

# COMPARISON OF 2013 AND 2020 CFPB RESPONSIBLE BUSINESS CONDUCT BULLETINS ARNOLD & PORTER



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## CFPB Bulletin ~~2013~~2020-0601

**Date:** ~~June 25, 2013~~March 6, 2020

**Subject:** Responsible Business Conduct: Self-~~Policing~~Assessing, Self-Reporting, ~~Remediation~~Remediating, and ~~Cooperation~~Cooperating

In executing its statutory responsibilities, the Bureau of Consumer Financial Protection (Bureau) places primary emphasis on preventing harm to consumers. Preventing harm to consumers is among the most effective and efficient ways of ensuring consumer access to a fair, transparent, and competitive financial market. In 2013, the Bureau issued a Bulletin that identified several activities that individuals or businesses, collectively “entities,” could engage in that could prevent and minimize harm to consumers, referring to these activities as “responsible conduct.” The Bureau is issuing this updated Bulletin to clarify its approach to responsible conduct and to reiterate the importance of such conduct.

~~The Bureau considers many factors in the exercise of its enforcement discretion. These include, for example: (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. This guidance is being provided to inform those subject to the Bureau’s enforcement authority that in addition to these and other factors, there are activities they can engage in both before and after the conduct in question has occurred that the Bureau may favorably consider in exercising its enforcement discretion. Specifically, a party may proactively self-police for potential violations, promptly~~In the first instance, the Bureau’s focus is on building a culture of compliance among entities, including covered persons and service providers, in order to minimize the likelihood of a violation of Federal consumer financial law, and thereby prevent harm to consumers. When a violation of law does occur, swift and effective actions taken by an entity to address the violation can minimize resulting harm to consumers. Specifically, an entity may self-assess its compliance with Federal consumer financial law, self-report to the Bureau when it identifies ~~potential~~likely violations, ~~quickly and completely~~ remediate the harm resulting from these likely violations, and ~~affirmatively cooperate with any Bureau investigation~~ above and beyond what is required by law with any Bureau review or investigation. ~~If a party meaningfully engages in these activities, which this bulletin refers to collectively as “responsible conduct,” it may favorably affect the ultimate resolution of a Bureau~~

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~~enforcement investigation.~~

~~The purpose of this guidance is to encourage activity that has concrete and substantial benefits for consumers and contributes significantly to the success of the Bureau's mission.~~ Such activities are in the public interest. Depending on its form and substance, responsible conduct can improve the Bureau's ability to promptly detect violations of ~~the federal~~ Federal consumer ~~protection laws~~ financial law, increase the effectiveness and efficiency of its supervisory and enforcement investigations work, enable the Bureau to ~~pursue a larger number of worthy investigations with~~ focus its finite resources, ~~provide important evidence in enforcement investigations and cases~~ on their best use for the mission, and help more consumers in more matters promptly receive financial redress and additional meaningful remedies for any harm they experienced.

Because responsible conduct is in the public interest, the Bureau seeks to encourage it. Accordingly, if an entity meaningfully engages in responsible conduct, the Bureau intends to favorably consider such conduct, along with other relevant factors, in addressing violations of Federal consumer financial law in supervisory and enforcement matters.<sup>1</sup> Depending on the nature and extent of ~~a party~~ an entity's actions, the Bureau has a wide range of options available to properly account for responsible conduct ~~in enforcement investigations~~. For example, in light of an entity's responsible conduct, the Bureau could ~~resolve an~~ exercise its discretion to close an enforcement investigation with no ~~public enforcement action, treat the conduct as a less severe type of violation, reduce~~ action or decide not to include Matters Requiring Attention in an exam report or supervisory letter. Even if the Bureau does take action, those who engage in responsible conduct may receive other types of credit for engaging in such behavior. For entities within the Bureau's supervisory authority, the Bureau's Division of Supervision, Enforcement, and Fair Lending makes determinations of whether violations should be resolved through non-public supervisory action or a possible public enforcement action through its Action Review Committee (ARC) process. The ARC process includes factors that are closely aligned with the elements of responsible conduct. Thus, for entities under the Bureau's supervisory authority, responsible conduct could result in resolving violations non-publicly through the supervisory process.

