

THE SEC'S ENFORCEMENT COOPERATION INITIATIVES

February 17, 2010

To Our Clients and Friends:

On January 13, 2010, the Securities and Exchange Commission ("SEC") announced a series of initiatives designed to encourage individuals and entities to provide cooperation in enforcement investigations. These new guidelines are very similar to approaches that the Department of Justice has used for many years in connection with criminal investigations. Although the SEC has encouraged cooperation in the past, prior to this new initiative, it did not have formal mechanisms for ensuring that cooperation was recognized and for permitting individuals and entities to avoid enforcement actions or receive reduced sanctions if they provided cooperation of a significant nature. The absence of such formal mechanisms meant that parties could not predict in advance what sort of credit they would get, and the Enforcement Staff was hamstrung in giving such assurances. The SEC's hope is that, by creating more latitude to provide assurances and benefits from cooperation, entities and individuals will feel more comfortable providing cooperation.

As an initial matter, the Enforcement Division Staff is now authorized, in appropriate circumstances, to provide oral assurances to individuals or entities that the Staff does not, based on the information available to them at the time, intend to bring an enforcement action against them. This type of oral assurance is a critical change since, for many years, Enforcement Staff felt unable to give such assurances, and therefore potential witnesses – even those who did not realistically face potential action – were reluctant to provide voluntary assistance to the SEC. Similarly, the new measures now authorize the provision of termination notices – which formally inform the individual or entity that the SEC will not bring an enforcement action – before the overall investigation is closed, if it will encourage cooperation.

For those individuals whose conduct could justify an enforcement action, the new guidelines provide three potential types of written agreements that the Enforcement Staff can enter into with individuals and entities to provide credit for assistance. Each of these potential agreements differs in structure and in the ultimate benefit that the individual or entity derives from it:

- **Cooperation Agreements.** This is a formal written agreement in which the Staff agrees that, although the individual or entity will enter into a settlement of an enforcement action, the Staff will recommend to the Commission that the individual or entity receive

credit for cooperation in an investigation or a related enforcement action if the cooperation provides substantial assistance to the SEC. This promises the benefit of a reduction in penalties or other sanctions if the individual or entity is successful in providing helpful assistance to the SEC. (It is important to note, however, that the Commission itself is not bound by the terms of a cooperation agreement negotiated with the Enforcement Staff, though presumably they will give the Staff great deference.)

- **Deferred Prosecution Agreements.** This is a formal written agreement in which the SEC agrees to forego an enforcement action against a cooperating individual or entity agreeing, among other things, to cooperate fully and to comply with express undertakings and prohibitions during a period of deferred prosecution. The guidelines also provide that, in cases involving regulated persons and corporate officers or directors, the cooperating individual or entity generally should agree either to admit or not to contest the underlying facts that the SEC could assert to establish a violation of the federal securities laws. If the agreement is violated during the deferred prosecution period, the Staff may recommend an enforcement action on the original misconduct, and any additional misconduct, and it may use any admissions under the agreement in that action.
- **Non-Prosecution Agreements.** This is a formal written agreement in which the SEC agrees not to pursue any enforcement action against a cooperating individual or entity. In return, the individual or entity agrees, among other things, to cooperate fully and comply with express undertakings, which may include the admission of specified facts, the payment of disgorgement and civil penalties, and other measures. These agreements are to be used only in “limited and appropriate circumstances.”

The SEC also issued a policy statement setting forth the criteria that it will use to evaluate whether, how much and in what form to credit cooperation by individuals. The statement discusses four general criteria for evaluating individual cooperation: (1) the nature and quality of the assistance provided by the individual, including the timing of the assistance; (2) the importance of the underlying matter and the extent of actual or potential investor losses; (3) the societal interest in holding the individual accountable; and (4) the profile of the individual, including whether he or she is a recidivist. These factors are similar to the factors that the SEC considers in evaluating cooperation by companies, which are set forth in a 2001 Report of Investigation (the so-called “Seaboard Report”).

The impact of these new guidelines remains to be seen. Cooperation provisions have been very successful in encouraging cooperation in the criminal realm because the available sanctions, including prison, are so severe. The SEC’s sanctions are less draconian but still potentially severe. Thus, there will be incentives to provide assistance and these measures

should help harness those incentives. At the same time, the SEC still will need to coordinate with criminal authorities in encouraging cooperation in cases with criminal exposure, since individuals are unlikely to cooperate with the SEC if they face the prospect of criminal charges. And entities will be wary of making factual admissions that could be used against them in civil proceedings. It is clear, though, that the measures will give the Enforcement Staff more latitude to encourage cooperation by promising some tangible benefits in response to cooperation and by allowing the Staff to more freely give assurances to potential witnesses and entities.

Please feel free to contact us with any questions.

Paul R. Berger

+1 202 383 8090

prberger@debevoise.com

Andrew J. Ceresney

+1 212 909 6947

ajceresney@debevoise.com

Jonathan R. Tuttle

+1 202 383 8118

jrtuttle@debevoise.com

Phillip D. Parker

+1 202 383 8109

pdparker@debevoise.com