

SECURITIES LAW ALERT

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SEC Announces Policy Statement Concerning Cooperation by Individuals

On January 13, 2010, the Securities and Exchange Commission released its “Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions.” As discussed at several recent industry events by Commission Staff, this release is intended to provide guidance for prospective individual respondents in much the same way as the 2001 Seaboard Report provided guidance to corporations with respect to credit for cooperation. A copy of the Policy Statement is available on the SEC’s website at <http://www.sec.gov/rules/policy/2010/34-61340.pdf>.

Central to the Policy Statement is the balancing between the “public interest in facilitating and rewarding an individual’s cooperation in order to advance the Commission’s law enforcement interests” and whether that public interest “justifies the credit awarded to the individual for his or her cooperation.” The Staff will evaluate four subjective considerations in determining whether, how much, and in what manner to credit cooperation. These factors are:

- **The assistance provided by the individual;**
- **The importance of the matter in which the individual cooperated;**
- **The societal interest in ensuring that the individual is held accountable for his or her misconduct; and**
- **The appropriateness of cooperation based upon the “profile” of the cooperating individual.**

To assess the first factor, the **“assistance provided by the individual,”** the Commission will consider (i) whether the cooperation resulted in “substantial assistance” to the investigation, (ii) the timeliness of the cooperation, (iii) whether the investigation was initiated based on information from the

individual, (iv) the quality of the cooperation, e.g., whether the information provided was truthful and complete and (v) whether the cooperation saved the Staff time and resources. The message is consider coming in early and, if you do, be candid and tell the whole story.

The Staff also will assess whether the cooperation was voluntary or required (for example, pursuant to an agreement with another regulatory body); the type of assistance furnished; whether the individual provided non-privileged documents or information to the Staff that may otherwise not have been discovered; whether the individual encouraged others to come forward; and any other unique circumstances. Notably, the Commission thus reaffirmed existing policy that a witness need not waive privilege to receive cooperation credit.

To weigh the **“importance of the underlying matter,”** the Staff will consider the “character of the investigation” including (i) whether the subject matter is a “Commission priority”, (ii) the type of underlying potential violations, (iii) the age and duration of the alleged misconduct, (iv) the number of violations, and (v) the isolated or repetitive nature of the violations. The Staff will also look at the “dangers to investors . . . presented by the underlying violations,” including (a) the amount of harm or potential harm, (b) the type of harm or threatened harm and (c) the number of individuals harmed.

In evaluating the **“interest in holding the individual accountable,”** the Commission has directed the Staff to consider the severity of the individual’s misconduct, the culpability of the individual (including whether he or she acted with scienter), whether the person tolerated the illegal activity or took steps to prevent it, whether the individual took steps to remediate the harm caused and sanctions imposed by other federal or state authorities or SROs.

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With regard to the **“profile of the individual,”** the relevant factors are the individual’s (i) history of lawfulness and compliance with securities laws and regulations, (ii) the degree to which the individual has accepted responsibility for any past misconduct and (iii) the extent to which the individual will have an opportunity to commit future violation of the federal securities laws in light of his or her occupation.

In return for such cooperation, the Policy Statement offers a number of potential rewards, ranging from “taking no enforcement action,” through “pursuing reduced charges and sanctions in connection with enforcement actions.”

The Policy Statement provides no real surprises. At the same time, it provides important food for thought in developing strategy in Commission investigations involving individuals. Just as the contours of the Seaboard Report on cooperation by corporations continue to evolve since that report was issued in 2001, we will have to wait and see how the Staff actually applies the Policy Statement to gain a clearer understanding of its meaning and significance. ■

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