

Securities Enforcement

E-ALERT

January 14, 2010

THE SEC'S NEW COOPERATION POLICY FOR INDIVIDUALS: ONLY TIME WILL TELL ITS EFFECTIVENESS

On January 13, 2010, the Securities and Exchange Commission's Division of Enforcement announced an initiative aimed at strengthening its enforcement program by encouraging individuals to cooperate and assist in investigations and enforcement actions. The tools that will now be available to the Enforcement staff range from taking no enforcement action against a cooperating individual to pursuing reduced charges and sanctions. They build on [recent significant changes](#) made to the Enforcement Division's policies and practices, including the creation of specialized units, which were designed in hopes of expediting investigations and bringing greater expertise to bear on complex products and industry practices.

NEW TOOLS TO ENCOURAGE COOPERATION

Robert Khuzami, the Director of the Enforcement Division, announced that the Staff is now authorized to use new techniques, modeled on those available to criminal prosecutors, to encourage individuals to report violations and provide assistance to the agency. These new tools, which are included in a revised version of the Division's [Enforcement Manual](#) under a new section, "Fostering Cooperation," include:

- **Proffer Agreements:** Formal written agreements providing that any statements made by a person, on a specific date, may not be used against the individual in subsequent proceedings, except as a source of leads to discover additional evidence and for impeachment purposes. The staff will use a standard proffer agreement, similar to those used by criminal prosecutors. In addition, the staff may give oral assurances that they do not anticipate recommending an enforcement action against an individual based upon the evidence currently known to them.
- **Cooperation Agreements:** Formal written agreements recommending to the Commission that a cooperator receive credit for cooperating in investigations or enforcement actions. The cooperator must provide "substantial assistance" such as full and truthful information and testimony.
- **Deferred Prosecution Agreements:** Formal written agreements in which the Commission agrees not to pursue an enforcement action against the cooperator for a period of time in exchange for complete and truthful cooperation. The cooperator must also agree to comply with certain prohibitions and undertakings during the deferred prosecution period. If the cooperator complies with his or her obligations during the deferred prosecution period, then no enforcement action will be brought.
- **Non-prosecution Agreements:** Formal written agreements in which the Commission agrees not to pursue an enforcement action against a cooperator if the cooperator agrees, among other things, to cooperate fully and truthfully, and to comply with express undertakings. Such agreements will be entered into only under what the Division calls "limited and appropriate circumstances."

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- **Criminal Immunity Requests:** To obtain testimony and/or to facilitate cooperation that will substantially assist an investigation, the staff may seek an immunity order or letter from the Department of Justice. The SEC has adopted [Final Rule § 200.30-4](#) to streamline the process for submitting witness immunity requests to the Justice Department.

The Enforcement Division's revised [Enforcement Manual](#) contains procedures for the staff to follow and lists certain considerations that the staff must evaluate when using a particular cooperation tool.

FOUR GENERAL CONSIDERATIONS IN EVALUATING COOPERATION

For the first time, the SEC has attempted to articulate how it will evaluate cooperation in an official [Policy Statement](#). The agency identified four general considerations:

- How much assistance is provided by the cooperating individual?
- How important is the underlying matter in which the individual cooperated?
- How important is it from a societal perspective to hold the individual cooperating accountable for his or her misconduct?
- What is the personal and professional profile of the cooperating individual (*e.g.*, his or her history of lawfulness, degree of acceptance of responsibility, and opportunity to commit future securities violations)?

The policy statement makes clear that the SEC retains the discretion to give or not give credit in an individual case and that a cooperator's receipt of the potential benefits of this new policy is by no means automatic. As a result, we do not expect to see a sudden rush of cooperators who are likely to provide information about securities violations in order to protect themselves. On the other hand, if, as this new policy is implemented, it becomes clear that the cooperators are given meaningful benefits, then the SEC may have the same level of success as criminal authorities have had in using cooperators to make cases. That, in turn, would lead to greater enforcement activity against institutions as well as other individuals.

The SEC's stated goals in announcing these initiatives, which accompany a significant reorganization of the Enforcement Division, are to increase the effectiveness and efficiency of its investigations while at the same time enhancing its ability to detect, punish and remedy violations of the federal securities laws. Whether these lofty goals are achieved will depend in large part on how effectively the SEC uses these new tools to reward cooperation in specific cases.

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