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How the CFPB defines 'responsible conduct'

With the passage of the Dodd-Frank Act in 2010 and the creation of the Consumer Financial Protection Bureau in 2011, corporations in the financial services industry have been investing significant resources to understand and master the numerous regulations and requirements imposed by the consumer financial protection laws in an effort to avoid costly fines and enforcement actions.

The importance of understanding and complying with the labyrinth of rules and regulations of the various laws administered by the new bureau takes on an even greater weight for employees working for corporations in regulated areas in the wake of a speech given in late October by bureau director Richard Cordray at Reuters' Washington Summit.

During his speech, Cordray indicated the bureau will pursue enforcement actions against individuals, as well as companies, that are in violation of the laws administered by the bureau. Part of this enforcement initiative includes an increased effort to seek admissions of wrongdoing from enforcement targets.

The bureau's efforts to seek admissions from individuals and companies subject to enforcement actions is in line with the recent change by the Securities and Exchange Commission increasing the frequency with which it requires an admission of wrongdoing from defendants seeking to settle.

Because of the consequences defendants in enforcement actions may face if they admit any wrongdoing, the bureau's apparent decision to adopt the SEC's new policy could be an

obstacle for many companies in reaching settlements with the bureau.

In light of the significant financial consequences that can accompany an enforcement action, it is critical for companies and their employees to be well informed about the factors that the bureau looks at when deciding whether to bring an enforcement action.

On June 25, the bureau issued Bulletin 2013-06, titled "Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation and Cooperation" which provides critical guidance to companies and individuals.

Although the bureau considers many factors in the exercise of its enforcement discretion, four important factors include: "1) the nature, extent and severity of the violations identified; 2) the actual or potential harm from those violations; 3) whether there is a history of past violations; and 4) a party's effectiveness in addressing violations."

These are factors that counsel for companies and individuals in regulated industries to be particularly aware of when assessing and counseling clients about the risk of possible enforcement actions that arise from certain conduct.

In addition to focusing on the factors that impact the bureau's enforcement decisions, companies and individuals should also be made aware of the actions — referred to by the bureau as "responsible conduct" — that they can engage in which may result in favorable treatment from the bureau.

Bureau Bulletin 2013-06 specifically identifies four activities a party may engage in that will be considered by the bureau in its enforcement decisions: 1) self-policing potential violations;



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2) self-reporting potential violations to the bureau; 3) remediate harm resulting from any violations; and 4) cooperating with any bureau investigation in a manner that exceeds the actions required by the relevant statute.

Each of these activities will be discussed in more detail below.

Self-policing — This concept, which can also be termed self-monitoring or self-auditing, requires a proactive commitment by a party to utilize resources for the prevention and early detection of potential violations of consumer financial protection laws.

In assessing a corporation or individual's efforts to self-police, the bureau will consider, among other things, the nature and source of the violation, how the violation was detected and the existence of applicable compliance procedures.

Self-reporting — Of the four categories of "responsible conduct," expeditious and complete self-reporting to the bureau is given significant

weight in making enforcement decisions. A party's prompt and effective disclosure of conduct to bureau regulators and consumers is critical to favorable consideration.

Remediation — To be viewed favorably, a corporation should provide complete redress for violations of consumer financial laws. Important factors include the timeliness of the company's response after becoming aware of misconduct, the procedures followed to preserve information and redress the harm and the extent and effectiveness of the measures taken to prevent future violations.

Cooperation — A corporation must take "substantial and material steps above and beyond what the law requires in its interactions with the bureau" to receive credit for cooperation. A corporation should promptly and completely cooperate with the bureau, promptly and thoroughly investigate any violations or potential violations and share the results of those investigations with the bureau.

Where a party meaningfully engages in the aforementioned "responsible conduct," it may favorably impact the resolution of a bureau enforcement investigation.

In these instances, the bureau may elect to conclude an investigation with no public enforcement action, treat the conduct as a less severe type of violation, reduce the number of violations pursued or reduce the sanctions or penalties sought in an enforcement action.

To assist clients who are operating in areas within the purview of the consumer financial protection statutes, it is critical that they be made aware of the information in the bureau bulletin.