Civil Penalty Recommendations

Congress has given the Bureau extraordinary powers to collect civil penalties. A "knowing" violation can result in a fine of $1 million per day (or per consumer affected). In the great majority of cases, the civil penalty assessed in a settlement is less than the maximum allowed by law, and it is usually much less than the maximum allowed. But the answer to how the exact lesser amount was determined is hard to discern.

The Dodd-Frank Act contains a short list of mitigating factors, but their general nature makes it hard to know how the Bureau applies them, much less whether they are applied consistently. The prudential regulators have taken three actions to improve the consistently and transparency of civil penalty demand, which the Bureau has declined to adopt.

The first is a matrix of how, in concrete terms, the agency should weigh the mitigating and aggravating factors. The prudential regulators have long used matrices as guidance, but they note the matrix is not substituting a mathematical formula for sound judgment. Indeed, using a matrix will never produce perfect justice. It does, however, represent a great step forward in fairness. Although the Bureau and the company may disagree on the number of violations or on which cell of the matrix should be applied to specific allegations, the matrix almost certainly would produce more consistent and transparent results. The Bureau has declined to adopt a matrix.

The second is adopting the FFEIC Interagency Policy Regarding Assessment of Civil Money Penalties (1998 FFIEC Interagency Policy). The 1998 FFIEC Interagency Policy articulates 13 relevant factors that the agencies should consider in assessing civil penalties, which provide further guidance on the general statutory factors. The matrices enacted by prudential regulators ensure these factors are considered in civil penalty decisions and enhance consistency of decisions. The Bureau has declined to adopt the 1998 FFIEC Interagency Policy and states that considering these 13 factors is optional.

Third, the FDIC and OCC have published statements on how they will apply each of the factors in the 1998 FFIEC Interagency Policy as part of the public Examination Manual (FDIC), general Policies and Procedures Manual (OCC), or Supervision and Regulation Letters (Federal Reserve Board). In contrast, the Bureau's Enforcement Policies and Procedure Manual, which discusses its civil penalty policy and procedures, is a non-public document.

Recommendations:

1. ***The Bureau should adopt expressly adopt the 1998 FFIEC Interagency Policy Regarding Assessment of Civil Money Penalties.***

2. ***The Bureau should adopt and publish a civil penalty matrix based on the factors in 1998 FFIEC Interagency Policy and consistent with the matrices of the prudential regulators, together with public guidance to enforcement staff on how to apply the factors in the matrix.***

   In setting settlement terms, the Bureau should give priority to consumer restitution, when feasible. The combined cost of the restitution and civil penalty should be based on the matrix, with a discount for restitution amounts.

4. ***Congress should reconcile the civil penalty authorities of the prudential regulators, the Bureau, and the Federal Trade Commission, including giving the FTC statutory authority for assessing civil penalties for consumer financial laws and regulations, consistent with the authority of the prudential regulators and the Bureau.***

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