Responsible conduct also could result in the Bureau's reducing the number of violations pursued; or ~~reduce~~ reducing the sanctions or penalties sought by the Bureau in ~~an enforcement action. It must be emphasized, however, 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~~

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<sup>1</sup> Other factors the Bureau considers in determining how to resolve violations of Federal consumer financial law include, without limitation, (1) the nature, extent, and severity of the violations identified and any associated consumer harm; (2) an entity's demonstrated effectiveness and willingness to address the violations; and (3) the importance of deterrence, considering the significance and pervasiveness of the potential consumer harm.

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~~required by law in its interactions with the Bureau. In 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.~~ any public enforcement action.

The Bureau intends to consider the extent and significance of an entity's responsible conduct, with more extensive and important responsible conduct leading to more substantial consideration.

~~In addition, this~~ This guidance, and its description of ~~activities~~ factors that may warrant favorable consideration, is not adopting any rule or formula, ~~or making a promise to any person about any specific ease to be applied in all matters. The importance of each factor in a given matter, and the way in which the Bureau evaluates each factor, will depend on the circumstances.~~ The Bureau is not in any way limiting its discretion and responsibility to evaluate each ~~ease~~ matter individually on its own facts and circumstances. ~~There is no consistent formula that can be applied to all enforcement actions to accomplish the goal of protecting consumers. Similarly, there is no formula that can be applied to account for cooperation based on a party's actions related to the activities set forth above. Indeed, there may be circumstances where the misconduct is so egregious, or the harm inflicted so great, that no amount of cooperation or other mitigating conduct could justify a decision not to bring an enforcement action, or even to forgo seeking the imposition of a civil money penalty.~~ In short, the fact that ~~a party~~ an entity may argue it has satisfied some or even all of the ~~elements~~ factors set forth in this guidance will not necessarily foreclose the Bureau from bringing any enforcement action or seeking any remedy if it believes such a course is necessary and appropriate.

### Factors Used to Evaluate and Acknowledge Responsible Conduct

As noted previously, the Bureau principally considers four categories of conduct when evaluating whether some form of credit is warranted in an enforcement investigation or supervisory matter: ~~self-policing~~ assessing, self-reporting, ~~remediation, and cooperation during the Bureau's enforcement investigation~~ remediating, and cooperating. However, if ~~a party~~ an entity engages in another type of activity particular to its situation that is both substantial and meaningful, the Bureau may take that activity into consideration.

Listed below are some of the factors the Bureau ~~will~~ intends to consider in determining whether and how much to take into account ~~self-policing, self-reporting, remediation, and cooperation~~ responsible conduct. This list is not exhaustive, and some of the factors identified may relate to more than one category of responsible conduct. ~~Finally, the importance of each factor in a given case, and the way in which the~~

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~~Bureau evaluates each factor, will depend on the circumstances.~~

Self-~~policing~~ assessing:

This ~~concept~~ factor, which can also be described as self-monitoring or self-auditing, reflects a proactive commitment by ~~a party~~ an entity to use resources for the prevention and early detection of ~~potential~~ violations of Federal consumer financial ~~laws~~ law. The Bureau recognizes that a robust compliance management system appropriate for the size and complexity of ~~a party~~ an entity's business will not ~~always~~ prevent all violations, but it will reduce the risk of violations, and it will often facilitate early detection of ~~potential~~ likely violations, which can limit the size and scope of consumer harm. Questions the Bureau ~~will~~ intends to consider in determining whether to provide favorable consideration for self-~~policing activity that detects violations or potential violations of federal consumer financial~~ laws ~~assessing activity~~ include:

1. What ~~is~~ resources does the entity devote to compliance? How robust and effective is its compliance management system? Is it appropriate for the size and complexity of the entity's business?
2. Has the entity taken steps to improve its compliance management system when deficiencies have been identified either by itself or external regulators? Did the entity ignore obvious deficiencies in compliance procedures? Does the entity have a culture of compliance?
3. Considering the nature of the violation ~~or potential~~, did the entity identify the issue? What is the nature of the violation or likely violation and how did it arise? Was the conduct pervasive or an isolated act? How long did it last? ~~Was the conduct significant to the party's profitability or business model~~ Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct?
4. ~~2.~~ How was the ~~violation or potential~~ violation detected and who uncovered it? ~~What compliance procedures or self-policing~~ If identified by the entity, how did the entity identify the issue (e.g., from customer complaints, audits or monitoring based on routine risk assessments, or whistleblower activity)? Was the identification the result of a robust and effective compliance management system including adequate internal audit, monitoring, and complaint review processes? Was identification prompted by an impending exam or an investigation by a regulator?
5. What self-assessment mechanisms were in place to effectively prevent, identify, or limit the conduct that occurred, elevate it appropriately, and ~~to~~ preserve relevant information? In what

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ways, if any, were the party entity's self-~~policing~~assessing mechanisms particularly noteworthy and effective?

