



News

Carlos Ortiz Analyzes in ARM Compliance Digest: CFPB Rescinds Policy on Identifying Abusive Acts or Practices

March 22, 2021

In the March 22, 2021 edition of the *ARM Compliance Digest*, Hinshaw partner Carlos Ortiz discusses the announcement by the CFPB that it had rescinded restrictions put in place by the previous leadership that established a two-part test to determine whether a company had engaged in abusive acts or practices:

Earlier this month, the CFPB rescinded the short-lived “Statement of Policy Regarding Prohibition on Abusive Acts or Practices,” which had been in place since only January, 2020. The rescinded policy provided a framework for interpreting the scope of the CFPB’s authority regarding what is “abusive conduct.” Congress defined “abusive” acts or practices in Section 1031 of the Dodd-Frank Act, 12 USC § 5331, as those that:

- *materially interfere with the ability of a consumer to understand a term or condition of the consumer financial product or service; or*
- *take unreasonable advantage of:*
- *a lack of understanding on the part of the consumer of the material risks or costs of the product or service;*
- *the inability of the consumer to protect the interest of the consumer in selecting or using such product or service; or*
- *the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.*

As justification for rescinding the previous policy, the CFPB noted that the previous policy sparked market uncertainties because the agency was permitted considerable discretion in its application, giving it wide latitude to determine what constituted “good faith efforts” to comply. In addition, the CFPB reasoned that the previous policy did not allow the agency to exercise the full scope of the above-referenced congressional statutory standard; thereby preventing the CFPB from protecting consumers from abusive acts and practices.

Under the previous policy, the CFPB would focus on citing conduct as abusive only when the harms to consumers outweighed the benefits to consumers. In addition, the agency would generally avoid overlap in challenging conduct as abusive where it was relying on all or nearly all of the same facts that the CFPB alleged were unfair or deceptive. The CFPB would also usually not seek certain types of monetary relief for abusiveness violations where a financial institution

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was making a good-faith effort to comply with the abusiveness standard.

The CFPB now intends to pursue abusiveness claims, regardless of whether they overlap with alleged unfair or deceptive conduct. The agency foreshadowed that it may seek all potential penalties, regardless of whether the company under investigation was sincerely attempting to comply with the abusiveness standard. In taking that position, the CFBP asserted its aim of achieving general deterrence through penalties and other monetary remedies. The CFPB, however, failed to provide new guidance on what it considered to be abusiveness acts, but did state that it "intends to consider good faith, company size, and all other factors it typically considers as it uses its prosecutorial discretion."

It comes as no secret that under the Biden Administration, the CFPB will be more active than what it was the previous four years. Through rescinding the previous policy, the agency will use its muscle to impose financial penalties on the consumer financial industry. Accordingly, businesses should pay close attention to the actions that the CFPB prosecutes and ensure that the products and services they offer are consistent with how the agency is interpreting what is compliant.

[Read the full March 22, 2021 edition of the AccountsRecovery.net Compliance Digest.](#)