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## CFPB's Vague New 'Responsible Conduct' Guidelines

*Law360, New York (June 28, 2013, 1:32 PM ET)* -- On Tuesday, the Consumer Financial Protection Bureau issued CFPB Bulletin 2013-6, titled "Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation and Cooperation."

The bulletin identified four pillars of "responsible conduct" on the part of potential targets of enforcement action by the bureau — self-policing, self-reporting, remediation and cooperation. Such conduct may be rewarded with (1) resolution of an investigation with no public enforcement action; (2) treatment of subject conduct as a less severe type of violation; (3) reduction in the number of violations pursued; or (4) reduction in sanctions or penalties.

The bureau observed that such conduct has "concrete and substantial benefits for consumers and significantly contributes to the success of the bureau's mission" because it speeds detection and increases investigative and enforcement efficiency, thereby enabling the bureau to pursue a larger number of investigations.

The factors that the CFPB will consider are similar to those evaluated by agencies like the U.S. Department of Justice and the U.S. Securities and Exchange Commission in the exercise of their enforcement discretion.

The bulletin identifies a series of questions and other considerations that will be taken into account by the CFPB in evaluating “responsible conduct” in each of these four areas:

- ***Self-Policing***. In deciding whether to provide favorable consideration for self-policing, the bureau will evaluate the nature of the violation (duration, pervasiveness and significance), how it was detected (effectiveness of internal mechanisms), prior or relative performance of compliance management and audit functions, and the institution's "culture of compliance."

- ***Self-Reporting***. The bureau notes that it views self-reporting to be "special" among the four factors and will evaluate for favorable consideration the completeness, effectiveness and timeliness of the disclosure, as well as the degree to which the disclosure was made purely proactively or in anticipation of a violation that was otherwise likely to be discovered.

- ***Remediation***. Remediation activity will be credited based on a review of how timely potential misconduct was addressed and how quickly it was remediated, whether responsible individuals were disciplined, whether information and extent of harm were documented and preserved promptly, and the bureau's confidence that misconduct is unlikely to recur.

- ***Cooperation***. In evaluating cooperation with enforcement efforts, the bureau will look for "substantial and material steps above and beyond what the law requires," including cooperation from start to finish and the identification of any additional misconduct, proper steps taken to complete an objective internal investigation and share findings with the bureau, encouragement of employee cooperation, and facilitation of enforcement actions against other potential targets.

Of note, the bulletin states that there is not a consistent formula that can be applied to the crediting of responsible conduct, and satisfaction of some or all of the factors will not bar the bureau from bringing any enforcement action or pursuing any remedy. The bulletin also observes that there may be misconduct so egregious or harm so great that enforcement actions or penalties cannot be mitigated.

While the factors set forth in the bulletin are similar to those in the SEC's Seaboard Report and the DOJ's Thompson and McNulty Memoranda, the way in which these factors will be applied remains an open question. If past is prologue, we may find that while the CFPB has drawn these procedures from those of the DOJ and the SEC, it may, in fact, apply them very differently.

By way of example, while the CFPB investigative processes are very similar to those of the Federal Trade Commission (particularly with respect to civil investigative demands), the bureau's execution of the processes has diverged from typical FTC practices in a number of ways. For this reason, the fact that the bureau adopts language or procedures from other agencies is not a clear indication that it will follow their customs.

The ambiguous, subjective nature of many of the factors that will be considered certainly paves the way for differential execution. For example, credit for self-policing may turn on the "tone at the top" or "culture of compliance." Credit for self-reporting may not be granted if the CFPB determines that an institution has reason to believe that disclosure is "likely to happen anyway, for example, due to impending supervisory activity, public company reporting requirements, the emergence of a whistleblower, consumer complaints or actions, or the conduct of a bureau investigation."

Favorable consideration for self-reporting, remediation or cooperation will require that conduct is reported "promptly," stopped "immediately" and investigated "quickly." There is a certain level of subjectivity in each of these determinations, and with some, there is much more than others.

Yet another open question is how the bureau will view an institution's reluctance or outright refusal to turn over privileged materials. The McNulty memo, for example, emphasizes a prosecutor's obligation to demonstrate a legitimate need for privileged information before requesting a waiver (through the careful application of considerations far more exacting than mere convenience or desire), and requires the least intrusive waiver necessary. Such a requirement is noticeably absent from the CFPB’s bulletin.

The way in which the CFPB handles this issue will be of particular interest because credit for cooperation requires an institution to take “proper steps to develop the truth quickly and completely and to fully share its findings with the bureau” in a “complete and thorough written report detailing the findings of its review.” Insofar as any internal investigation or report would involve the input of counsel, such information could be among those materials the bureau might expect to receive.

In some ways, the CFPB’s bulletin raises as many questions as it addressed. How will the bureau apply its four factors? Will it follow in the interpretative footsteps of its predecessors or chart a new course? Only time will tell.

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