

The New SEC Individual Cooperation Initiative: How Will It Work? Will It Work?

Webcast Presentation

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Features of the New Initiative – An Overview

- Standards for Evaluating Individual Cooperation
 - Assistance provided by the individual
 - Importance of underlying matter
 - Interest in holding individual accountable
 - Individual's profile
- New Cooperation Tools
 - Cooperation Agreements, Deferred Prosecution Agreements, and Non-Prosecution Agreements
 - Expedited Immunity Requests
 - Proffer Agreements and Oral Assurances
 - Settlement Recommendations and Termination Notices

Standards for Evaluating Cooperation: Assistance Provided

- Value of the Cooperation
 - Provides substantial assistance
 - Timely: first to cooperate, preceding knowledge of investigation
 - Quality: truthful, complete, reliable
 - Time and resources conserved as a result
- Nature of the Cooperation
 - Voluntary
 - Type of assistance provided
 - Revelation of information not otherwise obtainable
 - Encouraged or authorized others to cooperate

Standards for Evaluating Cooperation: Underlying Matter's Importance

- Character of the Investigation
 - Commission priority
 - Type and number of violations
 - Age and duration of misconduct
 - Isolated or repetitive violations
- Danger Presented by Underlying Violations
 - Amount of harm or potential harm caused
 - Type of harm
 - Number of individuals or entities harmed



Standards for Evaluating Cooperation: Interest in Holding Individuals Accountable

- Severity of Misconduct
- Culpability
 - Education, Training, Experience, Position of Authority
 - Intent or Knowledge of Wrongdoing
- Toleration of Illegal Activity
- Efforts to Remedy or Prevent Harm Caused
- Sanctions Imposed by Other Authorities



Standards for Evaluating Cooperation: Individual Profile

- Is Cooperation Credit Appropriate?
- Personal and Professional Profile
 - History of lawfulness
 - Acceptance of responsibility
 - Opportunities to commit future securities violations
 - Existing or proposed safeguards

New Cooperation Tools

Non-Exclusive List of Tools that are Available to Both Individuals and Entities:

- Proffer Agreements
- Oral Assurances
- Settlement Recommendations
- Cooperation Agreements
- Deferred Prosecution Agreements
- Non-Prosecution Agreements (Only Appropriate in Limited Circumstances)
- Termination Notices
- Expedited Immunity Requests

New Tools: Cooperation Agreements

- Agreement Between Enforcement Division and Cooperator
 - Director of Enforcement Division and Senior Officers designated by Director have authority to enter into cooperation agreements
 - Division agrees to recommend credit for substantial assistance to SEC
 - Cooperator agrees to cooperate fully and truthfully, waive statutes of limitations
- Division May Specify Enforcement Recommendations
 - Cooperator must provide substantial assistance
 - Cooperator must agree to resolve matter without admitting or denying alleged violations
- Not Binding on SEC
- Can be on “Neither Admit nor Deny” Terms

New Tools: Deferred Prosecution Agreements

- Generally Appropriate for Persons in Security Industry, Fiduciaries, Executives of Public Companies, and Licensed Professionals, such as Accountants and Attorneys
- Agreement Between SEC and Cooperator, Approved by SEC
 - In addition to general terms, Cooperator agrees to admit or not contest relevant facts underlying alleged offenses
- Payment of Disgorgement and/or Penalty
- Additional Prohibitions and Undertakings Designed to Protect the Investing Public
- For a Set Amount of Time, Not to Exceed 5 Years
 - If violated, SEC may authorize enforcement action, and any factual admissions made by cooperator may be used against the cooperator
- Will be Made Available to the Public Upon Request

New Tools: Non-Prosecution Agreements

- Only Appropriate in Limited Circumstances
 - Not appropriate for recidivists
 - Should not be entered into in the early stages of an investigation
- Payment of Disgorgement and/or Penalty
- Additional Undertakings Designed to Protect the Investing Public
- If Violated, SEC may Authorize Enforcement Action, and Any Information Provided by Cooperator may be Used Against the Cooperator

New Tools: Expedited Immunity Requests

- Request to Department of Justice to Protect Cooperator Against Criminal Prosecution
- Director of Enforcement Division Authorized to Make Requests, without Approval from SEC
- Immunity Letters and Orders Will be Treated as Public Documents
- BUT NOTE:
Before entering into a Cooperation Agreement or Non-Prosecution Agreement, the Enforcement Division “is instructed to consider *whether the individual or company is likely to enter into a plea agreement with criminal prosecutors* that will require the individual or company to cooperate in the Commission’s investigation and enforcement actions.”



What Does This Actually Mean?

Practical Application and Critical Analysis

The Process of Cooperation

- Well-Established in the Criminal Realm
 - Attorney Proffer
 - Client Proffer(s): process of extracting information over a period of time
 - Enter into Cooperation Agreement
 - Guilty Plea
 - Testimony
 - Sentencing by Judge (familiar with cooperation)

The Process of Cooperation

- SEC Process is Still Unclear
 - Attorney Proffer?
 - Client Proffer: Guidelines provide for this; perhaps low degree of tolerance for process of extracting information over a period of time
 - Requirement of stipulated statement of facts in some cases
 - Does this information get shared with other authorities?
 - Enter into Cooperation Agreement: Three formal types, with varying levels of approval required
 - Testimony? The goal of SEC cooperation is still unclear – are they looking for cooperators who can testify at trial, or will they accept strictly informational cooperators?
 - Penalty imposed by Commission: Unfamiliar with cooperation

The Process of Cooperation

- Interaction Between Criminal and SEC Cooperation – Can the SEC ever Compete?
 - Leverage and Incentives: SEC punishments and remedies are far more limited
 - Different Priorities: jail time v. loss of license
 - Informal Cooperation Agreements: require agency/agent brokering the agreement to personally protect cooperator from other entities
 - Criminal prosecutors has an established record of garnering this type of comity and protection
 - SEC would need to build up a reputation of this sort to gain credibility (particularly with regard to criminal prosecutors respecting and supporting SEC cooperation)
 - Timing: the two systems often operate at very different speeds




What Will Cooperation Look Like?

- Who Is the Cooperator?
 - Senior Executive at a Public Company
 - Low-level Employee at a Public Company
 - Low-level Employee at a Public Company, who does not have a professional license
- What is the Violation?
 - Criminal Conduct
 - Securities Law Violation: non-criminal
 - Awareness of Unlawful Conduct
- When in the Investigation?
 - Before an Investigation has Commenced
 - Early in the Investigation
 - Late in the Investigation

Looking Ahead

- Retention or loss of license needs to be negotiable: this is a potentially strong tool the SEC is overlooking, or under-utilizing
- Given unfamiliarity with new tools, previous informal methods may have the most practical value
- SEC culture may have to change to accommodate the goal of cooperation
- Deterrence: the SEC will need a more flexible understanding of the varying forms of achieving deterrence
- Collateral reputational damage may outweigh benefit of civil cooperation



Q & A

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