

Client Advisory | August 2009**SEC Division of Enforcement Director Announces Aggressive New Initiatives**

On August 5, 2009, the Director of the Division of Enforcement of the Securities and Exchange Commission, Robert Khuzami, outlined multiple new steps the SEC is taking to increase enforcement of securities laws and regulations in the wake of high-profile cases and losses for investors, such as the Bernard Madoff ponzi scheme.



Stephen G. Huggard
Partner



Matthew A. Martel
Partner



Scott R. Magee
Associate

In his wide-ranging speech, Director Khuzami explained that the SEC, and specifically the Division of Enforcement, plans to emphasize enforcement actions that have the greatest impact on investors in that matter or the greatest deterrent effect on other marketplace participants.

Accordingly, Khuzami outlined multiple new steps that the Division has undertaken, or will undertake soon, to increase the effectiveness and speed of enforcement actions. For companies and individuals who are regulated by the SEC, the most important new initiatives to be aware of are: (1) the creation of specialized units within the Division of Enforcement to handle the most complex matters, (2) reforms specifically targeted to expedite investigations by decreasing the use of tolling agreements while increasing the ability to issue subpoenas easily, (3) reforms designed to increase cooperation by witnesses and potential targets of enforcement actions, and (4) adding new resources to certain units within the Division, in particular the Trial Unit.

Specialized Units

The first move the SEC is taking to step up enforcement is to create specialized units to handle investigations concerning five discrete topics that, due to their complexity and novelty, require greater expertise than many enforcement actions have historically required. These are:

Asset Management Unit: This unit will focus on Investment Advisors, Investment Companies, Hedge Funds and Private Equity

Funds. The specific issues that this unit will focus its attention on include disclosure, valuation, portfolio performance, due diligence and diversification, transactions with affiliates, misappropriation, and conflicts of interest.

Market Abuse Unit: This unit will focus on complex schemes and abuses by institutional traders and market professionals by looking at trading activity across multiple corporate announcements and market events to seek patterns that show market abuses that might not appear by looking at a single transaction or event.

Structured and New Products Unit: This unit will focus on understanding and investigating alleged securities laws violations concerning complex and/or novel instruments, such as CDO's, derivatives, and other securitized products.

Foreign Corrupt Practices Act Unit: In addition to simply increasing investigations into the violation of the Foreign Corrupt Practices Act (FCPA), which prohibits American companies from bribing government officials in other countries, this unit will specifically work to improve the SEC's cooperation with other governments in investigations and enforcement of the FCPA.

Municipal Securities and Public Pensions Unit: This unit will be designed to give particular scrutiny in the context of municipal securities to offerings and associated disclosures, tax and arbitrage activity, underfunded liabilities and outright kickback schemes, among other things.

Streamlining and Speeding Up Investigations

Khuzami also announced reforms that the Division of Enforcement is implementing specifically to streamline and accelerate the timeline of investigations. The SEC has approved an order delegating the ability to issue formal orders of investigation to the Division Director, which he will then delegate to senior officers in the Division. Importantly, this authority includes the ability to issue subpoenas. Accordingly, Khuzami suggested that the use of subpoenas will become more common and will be issued more quickly to witnesses and potential defendants who do not voluntarily cooperate in a timely manner.

Consistent with Khuzami's suggestion that subpoenas will be issued more quickly, the SEC also intends to make the use of tolling agreements the "exception, not the rule" in an effort to speed up the process of investigations. Both the increased ability to use subpoenas, and the decreased use of tolling agreements means that subjects of SEC investigations or enforcement actions will need to be prompt in responding to future actions by the Division.

Increasing Cooperation by Individuals

The SEC is also looking to increase cooperation by individuals in the course of investigations, focusing on encouraging cooperation by witnesses who themselves may be subjects of the investigation. First, the Division is planning to create a policy statement that establishes standards by which the Division can evaluate a witness's cooperation. Second, the Division is seeking to expedite immunity requests to the Department of Justice. Third, the Division is developing means by which investigators, in certain circumstances, can give oral assurances to witnesses that the SEC does not intend to file charges against the witness. Finally, the Division is proposing to the SEC that it enter into more deferred prosecution agreements. These agreements would effectively act as both a carrot and a stick for the witness, by requiring him or her to comply with certain cooperation requirements in exchange for the SEC forgoing an enforcement action against that witness.

Use of New Resources

The SEC has also recently sought to reallocate its resources to increase

the effectiveness of investigations and enforcement. It has increased the size of its Trial Unit, which Khuzami explained is a necessary component to convincing targets of investigations to settle rather than fight a matter through trial. Khuzami candidly explained, "Without this credible threat, [the SEC] would be at a severe disadvantage," because targets of investigations would more willingly roll the dice and take their case to trial, or more likely, believe that the SEC is not willing to risk taking the case to trial.

Conclusion

Each of these moves by the Division of Enforcement is designed to increase the efficiency and effectiveness of the Division's investigations. While each of these new moves is in a nascent stage, for companies and individuals who are regulated by the SEC and may someday become subject to scrutiny by the Division of Enforcement, it is important to be aware of the new aggressiveness that the SEC is beginning to implement. Those companies and individuals should remain fully informed of when the SEC implements these changes, and how they operate in practice.

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Stephen G. Huggard, Partner

617.239.0769

shuggard@eapdlaw.com

Matthew A. Martel, Partner

617.239.0115

mmartel@eapdlaw.com

Scott R. Magee, Associate

617.239.0304

smagee@eapdlaw.com

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DODGE**

111 Huntington Avenue
Boston, MA 02199
Tel 617.239.0100
Fax 617.227.4420
eapdlaw.com