

## SEC enforcement formally lays out cooperation guidelines

There's no longer any mystery in how the SEC will treat individuals and companies that cooperate in investigations. New guidelines spell out rules for how and when the SEC will offer written cooperation agreements, deferred prosecutions and non-prosecution agreements to cooperating witnesses.

The decision by the enforcement staff to formalize the guidelines could add consistency to the way the SEC deals with cooperating witnesses and attract more people to help investigators, defense lawyers say.

"There was no rule that defense attorneys like me could look to to say, 'You [SEC enforcement] really should do something for the individuals because you have a rule in place. With the rule, it creates a set of expectations within corporate America, within the defense bar, within the SEC, as to how these rules should work. It provides a set of operating principles, which are quite helpful,'" says **David Z. Seide**, a partner in the Washington office of **Curtis, Mallet-Prevost, Colt & Mosle LLP**.

The guidelines piggyback on longstanding Justice Department witness agreements, allowing SEC enforcement officials to be more nimble, notes Seide, a former federal prosecutor. "It gives an investigator a few more arrows in his or her quiver, as they say, in terms of how to work cases."

Make sure your firm is ready to promptly respond to SEC requests for information to help with investigations, says **Deborah Meshulam**, a law partner at **DLA Piper** in Washington.

"If you're a broker-dealer, you would expect the SEC would be looking for account records, customer complaints, customer due diligence files, any of those things. As a compliance officer, you would want to make sure those files are up to date, they're easily accessible," Meshulam says.

You might want to institute a process where, say, once a quarter, or biannually, you or your team make an extra effort to ensure your books and records are up-to-date, she adds.

Educate your reps about what your firm will expect of them in terms of cooperating with the SEC in the event that is necessary. Make sure they know that they need to make themselves available to be interviewed by your firm, Meshulam says.

"There's nothing worse than having to tell the SEC that you can't get interviews, or you can't investigate fully, or not being able to investigate fully because your employees haven't cooperated in the way you would like," Meshulam says.

### The tools

SEC Enforcement Director **Robert Khuzami** wants to quickly lure people who can provide valuable information about wrongdoing, which helps investigators make cases faster and more efficiently. "Their testimony is often spot-on and irrefutable," Khuzami said at a press conference last week announcing the initiative.

He added, "Latecomers rarely will qualify for cooperation credit."

Under the cooperation agreements, staff would agree to recommend to the Commission that the "cooperator" get credit that could buffer a stiffer penalty. The person or company cooperating would have to provide "substantial assistance" and the

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person must cooperate “fully and truthfully,” according to the new guidelines.

The deferred prosecution agreement would involve the SEC staff holding off on prosecuting the person or company if they agree to abide by certain restrictions and conditions for a specified period of time up to five years, and indeed comply with those conditions.

Under the non-prosecution agreement, which would be offered under limited circumstances, the SEC would agree not to pursue enforcement action. “In virtually all cases,” this option wouldn’t be available for anyone who previously violated securities laws, according to the guidelines.

**Paul Huey-Burns**, a partner at **Dechert** in Washington, says most of these strategies have been part of the process for some time, but the act of putting them in detailed, formal guidelines, is a “very significant development.” (An SEC spokesman says the idea of deferred prosecutions is new.)

“The fact that it’s now laid out in some detail, I think at least for the moment, provides some degree of assurance that there will be greater consistency and more realistic credit afforded for cooperation,” Huey-Burns says. Seide adds that in the past, cooperating agreements often depended on which SEC regional office or official handled the case.

Although Huey-Burns is pleased with the guidelines, he’s cautious about the degree to which regulators will follow them, he says.

“There’s the old saying that the devil is in the

details. Well, in this situation, the details appear to be laid out. The devil is going to be in the implementation. We are going to have to see from case to case and situation to situation, whether this detailed framework in fact results in greater consistency and a clearer path for counsel and their clients to take in order to obtain credit for cooperation,” Huey-Burns says.

He says one new provision that is especially helpful allows enforcement staff to offer “oral assurances” about whether the SEC is considering enforcement action against the cooperator. In the past, cooperators wouldn’t get an answer to that question, and might just be told that enforcement is conducting a “fact-finding” investigation, Huey-Burns says.

Oral assurances may be offered when available evidence shows that the individual or company “has not violated the federal securities laws such as to warrant an enforcement action.”

But Huey-Burns is *not* happy that one of the factors considered in making these agreements is whether the individual or company accepts responsibility for what the SEC says is past misconduct. The cooperator might not think they did anything wrong, Huey-Burns says. “How bitter a pill do you have to swallow in terms of recognizing misconduct when at some level you really don’t believe you did anything wrong?” he says.

And Meshulam is concerned that some individuals who pursue some of these agreements “might be seeing issues that are not really issues, and

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then it becomes something the corporation has to deal with.”

She added that individuals “can have honest beliefs that issues exist that turn out, an expensive investigation later, not really to have been an issue. That’s always a tension here in these kinds of scenarios.” ■