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SEC Announces New Cooperation Initiative

On January 13, 2010, the SEC announced new provisions to encourage individuals and business organizations to cooperate in SEC investigations. Noting a “tension between the objectives of holding individuals fully accountable for their misconduct and providing incentives for individuals to cooperate with law enforcement authorities,” the new initiative establishes incentives for full and truthful cooperation similar to those currently in use by the Department of Justice. The SEC believes that the cooperation initiative will strengthen its enforcement efforts, describing the initiative as “a potential game-changer for the Division of Enforcement.” The initiative involves three measures to improve the quality, quantity and timeliness of assistance from individuals and business organizations.

First, the initiative allows the staff to use various tools to foster cooperation, including cooperation agreements, deferred prosecution agreements, and non-prosecution agreements. These tools will be used when a witness provides substantial assistance such as full and truthful information and testimony. Thus, the SEC will be able to offer witnesses who come forward early the potential of more lenient treatment in exchange for their cooperation. Such tools have been employed by the Department of Justice for several years, but were previously unavailable to the SEC.

Second, the SEC has expedited the witness immunity request process. The new, streamlined process will allow requests to the Department of Justice to occur in a more timely fashion when the SEC determines that a witness has the ability to assist in its investigation or enforcement action.

Third, the SEC has established criteria for determining whether, how much, and in what manner to credit cooperation. It is anticipated that this new policy will serve as an incentive for individuals to report violations promptly and cooperate fully. The new policy calls for consideration of the following four factors: (1) the assistance provided by the cooperating individual; (2) the

importance of the underlying matter in which the individual cooperated; (3) the societal interest in ensuring the individual is held accountable for his or her misconduct; and (4) the appropriateness of cooperation credit based upon the risk profile of the cooperating individual.

Despite these enhanced incentives, cooperation in an SEC inquiry or formal investigation—particularly when it involves waiving the attorney-client privilege—should be thoroughly and carefully analyzed, as it can carry serious and far-ranging consequences. Our attorneys have extensive expertise in representing individuals and companies in investigations and litigation with the SEC and various state and federal agencies. If you are contacted by the SEC about an investigation, please do not hesitate to call upon us for advice and assistance.

About the Authors

Paul E. Coggins is a partner at Locke Lord. He is the head of Locke Lord's national White Collar Criminal Defense and Internal Investigations practice. Mr. Coggins was the United States District Attorney for the Northern District of Texas from 1993-2001.

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