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BANK SUPERVISION

CFPB's New "Responsible Conduct" Guidelines: Will They Incentivize Greater Self-Reporting And Self-Regulation by Consumer Finance Firms?

BY BENJAMIN B. KLUBES, PHILIP M. CEDAR AND ALEX M. DEMPSEY

On June 25, 2013, the Consumer Financial Protection Bureau (CFPB or the Bureau) issued CFPB Bulletin 2013-6, titled "Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation." The CFPB issued the guidance to provide entities with a set of "activities" that they can engage in that the "Bureau may favorably consider in exercising its enforcement discretion."[1] The CFPB hopes and expects that the guidance will convince financial institutions and others that fall within the CFPB's broad jurisdiction to engage in additional self-policing and self-reporting. The Bureau apparently believes that by releasing these guidelines, regulated entities will be more comfortable cooperating with the Bureau both prior to and during its enforcement investigations.

[1] CFPB Bulletin 2013-16 at 1.

Benjamin Klubes is a partner, Phil Cedar is a counsel and Alex Dempsey is an associate with BuckleySandler. Ben Klubes and Alex Dempsey are in the firm's Washington, D.C., office, and Phil Cedar is in the firm's New York office. The authors represent financial institutions in examinations, investigations, and enforcement matters by the CFPB and other government regulators.

The Bureau's guidance specifically identified four categories of activities that would be considered when determining whether the regulated entity should receive "some form of credit" for their actions: (1) self-policing; (2) self-reporting; (3) remediation; and (4) cooperation. While the CFPB noted that there may be additional activities that will factor into their decision, these four categories will be the principal categories used by the CFPB.

With this release, the Bureau becomes another in a line of federal agencies which have established guidelines or programs that are designed to explain the exercise of prosecutorial and enforcement discretion and to encourage corporate cooperation with governmental investigations and enforcement activities. Other related guidelines include the Department of Justice's (DOJ) Principles of Prosecution of Business Organizations, DOJ's Antitrust Division's Corporate Leniency Policy, the Securities and Exchange Commission's (SEC) Cooperation Initiative, and the Department of Defense/Department of Justice Voluntary Disclosure Program. While some of these programs are of a slightly different

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nature, a brief review of these programs may offer useful perspective on the CFPB guidelines and what to expect from their implementation.

In this article, we begin by discussing the new guidelines and the questions the CFPB will ask when analyzing the applicability of each category of behavior to the actions of regulated entities. We then review several other examples of cooperation programs and examine available information regarding their successes and failures. Then, we discuss how what we have learned from these other programs can be used to predict the impact of the CFPB guidelines.

The CFPB Cooperation Guidelines

The CFPB's Bulletin reviewed each of the four categories of responsible behavior and discussed what the Bureau expects and what questions it will consider when determining whether cooperation credit is due to a corporation. As a general matter, the Bureau noted that the importance of each factor described below will be evaluated on a case-by-case basis and will depend on the facts of a given case.

■ ***Self-policing***: A proactive, robust compliance management system designed to prevent and detect potential violations of consumer financial laws. The Bureau will evaluate the nature of the violation itself, including the duration of the violation, the pervasiveness of the conduct throughout the corporation, and the significance of the conduct to the corporation's business model. The Bureau also will look to how the violation initially was detected and consider whether the discovery was related to the self-policing mechanisms utilized by the business. The CFPB also will consider how the organization's compliance policies have fared in past supervisory examinations and how they compare to industry standard compliance programs. Finally, the Bureau will evaluate the institution's culture of compliance and determine the level of commitment senior leaders have to a robust compliance program.

■ ***Self-reporting***: The prompt and complete self-reporting of any significant violations or potential violations to the Bureau. The CFPB noted that while all four categories are important, self-reporting is important enough to receive ''special mention.'' The Bureau will consider whether the corporation completely and effectively disclosed the violative conduct to the appropriate regulators and the affected consumers. The CFPB will further look at whether the disclosures were made in a timely manner and if the disclosure was truly proactive and voluntary rather than being made in anticipation of the information being discovered through other channels.

