

SEC Announces Significant New Initiatives to Encourage Cooperation in Investigations

by Mark R. Hellerer and George Chikovani

On January 13, 2010, the Securities and Exchange Commission announced a series of measures designed to encourage cooperation in the agency's enforcement actions by companies and individuals. The new measures (1) authorize the Division of Enforcement to use several new tools to encourage cooperation; (2) streamline the process for submitting witness immunity requests to the Justice Department; and (3) set out for the first time guidelines crediting cooperation by individuals, complementing existing guidelines for companies. Robert Khuzami, Director of the Division of Enforcement, stated that the measures represented a "potential game-changer," by enhancing the collection of "the insiders' view into fraud and misconduct that only cooperating witnesses can provide." While it will take some time for practices to develop, it can be expected that the measures will have a significant impact on the conduct of investigations and should accelerate the pace of those investigations.

New Tools Available to Enforcement Division

The SEC announced that Enforcement Division staff would be authorized to employ a series of new tools to encourage cooperation, including:

- Cooperation agreements, in which the Enforcement Division agrees to recommend to the Commission that a cooperator who is subject to an enforcement action receive credit in exchange for providing substantial assistance.
- Deferred prosecution agreements, in which the Commission agrees to forgo an enforcement action in exchange for cooperation and compliance with express prohibitions and/or undertakings, during

a deferred prosecution period of up to five years; the cooperating party also generally admits or agrees to not contest the facts underlying the alleged offenses and pays disgorgement or a penalty.

- Non-prosecution agreements, in which the Commission agrees to forgo an enforcement action in exchange for cooperation, with no deferred prosecution period; these agreements are to be used only in “limited and appropriate” circumstances, where there is no alternative method for obtaining cooperation, and the culpability of the cooperating party is relatively low.

The Enforcement Manual used by the Enforcement Division staff has been updated to reflect guidelines for the use of these new tools.

The SEC’s press release noted that these tools were previously not available in SEC enforcement matters, but have been used regularly by the Justice Department. It can be expected that the SEC will use these new tools in a manner similar to the Justice Department, especially since many of the new Enforcement Division leaders are former Justice Department prosecutors.

Streamlining Requests for Immunity

The SEC also announced that it had streamlined the process for submitting witness immunity requests to the Justice Department for witnesses who have the capacity to assist in SEC investigations and related enforcement actions, without specifying how the process has been “streamlined.”

Guidelines for Evaluating Cooperation by Individuals

The SEC also issued a policy statement that sets out for the first time guidelines for evaluating the credit that should be given to cooperation provided by individuals, codified as 17 C.F.R. § 202.12 and included in the new edition of the Enforcement Manual.

The guidelines identify four non-exclusive categories to consider in deciding how much credit to give for cooperation:

1. The value and nature of the assistance provided by the cooperating individual, including the timeliness of the information (with special consideration for information that provides the basis of the investigation), whether the individual cooperated voluntarily and provided information that might otherwise not have been discovered, encouraged others to cooperate, and the amount of time and resources conserved.
2. The importance of the underlying matter in which the individual cooperated, including the type of violation, the duration and degree of harm to investors, and whether the investigation involves subject matter that is a “Commission priority.”
3. The societal interest in ensuring the individual is held accountable for his or her misconduct, focusing on the culpability of the individual, any attempts to bring the violations to the attention of superiors or law enforcement, and attempts to remedy the harm to investors through the payment of disgorgement or assistance in the recovery of the fruits and instrumentalities of the violations.
4. The appropriateness of cooperation credit based upon the risk profile of the cooperating individual, including any prior history of unlawful behavior, the degree to which the individual accepts responsibility, and the opportunity to violate securities law in the future.

The SEC described the new guidelines as similar to the existing guidelines for evaluating cooperation by companies, which were set out by the SEC in a 2001 document called the Seaboard Report.

Conclusions

- The measures announced by the SEC clearly signal the SEC's intent to take a more proactive role in the investigation and enforcement of securities violations, and to expedite the investigation process.
 - Providing Enforcement Division staff with the authority to use tools such as cooperation and deferred prosecution agreements, previously used only by the Justice Department, together with the streamlining of the process for submitting witness immunity requests to the Justice Department, should greatly expedite securities investigations.
 - The statement of policy on evaluating cooperation by individuals also provides important guidance to individuals and their counsel in evaluating the credit they can reasonably expect in exchange for cooperation.
- These measures promise to change dramatically the conduct of securities investigations, both civil and criminal.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Mark R. Hellerer **(bio)**
New York
+1.212.858.1787
mark.hellerer@pillsburylaw.com

George Chikovani **(bio)**
San Francisco
+1.415.983.1373
george.chikovani@pillsburylaw.com

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