



Please contact any of the attorneys in our [SEC Investigations and White Collar Defense Group](#) if you have any questions regarding this alert.

Authors:

George Kostolampros
gstolampros@Venable.com
202.344.8071

Geoffrey R. Garinther
rgarinther@Venable.com
202.344.4919

Matthew L. Beville
mlbeville@Venable.com
202.344.4487

Senate Questions SEC Disclosure Policies

Last month, the ranking Republican on the Senate Judiciary Committee, Sen. Charles Grassley (R. Iowa), issued letters to Securities and Exchange Commission ("SEC") Chairman Mary Schapiro and Attorney General Eric Holder requesting information regarding how the agencies coordinate parallel civil and criminal investigations. Specifically, Sen. Grassley is interested in whether the SEC informs individuals it is investigating whether the Department of Justice ("DOJ") is conducting a parallel criminal investigation. While this information is undoubtedly useful for defense counsel deciding whether to cooperate with an SEC investigation, Sen. Grassley said in a press release that this practice could "sound the alarm" for anyone concerned that "the SEC [is] being overly cozy with those it should be investigating."

Sen. Grassley's letters were motivated by recent comments from the SEC's Director of Enforcement, Robert Khuzami. In a recent conference, Director Khuzami addressed how the SEC coordinates parallel investigations with DOJ. He said that as defense counsel are reluctant to cooperate "without knowing what the Justice Department is doing," the SEC was developing a process to provide defense counsel "answers whether or not there is a criminal interest in the case." However, Sen. Grassley pointed out that such a policy may conflict with the SEC's Enforcement Manual, which provides that SEC staff should direct such inquiries to DOJ without comment. Sen. Grassley also pointed out that recent comments from Assistant Attorney General Lanny Breuer also indicate that while DOJ and the SEC "collaborate," they do not seek each other's "guidance" when deciding to resolve investigations.

It is not clear, however, that Director Khuzami's comments are actually in conflict with the SEC's written policies. The Enforcement Manual itself expressly provides that SEC staff may disclose a criminal investigation if "authorized by the relevant criminal authorities." Director Khuzami's comments were in the context of the SEC expressly collaborating with criminal authorities. Therefore, it follows that the SEC would only disclose criminal interest if expressly authorized to do so.

Assistant Attorney General Breuer's comments regarding collaboration between the SEC and DOJ in resolving investigations are very brief, but do highlight that the SEC does not seek DOJ's guidance when deciding how to resolve a case. Senator Grassley commented that "[t]his suggests much less coordination than implied by Director Khuzami." The fact that the SEC does not seek guidance from DOJ in deciding whether to resolve a case should not be surprising, as the SEC is an independent agency tasked with civil enforcement of the securities laws. Further, it does not mean that the SEC and DOJ do not share information or coordinate their efforts. Although DOJ and the SEC may share information and coordinate their efforts, there are nevertheless limits to that coordination. As set forth in the SEC's enforcement manual, it is important that the SEC's investigation have its own independent civil purpose and not be initiated to obtaining evidence for the criminal authorities.¹

Further, the SEC appears to believe that it could obtain concrete benefits from a disclosure policy that provides defense counsel with answers as to whether or not there is criminal interest in their client. Director Khuzami's comments are related to the SEC's recently enacted policy designed to encourage individuals to cooperate in SEC enforcement actions. See 17 C.F.R. § 202.12. Known as "Seaboard for Individuals," after the Seaboard Report that outlines the SEC's policy for rewarding corporate cooperation, this policy provides individuals with incentives to cooperate, from "taking no enforcement action to pursuing reduced charges and sanctions," depending on the level of cooperation and the seriousness of the individuals' alleged violation.

The SEC has stated that it believes rewarding cooperators allows the SEC to "secure higher-value evidence" and efficiently allocate its limited resources. Further, by offering leniency to less-culpable individuals, the SEC may be able to obtain evidence against the individuals most responsible for the alleged violation. However, individuals and their counsel are highly unlikely to cooperate unless they are assured that their statements will not be used against them in a future criminal investigation. Thus, rather than evidence of a "cozy" relationship with the industry, the SEC likely sees a disclosure policy that informs defense counsel whether or not there is criminal interest in their client as a necessary part of a robust cooperation policy.

At this point, it is unclear whether the SEC has already provided such information to defense counsel; the SEC and DOJ were to respond to Senator Grassley's letters by February 22nd.

1. Additionally, DOJ is limited in sharing information it gains through the Grand Jury. See Federal Rule of Criminal Procedure 6(e) (2).

If you have friends or colleagues who would find this alert useful, please invite them to subscribe at www.Venable.com/subscriptioncenter.

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | www.Venable.com

©2011 Venable LLP. This alert is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.