■ ***Remediation***: Fully redressing any individuals injured by violations of consumer financial laws. This category also includes preventing violations from reoccurring and changing any procedures that need to be changed to protect consumers in the future. The CFPB will first review what the institution did upon learning of the violations and look to whether the conduct was immediately stopped and whether the individuals responsible for the violative conduct were punished. The Bureau will also analyze the remediation actions that were taken with respect to the affected consumers and determine if the institution has done anything to improve internal procedures in an effort to prevent future violations from occurring.

■ ***Cooperation***: Taking steps that are above and beyond what is legally required in working with the Bureau during an investigation. This category focuses almost entirely on the corporation working with the CFPB in a prompt and complete manner including the completion and production of internal reports relating to the violation.

Without providing a specific framework or other details for determining what credit a corporation will receive for engaging in ''responsible conduct,'' the Bulletin listed a number of potential benefits that a corporation could receive. The Bureau specifically noted that its ''credit'' for ''responsible conduct'' could range from resolving an investigation without a public enforcement action, to reducing the number of violations pursued, to seeking reduced penalties in an enforcement action.

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Although the Bulletin did point out potential benefits of cooperation, there were no concrete standards included to determine what benefits one could expect to receive. Rather, the Bulletin appeared to make this calculation almost entirely subjective and case specific. In this way, the CFPB maintains greater flexibility in deciding what kind of credit an entity will receive. However, this is especially problematic for the CFPB in terms of creating an environment in which such ''responsible conduct'' is encouraged, because the CFPB does not have an established track record of how it will handle cooperating parties. In fact, of the sixteen consent orders that have been released through Dec. 20, 2013, only two have mentioned the possibility of any credit being given for institutional cooperation. In these cases, the only mention of corporate cooperation was that it factored into the calculation of the civil penalty. Without a more extensive track record, such a subjective standard leaves observers and regulated entities alike to wonder how the Bureau will decide to exercise its broad discretion.

Moreover, the Bureau took pains to make strong cautionary statements regarding the availability of credit which could undermine the invitation to self-report and cooperate. For example, the Bulletin: (1) ''emphasize[d] that in order for the Bureau to consider awarding affirmative credit in the context of an enforcement investigation, a party's conduct must *substantially exceed* the standard of *what is required by law* in its interactions with the Bureau'' (emphasis added); (2) stated that the Bureau is not adopting any formula or limiting its discretion; (3) stated the fact that a party may argue (presumably correctly) it has satisfied all of the elements in

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the guidance does not foreclose the Bureau from bringing an enforcement action or seeking a remedy if it believes such a course is appropriate; and (4) suggested that since the protection of consumers ''is central to the Bureau's enforcement discretion,'' the need for ''vigorous, consistent enforcement and the imposition of appropriate sanctions'' may outweigh satisfaction of all the elements of reporting and cooperation.

Other Agency Guidelines Regarding Corporate Cooperation:

Voluntary disclosure/cooperation programs have been a part of enforcement and regulatory agency strategy for decades. While each of the programs is different, they all share the same goal of encouraging corporate cooperation with government regulators and law enforcement. By looking at several such programs, we can see what difficulties these programs tend to encounter and how these issues affect the success of the programs.

DOJ's Filip Memo and the Principles Of Prosecution of Business Organizations

One of the most significant developments in corporate prosecutions was the creation and evolution of the principles of prosecution. These guidelines provided a basis for how the DOJ would approach and penalize corporate malfeasance. While these guidelines were clearly instrumental to how corporations were prosecuted, they began to shift in the late nineties with the release of a memo titled ''Bringing Criminal Charges Against Corporations,'' authored by then Deputy Attorney General Eric Holder.[2] One of the key suggestions in the Holder Memo was that prosecutors consider a corporation's voluntary disclosures and its willingness to cooperate with the DOJ when considering how to proceed in an investigation. While the Holder Memo did not demand it, it suggested that prosecutors could also consider the willingness of a corporation to waive any attorney-client and attorney work product privileges to help facilitate a pending investigation.

