



SECURITIES LITIGATION, GOVERNMENT ENFORCEMENT AND WHITE COLLAR DEFENSE UPDATE | AUGUST 7, 2009

SEC ENFORCEMENT DIVISION ANNOUNCES NEW POLICIES AND PROCEDURES REGARDING INVESTIGATIONS, INCLUDING CREATION OF SUBGROUPS FOR TARGETED INVESTIGATIONS

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Robert Khuzami, the new Director of the SEC's Division of Enforcement, announced more details regarding the Division's overhaul on August 5, 2009¹. In addition to streamlining management by eliminating the Branch Chief position, he announced the creation of units within the Division to handle more targeted investigations. These groups include:

- the Foreign Corrupt Practices Act ("FCPA") Unit (bribery, books and records, and internal controls);
- the Asset Management Unit (hedge funds, private equity funds, investment advisors and companies);
- the Municipal Securities and Public Pensions Unit (pay-to-play and disclosure issues);
- the Market Abuses Unit (pump-and-dump schemes and suspicious trading activity); and
- the Structured and New Products Unit (CDS, CDOs, ARS and other derivative products).

The Market Abuses and Structured and New Products units are intended to give the Division greater flexibility to investigate new products more quickly upon introduction or if they become problematic. The SEC has experimented with such groups before, such as the Office of Internet Enforcement, the Financial Fraud Task Force, the Stock Option Backdating Task Force, and the Penny Stock group. The creation of these units is intended to result in more consistent policies governing particular types of investigations and allow the SEC's Enforcement Staff to be more knowledgeable about particular products, participants, and practices. We expect that the Staff's familiarity with and approach to particular issues will be guided by the Office of Risk Assessment, the General Counsel's Office (now that the "GC" also has the title of Chief Policy Officer), the Office of Compliance Inspections and Examinations ("OCIE"), and the new Office of Market Intelligence, which will analyze tips and referrals.

Other significant developments include:

- **Subpoena Authority**

The Staff will have independent authority to issue subpoenas. The Director of Enforcement will now have the authority to approve formal orders, which he will delegate to senior enforcement officials. This is good news for issuers because the formal order is often the trigger for insurance coverage.

¹ See <http://www.sec.gov/news/speech/2009/spch080509rk.htm>

■ **Immunity Requests**

In a move that could benefit companies and individuals, the Division will seek to expedite immunity requests. This change – as well the Division’s exploration of ways in which it can signal to individuals whether they will be subject to enforcement proceedings – will give individuals greater clarity on their potential exposure in an investigation (i.e., as fact witness or potential defendant). This will allow individuals to make an informed decision about cooperation and give companies the relevant information to make decisions related to employment status and indemnification sooner rather than later.

■ **Tolling Agreements**

The Staff will now be much more limited in its ability to enter into “tolling agreements.” The Division Director will be the arbiter for whether such agreements are sought. Mr. Khuzami vowed to make them the “exception, not the rule.”

■ **Cooperation**

The Division also is seeking to set policies concerning cooperation for individuals, as it did in 2001 for corporations under *Seaboard*. The Division is considering outlining a series of factors to help define cooperation and leniency.

■ **Deferred Prosecution Agreements**

Apparently emulating the Department of Justice’s program, the Division also is exploring the option of deferred prosecution agreements for individuals and issuers. Such agreements could be granted under certain circumstances such as full cooperation, waiver of statutes of limitations, and the undertaking of remedial measures.

As Mr. Khuzami told Congress earlier this year, the revamping of the Division is based on four goals: to be strategic, to be swift, to be smart, and to be successful. With these new policies and procedures, Mr. Khuzami also vowed to remain tough, stating: “... if your client has broken the law, and has not provided the requisite level of cooperation, don’t expect leniency. Arguments such as your client is a ‘good guy,’ or ‘our competitors do it,’ or ‘we’ve always done it this way,’ will not be credited.”

To date, the SEC has opened 10% more investigations, granted 118% more formal orders, filed 147% more temporary restraining orders, and filed nearly 30% more cases than last year.

For those companies and individuals currently caught in the crosshairs of SEC investigations, these new guidelines and initiatives may change the rules “in the middle of the game.” For everyone else, they represent a new paradigm for SEC investigations going forward.

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FOR FURTHER INFORMATION:

For further information on this topic or other issues involving Securities Litigation, Government Enforcement and White Collar Defense, please contact one of the attorneys below, or any Howrey attorney with whom you have an existing relationship.

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