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Counseling clients about 'responsible conduct' under federal guidelines

Last month's installment of Tully's Law (Dec. 16) highlighted some of the key information presented in the Consumer Financial Protection Bureau Bulletin 2013-06, titled "Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation and Cooperation."

To summarize the key information provided in last month's column, there are four categories of "responsible conduct" a party may engage in that will be considered by the bureau in its enforcement decisions.

These categories of "responsible conduct" include: 1) self-policing potential violations; 2) self-reporting potential violations to the bureau; 3) remediating harm resulting from any violations; and 4) cooperating with any bureau investigation in a manner that exceeds the actions required by the relevant statute.

While the guidance provided by the bureau in Bulletin 2013-06 is helpful to companies operating in the financial services industry, it raises many questions that must be discussed with clients who are being counseled about the benefits and possible detriments of such action.

This column will focus on some of the questions and uncertainties that need to be discussed with the client who is considering engaging in one or more categories of responsible conduct.

One factor that is important to keep in mind when counseling clients about their dealings with the bureau is that the agency has only been in existence since 2011 and so it is still in its nascent stages of development.

This means that the agency is still getting its sea legs, so to speak, and figuring out the bal-

ance it is going to strike between encouraging businesses to engage in "responsible conduct" and aggressively prosecuting violations of the law it administers.

The newness of the agency makes it more unpredictable and thus makes it more difficult to counsel clients, as there is not much history to examine when deciding how the agency will view certain conduct.

Additionally, the bureau has come into existence at a time when the budget crisis has created pressures on agencies that may cause them to be more aggressive in their enforcement decisions.

First, agencies, such as the consumer bureau, may feel greater pressure to bring and win more enforcement actions to demonstrate their importance in the law enforcement arena and to thereby justify continued funding for the agency.

Additionally, agencies, in dealing with budget cuts, may feel pressure to do more with less. These two dynamics can create particular risks for companies that take steps such as self-reporting because agencies feeling the pressure to bring enforcement actions that can be quickly and successfully concluded may be tempted to use self-reporting as a means of accomplishing that goal.

It is too soon in the bureau's history to know how it will handle these pressures and how it will treat those engaged in "responsible conduct."

However, within Bulletin 2013-06, there are cautionary words that those counseling companies should keep firmly in mind.

Specifically, Bulletin 2013-06 notes that, although the Bulletin outlines steps a company can take which may be viewed favorably by



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the bureau, the agency does not have any formula that it applies in determining how to credit "responsible conduct."

Thus, it is noted that satisfaction of some or all of the factors outlined as "responsible conduct" in the Bulletin will not bar or prevent the bureau from bringing an enforcement action or pursuing any remedy it deems appropriate.

In this vein, the bulletin notes that "[i]n the bureau's consideration of a party's conduct in these areas it must be stressed that what best protects consumers is ultimately central to the bureau's exercise of its enforcement discretion.

Self-policing, self-reporting, remediation and cooperation with the bureau's investigation are unquestionably important in promoting the best interests of consumers, but so too are vigorous, consistent enforcement of the law and the imposition of appropriate sanctions where the law has been violated."

This language may foreshadow an enforcement-minded focus on punishing violators, even where

they have engaged in responsible conduct.

The lack of any kind of formula or direction from the bureau about how it will treat companies who engage in responsible conduct leaves open many unanswered questions.

For example, if a company engages in self-policing and the remediation of any violations, but does not self-report a violation, will the company be given favorable consideration by the bureau when it is making its enforcement decisions?

Bulletin 2013-06 notes that a party's "prompt and complete" disclosure of conduct to bureau regulators and consumers is critical to favorable consideration. This statement seems to indicate that the failure to self-report may negate the value of other acts of "responsible conduct."

If it is critical that companies engage in prompt and complete disclosure of potentially unlawful conduct, what will be considered "prompt and complete" disclosure? The words "prompt" and "complete" are somewhat at cross-purposes with one another.

To provide a complete disclosure of conduct which violates Dodd-Frank Wall Street Reform and Consumer Protection Act, it will likely take time for a company to adequately and properly investigate and analyze the conduct and then prepare a report.

Is a company better off reporting violations early, before it has the ability to thoroughly investigate or provide a comprehensive disclosure of the conduct?

These and many other questions must be discussed with a client who is considering engaging in one or more of the categories of "responsible conduct" outlined in the Bulletin.