While influential, the Holder Memo was completely voluntary and did not require the prosecutors to consider it when prosecuting a corporation. This all changed in 2003 when the DOJ revised the Holder Memo with a memo from then Deputy Attorney General Larry Thompson titled, ''Principles of Federal Prosecution of Business Organizations.''[3] Written after the explosion of large corporate scandals in the late 1990s and early 2000s, the Thompson Memo focused on making sure that a corporation asking for leniency was actually cooperating fully with the DOJ. With the Thompson memo, prosecutors were required to consider nine factors to determine whether to prosecute a corporation. Further, prosecutors were reminded that they should consider whether a corporation was willing to waive the attorney-client privilege when considering whether or not the corporation was cooperating fully. This emphasis led to an increase in demands for privilege to be waived, with the specter of prosecution hanging over any corporation who chose to invoke their rights to withhold privileged documents.

This aggressive stance eventually led to court challenges to the constitutionality of the Thompson Memo. In 2006, Judge Kaplan ruled that the way the Thompson Memo was being implemented violated the Fifth and Sixth Amendments.[4] This judicial rebuke of DOJ policy was coupled with Senator Arlen Specter introducing legislation to prevent federal prosecutors from pressuring corporations to waive privileges to avoid prosecution. In response to these criticisms from the other two branches of government, DOJ again revised its criteria in 2006 with a memo promulgated by then Deputy Attorney General Paul McNulty.[5] While the McNulty Memo began to walk back DOJ's aggressive pursuit of corporate cooperation through questionable tactics, both courts and Congress remained critical of the DOJ's methods.

It was in light of this continued criticism that DOJ again revised the Principles of Federal Prosecution of Business Organizations by issuing the most recent memo, signed by then Deputy Attorney General Mark Filip.[6] This memorandum, which is now incorporated in the U.S. Attorney's Manual, expressly states that cooperation credits may not be ''predicated upon the waiver of attorney-client privilege or work product protection.'' Going even further, the memo states that ''prosecutors may not request protected notes or memoranda generated by the lawyers' interviews.'' In addition to changing government policy regarding requesting privileged material, the memo formalized the nine factors that are still used to guide prosecutorial discretion:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
5. the existence and effectiveness of the corporation's pre-existing compliance program;
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

[2] Memorandum from Eric H. Holder, Deputy Attorney Gen., *Bringing Criminal Charges Against Corporations* (June 16, 1999).

[3] Memorandum from Larry D. Thompson, Deputy Attorney Gen., *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003).

[4] *U.S. v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008) (holding that pressuring a corporation to stop paying attorney fees for its employees was violative of the Fifth and Sixth Amendments); *U.S. v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) (holding that requiring employees to make statements or face termination amounted to compelling statements, leading to the statements being suppressed under the Fifth Amendment).

[5] Memorandum from Paul J. McNulty, Deputy Attorney Gen., *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006).

[6] Memorandum from Mark Filip, Deputy Attorney Gen., *Principles of Federal Prosecution of Business Organizations* (Aug 28, 2008).

7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and,

9. the adequacy of remedies such as civil or regulatory enforcement actions.

Through a detailed process, specific requirements, and explicit restrictions on what prosecutors demand from corporations, the DOJ seems to have found a way to encourage corporate cooperation while reassuring corporations that their cooperation will be appropriately valued.

The Filip Memo also encouraged the use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), instead of prosecutors just choosing whether or not to pursue charges against a corporation. The significance of these changes and the liberalization of DOJ's standards can be seen in the number of DPAs and NPAs in a corporate context since 1992. From 1992 until the end of 2002 (the Thompson Memo was signed in January 2003), ''the ten years following the first use of prosecution agreements in the corporate criminal context, there were sixteen deferred and non-prosecution agreements—an average of fewer than two a year.''[7] From 2003 through the end of 2006 (the McNulty Memo was signed in December 2006), there were forty-three prosecution agreements – more than ten per year.[8] Finally, from 2007 until 2013, there have been at least one-hundred eighty-six DPAs and NPAs—an average of thirty-one per year.

