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SEC Cooperation Initiatives

On January 13, the SEC announced several initiatives designed to encourage greater cooperation in its enforcement investigations. Several measures are intended to encourage individuals who have knowledge of wrongdoing to come forward and provide evidence. Other elements include corporate resolutions that fall short of enforcement actions, including non-prosecution agreements and deferred prosecution agreements. While the new policies were devised to strengthen enforcement, they equally hold out the prospect of fairer treatment and concrete benefits for parties who cooperate.

To a considerable degree, these initiatives are an effort to import methods and tools into the SEC's civil enforcement arena that have long been used by criminal prosecutors. The continuing fundamental differences between civil and criminal enforcement will have a significant role in determining whether these initiatives succeed in the SEC's goal of enhancing the speed, efficiency and effectiveness of its enforcement function, and whether the new forms of resolution prove to be beneficial for parties caught up in SEC investigations.

Historically, it was questionable whether individuals obtained meaningful credit for cooperation from the SEC, as reflected in settlement terms. Under the new policies, the SEC is now formally holding out the possibility that individuals may receive assurance that they will not be charged, or at least may receive a written commitment to the disposition that the enforcement staff will recommend to the Commission. Even under the new approach, a cooperating individual will need to make a leap of faith before deciding to make a proffer admitting to involvement in wrongdoing, or before entering into a cooperation agreement. Although the new policies shift the elements of the calculation somewhat, individuals will still need to judge whether the risks of coming forward are outweighed by the reasonably likely benefits. Such calculations have tended to be clearer in the criminal context, where the key benefit has always been avoidance or reduction of a term of imprisonment.

For corporations, there is substantial value in the prospect that cooperation may lead to resolutions short of an enforcement action. While time will tell the circumstances in which the SEC will be willing to go the route of non-prosecution agreements or deferred prosecution agreements, the availability of these resolutions raises the possibility that companies may see more concrete benefits in return for cooperation. Companies involved in investigations should consider these possible forms of resolution in their dealings with the enforcement staff.

One subtext underlying the SEC's initiatives highlights a contrast between the current Commission and its predecessor. Some of the new measures continue a trend of increased delegation of authority from the Commission to the Director of the Division of Enforcement and other senior enforcement staff. This is a sharp reversal from the approach of the prior administration, which was noteworthy for a number of steps that reduced the authority and freedom to act of the enforcement staff. The enforcement staff should stay mindful that greater authority also brings greater responsibility to exercise careful and balanced judgment.

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