intent, deference to the Federal Reserve is compelled by necessity; a court that tries to chart a true course to the Act’s purpose embarks upon a voyage without a compass when it disregards the agency’s views....[S]triking the appropriate balance is an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices. Administrative agencies are simply better suited than courts to engage in such a process.”).

⁵² See *Goswami v. Am. Collections Enter.*, 377 F.3d 488, 493, n.1 (5th Cir. 2004) (in the context of the FDCPA, FTC staff commentary is not entitled to judicial deference, but only to respect to the extent it has the power to persuade) (citing *Christensen*, 529 U.S. at 587).

⁵³ *Beaver v. Tarsadia Hotels*, 29 F. Supp. 3d 1294, 1318 (S.D. Cal. 2014).

They're Just Not That into You: A Brief Summary of How Federal Courts Have Treated the CFPB's Interpretations of Statutes and Regulations

because the plaintiffs had not “provide[d] any facts or arguments that the [CFPB's] judgment on [the] issue reveals ‘the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control.’”⁵⁴ Another court refused to extend *Skidmore* deference to interpretations set forth by the CFPB in consent decrees, because “neither the complaints filed by the [CFPB] nor the consent decrees in those cases provide persuasive content” to justify deference.⁵⁵

* * *

Thus far in its short existence, the CFPB's interpretations of statutes and regulations have been afforded various levels of deference, if any at all. The CFPB's attempts to promote its interpretations through *amicus* briefs, consent decrees, and other informal procedures have yielded inconsistent results in the courts. In the CFPB's consumer protection role, courts appear willing to defer to the CFPB's interpretations regarding the type of conduct that would be deceptive to a consumer when the CFPB supports those interpretations with empirical and other data. Nonetheless, in order to achieve *Chevron* deference in judicial proceedings, the CFPB will need to make more use of its rulemaking authority—particularly where it seeks to enforce a contrary position from one of its predecessors. Notably, the CFPB has been aggressively exercising its broad authority to regulate unfair and deceptive conduct without formal rulemaking. The extent to which courts defer to the CFPB's interpretations in that context—if they are challenged—will be important to watch.

We will continue to monitor the treatment of the CFPB's interpretations by the judicial system and provide updates accordingly.

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⁵⁴ *Id.* at 1319 (quoting *Skidmore*, 323 U.S. at 140).

⁵⁵ *Harris*, 2013 WL 5221631, at *7 (internal quotations omitted).

They're Just Not That into You: A Brief Summary of How Federal Courts Have Treated the CFPB's Interpretations of Statutes and Regulations

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