One area where the increase in DPAs and NPAs has been particularly illustrative is in the Foreign Corrupt Practices Act (FCPA) context. The FCPA has been historically difficult for the government to enforce without corporate cooperation because of the nature of FCPA charges. In most FCPA cases, the illegal conduct is performed in a foreign country, involves individuals outside the reach of U.S. law enforcement and its ''victims'' (e.g. competitors for contacts) may have no inkling that anything illegal occurred. All this makes obtaining evidence and witnesses to testify more difficult than in many other types of cases. In the FCPA context, from 2002 until 2012, over 82 percent of the NPAs entered into by the DOJ, and every NPA since 2007, have been in cases where the corporation involved voluntarily disclosed information about the violation to the DOJ.[9]

These trends help illustrate that the liberalization of DOJ's Principles of Federal Prosecution of Business Organizations is not only helping to increase the use of DPAs and NPAs, but that the corporations are receiving a tangible benefit for their voluntary disclosures. Through a detailed process, specific requirements, and explicit restrictions on what prosecutors demand from corporations, the DOJ seems to have found a way to encourage corporate cooperation while reassuring corporations that their cooperation will be appropriately valued. The path was not without significant bumps and detours, with substantial controversy generated as a result, but it does appear that these approaches were at least one factor in decisions by a number of major companies in various industries to disclosure and cooperate in investigations relating to potential criminal conduct.

DOJ Antitrust Division's Corporate Leniency Policy

Another important development in corporate cooperation programs was the DOJ Antitrust Division's Corporate Leniency Policy. This policy emerged as part of the Division's commitment to increase corporate cooperation and self-reporting. By providing a clear framework for self-reporting and cooperation, the Antitrust Division hoped to incentivize the early disclosure of criminal conduct that the Division otherwise did not know of, leading to an increase in successful prosecutions of other participants in antitrust conspiracies.

Released in 1993, the Antitrust Division's corporate leniency policy guaranteed amnesty for corporations that were the first to self-report an instance of criminal activity and provide evidence incriminating co-conspirators, subject to the satisfaction of achievable conditions in the corporate leniency policy. Even if the corporation was not the first to report a violation, an alternative form of amnesty could be extended assuming a different set of factors was met. Finally, if the corporation qualified for automatic amnesty, the amnesty would also extend to all cooperating officers and employees. In order to qualify for automatic amnesty, the following conditions must be met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;

4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

5. Where possible, the corporation makes restitution to injured parties; and,

6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

By making the requirements for amnesty transparent and by providing such a significant incentive for cooperation, the Antitrust Division was able to greatly increase corporate participation in its leniency program. Since the corporate leniency program was revised in 1993, the number of leniency applications has increased

[7] Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. Rev. 1434, 1444 (2007)

[8] *Id.*

[9] Sarah Marberg, *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act,* 45 Vand. J. Transnat'l L. 557, 592-97 (2012).

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nearly twenty-fold.[10] Not only have leniency applications increased, successful enforcement of antitrust violations has increased dramatically as well. From 1970-89, there were only $232 million in criminal antitrust corporate fines levied against corporations. In contrast, from 1990-2009, the Antitrust Division has successfully negotiated $5.8 billion in criminal antitrust corporate fines, with $5 billion coming since 1996 and over 90% of the fines tied to investigations initiated after disclosures by leniency applicants.[11]

According to Deputy Attorney General Hammond, the increase in fines is directly related to the revised corporate leniency standards. Specifically, he noted that the three critical cornerstones for a successful leniency program are: (1) the threat of severe sanctions for corporations who violate the law and fail to self-report, (2) the corporate perception that there is a high risk of the detection of criminal activity without self-reporting, and (3) transparent and predictable standards so that corporations ''can predict with a high degree of certainty how they will be treated if they seek leniency, and what the consequences will be if they do not.''[12]

SEC Cooperation Initiative and Seaboard Report

The SEC's disclosure and cooperation initiatives have followed a similar path to the DOJ's Principles of Federal Prosecution of Business Organizations. In 2001, the SEC issued its Seaboard Report, in which the SEC outlined when a corporation would receive credit for cooperation.[13] The report focused on the four key factors of self-policing, self-reporting, cooperation, and remediation. In addition to these four general factors, the report outlined a list of factors that the SEC could consider when bringing an enforcement action. The Seaboard Report, like the DOJ's Thompson Memo, came under fire for its treatment of privilege and was updated and incorporated into the SEC Enforcement Manual in 2008.[14] The SEC Enforcement Manual now includes guidance for corporate cooperation and discussion of the potential benefits that may be conferred upon cooperating corporations.