- ~~3. If the party's self-policing functions have previously been the subject of supervisory examination by the Bureau or other regulators, what have been the results of such examination? How, if at all, has the party changed its self-policing following such examination? If the party's self-policing functions have not previously been the subject of supervisory examination, how do those functions measure up to customary supervisory expectations?~~
- ~~4. If the party is a business entity, what was the "tone at the top" of the business about compliance? Was there a culture of compliance? How high up in the chain of command did people know of or participate in the conduct at issue? Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct or deficiencies in compliance procedures?~~

Self-reporting:

~~Each category of responsible conduct is important to the Bureau and can significantly affect the Bureau's decision about whether a party should receive favorable consideration. Of the four categories, however, prompt and complete self-reporting to the Bureau of significant violations and potential violations is worth special mention. While no substitute for effective self-policing, self-reporting~~This factor substantially advances the Bureau's protection of consumers and enhances its ~~enforcement~~ mission by reducing the resources it must expend to identify ~~potential or actual violations that are significant enough to warrant an enforcement investigation~~ and making those resources available for other significant matters. Prompt self-reporting of ~~serious~~likely violations also represents concrete evidence of ~~a party's~~an entity's commitment to responsibly address the conduct at issue. Conversely, efforts to conceal a ~~likely violation from the Bureau represent concrete evidence of the entity's lack of~~ commitment to responsibly address the conduct at issue. For these reasons, the Bureau ~~puts special emphasis on~~considers this ~~category~~factor in its evaluation of ~~a party~~an entity's overall conduct. Of note, however, an entity's self-reporting of a potential issue does not require it to concede that it has violated the law. Questions the Bureau ~~will~~intends to examine in determining whether to provide favorable consideration for self-reporting of ~~violations or potential~~likely violations of ~~federal~~Federal consumer financial ~~laws~~law include:

1. Did the party entity completely and effectively disclose the existence of the conduct to the Bureau, to other regulators, and, if applicable, to self-~~regulators~~? ~~Did affected consumers receive appropriate information related to the violations or potential violations within a reasonable period of time~~regulatory organizations? Did the entity report any additional related misconduct likely to have occurred?
2. Did the party entity report the conduct ~~promptly~~ to the Bureau without unreasonable delay? If

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it delayed, what justification, if any, existed for the delay? How did the delay affect the preservation of relevant information, the ability of the Bureau to conduct its [review or](#) investigation, or the interests of affected consumers?

3. Did the [party/entity](#) proactively self-report, or wait until discovery or disclosure was 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?

### ~~Remediation:~~[Remediating:](#)

When violations of ~~federal~~[Federal](#) consumer financial ~~laws~~[law](#) have occurred, the Bureau's remedial priorities include obtaining full redress for those injured by the violations, ensuring that the [party/entity](#) who violated the law implements measures designed to prevent the violations from recurring, and, when appropriate, effectuating changes in the [party/entity](#)'s future conduct for the protection and/or benefit of consumers. ~~Remediation may be viewed positively even when the party believes that it may have identified a potential rather than an actual violation.~~ Questions the Bureau ~~will~~[intends to](#) examine in determining whether to provide favorable consideration for remediation activity regarding [likely](#) violations of ~~federal~~[Federal](#) consumer financial ~~laws~~[law](#) include:

1. What steps did the [party/entity](#) take upon learning of the ~~misconduct~~[violation](#)? Did it immediately stop the ~~misconduct~~[violation](#)? How long after the ~~misconduct~~[violation](#) was uncovered did it take to implement an effective response?
2. ~~If the party is a business, were there any consequences imposed on~~[What steps did the entity take to discipline](#) the individuals responsible for the ~~misconduct~~[violation](#) ~~and to prevent the individuals from repeating the same or similar conduct?~~
3. ~~Did the party take prompt and effective steps to preserve information, identify the extent of the harm to consumers, and appropriately recompense those adversely affected? In situations where the harm caused by the violation goes beyond the amounts the victims may have paid to the party, did the party identify and implement additional ways to completely redress the harm?~~[entity conduct an analysis to determine the number of affected consumers and the extent to which they were harmed? Were consumers made whole through compensation and other appropriate relief, as applicable? Did affected consumers receive appropriate information related to the](#) ~~violations within a reasonable period of time?~~
4. What assurances are there that the ~~misconduct is unlikely to recur? By the time of the~~

