On February 5, 2010, during PLI’s annual “The SEC Speaks,” top officers of the SEC’s Division of Enforcement discussed the Division’s new initiatives. While it was cold and snowing outside, inside the new informer provisions threatened to make it hotter for public companies, market participants and others under investigation.

**Cooperation**

Enforcement officials were quick to elaborate on the Commission’s new cooperation guidelines, which we have described in more detail in a prior Client Alert, [SEC Cooperation Game Changer Or the Same Old Game?](#) Deputy Director Lorin Reisner initially summarized the new cooperation tools:

- **Cooperation Agreements**: in which the Division agrees in writing to recommend to the Commission that a cooperator receive credit for cooperating, if the cooperator provides substantial assistance in the investigation and enforcement action.

- **Deferred Prosecution Agreements**: in which the Commission agrees in writing to forego an enforcement action against a cooperator — if the individual or company agrees to cooperate fully and truthfully and to comply with certain undertakings.

- **Non-prosecution Agreements**: in which, under very limited circumstances, the Commission agrees not to pursue an enforcement action against a cooperator in exchange for full and truthful testimony and assistance in connection with an investigation or enforcement action and compliance with express undertakings.

Next, he described the four general considerations which the staff and Commission will consider when evaluating what weight should be given for cooperation when making charging decisions:

- The degree of assistance provided by the cooperating individual,
- The importance of the underlying matter,
- The culpability of the individual witness, and
- The appropriateness of cooperation credit based upon the risk profile of the cooperating individual.

He emphasized that these considerations are analogous to those previously issued for corporations in the Seaboard Report, although the standards are somewhat different. The affect of these new policies is to bring uniformity to the program — a change that one attendee noted would be revolutionary.
Deputy Reisner then answered a number of previously submitted questions. First, he explained that the cooperation tools are to be implemented by signing written agreements with witnesses who are prepared to provide substantial evidence, including testimony, which is timely, thorough and useful to the SEC’s enforcement effort. This should include all non-privileged information requested, interviews with the staff in which the witness responds to all questions, and truthful testimony. In return, the Division agrees to recommend that the witness’ cooperation be taken into consideration by the Commission. If the assistance is substantial enough, the Division may agree to make a specific recommendation. These tools provide incentives to potential witnesses to be the first to offer testimony so as to add to the quickness of the Division’s enforcement efforts.

Second, the cooperation policy is different from what preceded it because it provides a defined and reliable framework. Credit will be awarded for earlier, more extensive cooperation provided at or near the beginning of an investigation. It allows counsel for witnesses to make a practical assessment of the viability of cooperation.

Third, the Division recognizes that substantial cooperation benefits to the Division will result only if there are real benefits to witnesses. The Division will extend significant credit and benefits to those who enter cooperation agreements and comply with them. This is the only way the program can work. But the witnesses have to come through with substantial information. Those who do not fully cooperate can expect full penalties under law and a statement to the Commission that the witness did not cooperate.

Fourth, these cooperation agreements will be used only for those witnesses who can offer substantial assistance. The evidence must help in bringing cases against others. Normally, they will be offered to lower level people who can provide useful evidence against higher level people.

Fifth, it is less likely that the Division will offer cooperation agreements to people whose own conduct was egregious. There will be no deals where the result would be to put investors at risk. Those brokers and others in the securities business probably will not be allowed to continue to operate in the business.

The cooperation agreements open the door to witnesses to help the SEC while helping themselves.

**Attorney Conflicts**

Deputy Reisner emphasized that this broader ability provided by cooperation agreements expands the possibilities for conflicts for attorneys in multiple representation situations. Only the first witness to come forward with an offer to cooperate is apt to get a cooperation agreement and he or she will have to testify against others. Thus, a conflict may be present for any attorney trying to advise one client where cooperation may be adverse to the interests of another client. The SEC Enforcement staff will be carefully evaluating all multiple representation situations. In other words, companies may more often have to hire separate counsel for each of its employees who require counsel.

**Insider Trading and SOX Claw-Back Provision**

The SEC is pursuing a national effort to monitor securities market professionals and institutional investors who may be abusing their positions. Examples are the recent Galleon Management and Cutillo Wall Street cases in which 31 defendants have been sued involving over $70 million in alleged insider trading profits. The staff is developing investigative techniques which allow them to analyze masses of trading data so that they can
catch larger schemes that previously may have remained hidden because of the complexity and many interwoven threads.

Also, the SEC is reaching out to investigate transactions in new products. Witness the recent case brought by the SEC involving credit default swaps. Moreover, the SEC is in the process of expanding its expertise in new types of derivatives and is leading efforts to require uniform trade reporting in all markets.

Section 304 of the Sarbanes-Oxley Act (SOX) contains a claw-back provision which has recently been used to seek return of bonuses and stock profits when there has been a restatement due to securities fraud, even from executives who are not alleged to have participated in the fraud. This is not an isolated incident. You can expect more such cases in the future.

**Limitation on Access of Other Regulators to SEC Information**

Under a changed policy, the SEC may no longer provide to other regulators and criminal authorities without limitation all information the SEC collects. In cases where the SEC has entered an agreement to limit the use of information it receives from a cooperating witness, in order for other authorities to obtain that information from the SEC through voluntary sharing, the requesting authority will have to agree to apply the same limitations to which the SEC agreed in obtaining the information. Hence, where for example, the Division accepts proffered testimony from a witness with a promise not to use the information obtained as affirmative evidence against the witness, other authorities also will have to agree to this limitation in order to obtain the information from the SEC pursuant to an access request.

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**Endnote:**


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