After revisions in 2010, the SEC's Enforcement Manual outlines the various potential benefits that a corporation can receive for cooperating with the SEC. Specifically, the Manual discusses Cooperation Agreements, DPAs, and NPAs. While information regarding specific facts associated with a given DPA or NPA is generally limited, there have been several notable cases where the SEC has entered into DPAs and NPAs based on corporate cooperation.

The SEC's first published DPA came in 2011 in an FCPA related settlement with Tenaris.[15] In that case, the SEC noted in the DPA that the reason it entered into a DPA with Tenaris was because of the cooperation exhibited by Tenaris. According to the agreement, the initial discovery of wrongdoing was made during an internal audit commissioned by Tenaris. Tenaris then disclosed this information to the DOJ and the SEC.

In a similar case, the SEC entered into its first public NPA with Carter's Inc. in December 2010.[16] In that case, Carter's Inc. discovered fraud and violations of the SEC's reporting and books and records provisions committed by its executive vice president of sales. After discovery of this conduct, Carter's Inc. conducted an internal audit, identified the scope of the wrongdoing, and disclosed the conduct to the SEC. As outlined by the SEC's Director of Enforcement while announcing the NPA, Carter's Inc. received the NPA for doing ''the right thing by promptly self-reporting the misconduct, taking thorough remedial action, and extensively cooperating with our investigation, for which it received the benefits of a non-prosecution agreement.''[17]

By making the requirements for amnesty transparent and by providing such a significant incentive for cooperation, the Antitrust Division was able to greatly increase corporate participation in its leniency program.

While there is a limited time period to analyze the success of the SEC's changes to its corporate cooperation program, the benefits of participating in such a program appear substantial for corporations. By following a path laid out, at least in part, by the DOJ, the SEC appears to be on the way to creating a workable corporate cooperation program that follows the Seaboard factors while also drawing from the SEC Enforcement Manual. This plan incentivizes corporate cooperation by providing a level of predictability in how the SEC will treat corporations that choose to self-report violations before an investigation begins.

DOD Voluntary Disclosure Program

Although of a slightly different nature, another program designed to increase disclosure between the government and corporate entities was the Department of Defense Voluntary Disclosure Program. This program, outlined originally in 1986, looked to encourage government defense contractors to adopt voluntary disclosure policies to help the government combat fraud.[18] While substantively distinct, these types of programs also

[10] Report by Scott D. Hammond, Deputy Assistant Attorney General, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades* (Feb. 25, 2010).

[11] *Id.*

[12] *Id.*

[13] Securities and Exchange Commission Statement on the Relationship of Cooperation to Agency Enforcement Actions, Exchange Act Release No. 44,969 (Oct. 23, 2001).

[14] SEC, SEC Enforcement Manual (2012).

[15] *See In re Tenaris S.A.*, Deferred Prosecution Agreement (May 17, 2011), *available at* http://www.sec.gov/news/press/2011/2011-112-dpa.pdf.

[16] *See In re Carter's Inc.*, Deferred Prosecution Agreement (Dec. 17, 2010), *available at* http://www.sec.gov/litigation/cooperation/2010/carters1210.pdf.

[17] Press Release, U.S. Securities and Exchange Commission, SEC Charges Former Carter's Executive With Fraud and Insider Trading, 2010-252 (Dec. 20, 2010), *available at* http://www.sec.gov/news/press/2010/2010-252.htm.