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~~resolution of the Bureau matter, did the party improve internal controls and procedures designed to prevent and detect a recurrence of such~~violation (or a similar violation) is unlikely to recur?  
Did the entity take measures, such as a root-cause analysis, to ensure that the issues were addressed and resolved in a manner likely to prevent and minimize future violations? Similarly, have the party entity's business practices, policies, and procedures changed to remove harmful incentives and encourage proper compliance?

### ~~Cooperation:~~Cooperating:

Unlike self-~~policing~~assessing and ~~remediation~~remediating, which may occur with or without Bureau involvement, ~~cooperation~~cooperating relates to the quality of ~~a party~~an entity's interactions with the Bureau after the Bureau becomes aware of a ~~potential~~likely violation of ~~federal~~Federal consumer financial ~~laws~~law, either through ~~a party~~an entity's self-reporting or the Bureau's own ~~discovery~~ efforts. ~~In order to receive credit for cooperation~~Credit for cooperating in this context, ~~a party must take substantial and material~~ depends on the extent to which an entity takes steps above and beyond what the law requires in its interactions with the Bureau. Simply meeting those legal obligations ~~will not be rewarded by~~is not a factor that the Bureau intends to give any special consideration. ~~Questions the Bureau will~~ in a supervisory review or enforcement investigation. Of note, the Bureau does not consider an entity's good faith assertion of privilege in an enforcement investigation to be a lack of cooperation; an entity asserting privileges in good faith remains eligible for potential favorable consideration for cooperating. Questions the Bureau intends to examine in determining whether to provide favorable consideration for ~~cooperation~~cooperating in a Bureau ~~investigation~~matter include:

1. Did the party entity cooperate promptly and completely with the Bureau and other appropriate regulatory and law enforcement bodies? Was that cooperation present throughout the course of the review and/or investigation? ~~Did the actor identify any additional related misconduct likely to have occurred?~~
2. Did the party entity take proper steps to develop the ~~truth~~facts quickly and completely and to fully share its findings with the Bureau? Did it undertake a thorough review of the nature, extent, origins, and consequences of the ~~misconduct~~violation and related behavior? Who conducted the review and did they have a vested interest or bias in the outcome? Were scope limitations placed on the review? If so, why and what were they?
3. Did the party entity promptly make available to the Bureau the results of its review and provide sufficient documentation reflecting its response to the situation? Did it provide evidence with sufficient precision and completeness to facilitate, among other things, ~~enforcement~~appropriate

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actions against others who violated the law? Did the ~~party~~entity produce a complete and thorough written report detailing the findings of its review? Did it voluntarily disclose material information not directly requested by the Bureau or that otherwise might not have been uncovered? ~~If the party is a business, did it~~Did the entity provide all relevant, non-privileged information and make assertions of privilege in good faith?

4. Did the entity direct its employees to cooperate with the Bureau and make reasonable efforts to secure such cooperation? Did it make the most appropriate person(s) available for interviews, consultation, and/or sworn statements?

The Bureau intends ~~and expects that~~for this guidance ~~will~~to encourage ~~parties~~entities subject to the Bureau's supervisory and enforcement authority to engage in more ~~self-policing. When potential violations of the consumer financial laws arise, the Bureau intends and expects that parties will engage in more self-reporting to the Bureau, more prompt and complete remediation of harm to victimized consumers, and more cooperation with the Bureau in its enforcement investigations~~"responsible conduct," as defined herein. Such an outcome, the Bureau believes, would benefit both consumers and providers of consumer financial products and services, is in the public interest, and supports the Bureau's efforts to prevent consumer harm.

### Regulatory Requirements

This Bulletin is a non-binding general statement of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority. It is therefore exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a). The Bureau has determined that this Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

Pursuant to the Congressional Review Act, 5 U.S.C. 801 et seq., the Bureau will submit a report containing this policy statement and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to its applicability date. The Office of Information and Regulatory Affairs has designated this policy statement as not a "major rule" as defined by 5 U.S.C. 804(2).