



WHITE COLLAR COMPLIANCE & DEFENSE PRACTICE

ALERT

SEC ANNOUNCES NEW COOPERATION INITIATIVES

By Patrick J. Egan and Amit Shah

The Securities and Exchange Commission (SEC) recently announced new cooperation initiatives to strengthen its enforcement capabilities. The new initiatives have been described by the director of the Division of Enforcement as a “game-changer” for SEC enforcement activities. The initiatives establish incentives for companies and individuals to fully and truthfully cooperate with SEC investigations and enforcement actions. Many of the tools the SEC authorized for use by the Division of Enforcement are similar to those used by the Department of Justice in criminal investigations and prosecutions.

The new cooperation tools not previously available to the Division of Enforcement include:

- Cooperation Agreements – Formal written agreements between the Division of Enforcement and the individual or company, in which the Division agrees to recommend to the SEC that a cooperator receive credit if the cooperator provides substantial assistance such as full and truthful information and testimony.
- Deferred Prosecution Agreements – Formal written agreements in which the SEC agrees to forego, for an expressed period of time, an enforcement action against a cooperator if the individual or company agrees, among other things, to fully and truthfully cooperate and comply with express prohibition and undertakings during the period of deferred prosecution.
- Non-Prosecution Agreements – Formal written agreements entered into under limited circumstances,

in which the SEC agrees not to pursue an enforcement action against a cooperator if the individual or company agrees, among other things, to cooperate fully and truthfully and comply with express undertakings.

In addition, the SEC streamlined the process for submitting witness immunity requests to the Department of Justice for witnesses who have agreed to fully and truthfully cooperate with an investigation and enforcement-related activities.

For the first time, as part of the new initiatives, the SEC described the way it will evaluate whether, how much and in what manner to credit cooperation by individuals to ensure that cooperation agreements maximize the SEC’s enforcement interests. The SEC expects the policy to serve as an incentive for individuals and companies to report violations and cooperate fully and promptly in enforcement cases. The new policy statement identifies four general areas of consideration for cooperation by individuals:

- The assistance provided by the cooperating individual;
- The importance of the underlying matter in which the individual cooperated;
- The social interests in ensuring the individual is held accountable; and
- The appropriateness of cooperation credit based upon the risk profile of the cooperating individual.

In its new policy, the SEC outlines a specific list of considerations for each of the factors listed above. For

cooperation by companies, the SEC had previously defined a list of factors in the 2001 “Seaboard Report” for evaluating cooperation by companies. The Seaboard Report identifies, among other things, the following areas of consideration for cooperation by companies:

- The nature of the misconduct, including whether the conduct was intentional, negligent, reckless or indifferent;
- The commitment of the company to learning the truth fully and expeditiously;
- The harm to the investors; and
- The steps taken by the company upon learning of the misconduct, including whether the company

promptly made available key employees and staff to the SEC.

Companies, executives and other key employees subject to an investigation by the SEC should take note of the new cooperation initiatives and the factors outlined above to ensure that the company or individual potentially qualifies for a more favorable outcome.

For more information about the new cooperation initiatives announced by the SEC, please contact Patrick Egan at 215.299.2825 or pegan@foxrothschild.com, Amit Shah at 215.299.3834 or ashah@foxrothschild.com, or any member of our [White Collar Compliance & Defense Practice](#).



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