[18] While the Voluntary Disclosure Program began with relative success, the program was superseded by the Department of Defense Office of Inspector General's Contractor Reporting Program in December 2008 after a downward trend in reporting. The Contractor Reporting Program created a mandatory disclosure obligation as part of the contractual relationship between contractors and the Department of Defense—a relation-

looked to provide incentive to a corporation for the disclosure of corporate wrongdoing in exchange for prosecutorial leniency. For a more complete discussion of the Department of Defense Voluntary Disclosure Program, *see* Benjamin B. Klubes, The Department of Defense Voluntary Disclosure Program, 19 Pub. Cont. L.J. 504 (1990).

Prospects for the CFPB's Attempt To Incentivize Self-Reporting and Cooperation

While the CFPB's Bulletin is based on similar principles which animated other government agencies' disclosure and cooperation programs, it differs notably in lacking certain key elements of the most successful of such programs. Unlike the Antitrust Division's formal leniency program, the CFPB guidelines lack the transparency and predictability that appear to have made that program successful in encouraging self-reporting. Unlike the Antitrust Division's program, compliance with all of the CFPB factors will not prevent the CFPB from bringing an enforcement action or pursing a costly remedy. This, combined with the subjective nature of the CFPB factors, leaves a great deal of ambiguity in predicting whether the Bureau will give cooperation credit in a given situation.

Another major difference from existing programs is the lack of attention given to the required sharing of privileged information. Unlike both the DOJ's and the SEC's programs, in which eligibility criteria have been liberalized over time to encourage cooperation, the CFPB guidelines require that, in order to receive credit for cooperation, a party ''must take substantial and material steps above and beyond what the law requires.'' Furthermore, the CFPB continues to maintain that it has the authority to compel the production of privileged materials from supervised entities.[19] While other programs have severely curtailed the ability of prosecutors to request most privileged materials, to consider fee advancement and entering into joint defense agreements negatively in awarding cooperation credit, the CFPB appears to seek the production of ''a complete and through report detailing the findings of'' a company's review. The absence of any assurances regarding privileged materials and the pursuit of detailed findings certainly suggests that those companies which elect not to produce privileged materials will not meet the ''above and beyond'' eligibility standard. As with early versions of both the DOJ's and the SEC's programs, the Bureau's decision not to provide some comfort on the privilege issue may well be a significant disincentive to cooperation with the CFPB. This is particularly concerning with regards to the CFPB and their stated intent to share privileged information with other agencies and state and local authorities.

The requirement of prompt self-reporting also presents a vexing problem for regulated financial services firms. It will be difficult for an institution to know when to report misconduct that is suspected or some evidence of which has been identified, but no firm conclusion has been reached as to whether any violation occurred – particularly with respect to the subjective standards that currently exist for UDAAP violations. Further, it will be difficult for an institution to know when it should report something and how much verification should take place before reporting information to the CFPB. Finally, for financial institutions, there frequently are major consequences associated with reporting a potential violation before internal investigations have been completed. Among other issues, once a financial institution reports possible misconduct, other federal and state regulators may begin their own inquiries.

Along with the sometimes subjective and stringent eligibility requirements in the CFPB guidelines, the CFPB's case-by-case decision making, and the publicity surrounding those decisions, will over time shape the behavior of companies in deciding whether to seek credit by self-reporting and engaging in ''responsible business conduct.'' As with other areas of enforcement, the CFPB looks to be taking a ''we will know it when we see it'' approach to corporate cooperation. Unless that informal process offers greater predictability and encouragement, the CFPB's expectation of more self-reporting and more cooperation may not be realized.

ship that does not exist between the CFPB and its regulated entities.

[19] This view is based principally on the position that the federal banking regulators have consistently taken that they can compel privileged information pursuant to their supervisory authority. 77 Fed. Reg. 39617, at 39619. While recent Congressional action amending the Federal Deposit Insurance Act has negated concerns that sharing privileged information with the CFPB or the CFPB sharing such information with other designated federal and state authorities will result in a waiver of privilege, see H.R. 4014, 112th Cong. (2013), this legislation does not address the threshold question of whether the production of privileged information can be compelled or whether the CFPB's sharing such information with agencies not enumerated in the statute will result in a waiver as against third parties and adverse litigants.

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