

# BURR ALERT

## SEC Enters First Individual DPA *by Thomas K. Potter, III*

The SEC announced November 12 that it has entered its [first DPA \(deferred prosecution agreement\) with an individual respondent](#). In a DPA, the SEC rewards substantial assistance to an important investigation by agreeing not to prosecute so long as the cooperator complies with certain specified undertakings. DPAs are part of [Enforcement's Cooperation Program](#), which adopted a suite of tools that are a long-standing part of the white-collar-crime canon. Those tools include:

- **Cooperation Agreements** – recommending some credit for substantial assistance;
- **Deferred Prosecution Agreements** – formal agreements foregoing prosecution in return for a cooperator's substantial assistance and compliance with specified undertakings over a specific time;
- **Non-Prosecution Agreements** – formal agreements not to prosecute for a cooperating respondent's substantial assistance and compliance with specified undertakings.

The SEC [adopted the Program](#) in January 2010 under then -Enforcement Director Rob Khuzami, arising in part from his prior tenure as an Assistant US Attorney for the Southern District of New York. The full suite of cooperation tools is set out in the [SEC's Enforcement Manual](#).

The SEC has [used DPAs and NPAs four times before](#) but only with entities. This is the Commission's first with an individual respondent. The [framework for evaluating individual cooperation](#) includes:

- value to the investigation;
- nature of cooperation;
- character of investigation;
- dangers to investors;
- individual culpability and accountability; and,
- profile of the individual.

In [this case](#), a hedge fund administrator – concerned about a hedge-fund manager's conduct and fund-accounting discrepancies – resigned and contacted the SEC. He provided documents and a detailed description of the accounting fraud. His cooperation enabled the SEC to file an emergency action within weeks to stop the fraud. Under the DPA, the cooperator is barred from the industry (and as a fund administrator) for 5 years and must disgorge his profits from the period before turning himself in.

The SEC expects cooperation. A cooperating witness is unlikely to benefit materially from the Cooperation Program, unless his assistance is exceptional and saves the Commission significant time and effort in its effective enforcement efforts.

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