CORPORATE COUNSEL
An ALM Website
corpcounsel.com | December 13, 2016

Four Steps of Cooperation During an SEC Investigation

From the Experts

Neal Marder, Peter Altman and Josh Rubin

Speaking to an audience in Washington, D.C., in November 2015, outgoing SEC Division of Enforcement director Andrew Ceresney described the benefits of cooperation during an SEC investigation as "significant" and "tangible." Ceresney highlighted several Foreign Corrupt Practices Act (FCPA) investigations over the prior 12 months in which the SEC's settlement with the company included reduced penalties on the ground of cooperation credit. In addition to reduced charges, settled orders entered by the commission in FCPA cases routinely include reference to specific steps taken by companies to assist the Division of Enforcement in its investigation.

For example, within recent years, the SEC has commended companies for initiating internal investigations and providing the SEC with "real-time" updates of its preliminary findings; terminating or cutting the pay of culpable employees; voluntarily producing documents to the SEC and making witnesses available; reviewing and revising its compliance programs; and voluntarily ceasing and self-reporting unlawful behavior. Such cooperation is often critical to the success of an FCPA investigation by the division because FCPA cases often involve the production of relevant documents and witnesses located outside of the United States, which can be difficult for the division to obtain without the company's assistance. The resulting inclusion of text describing a company's cooperative efforts in settlement documents acknowledges the programmatic importance of this cooperation to the SEC.

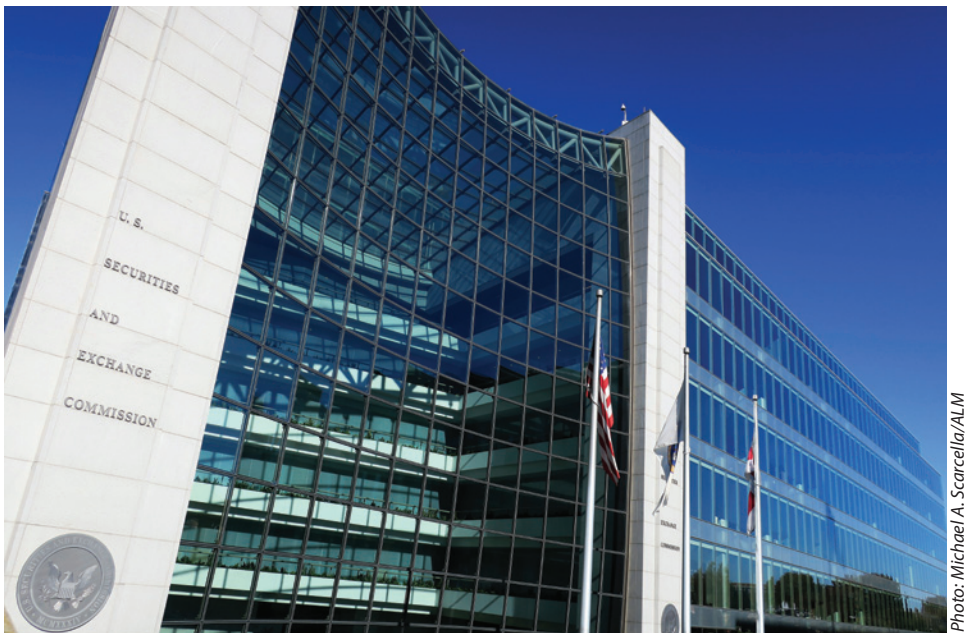

Photo: Michael A. Scarcella/ALM

U.S. Securities and Exchange Commission building in Washington, D.C.

In settled orders outside of the FCPA arena, the division historically has been willing only to include plain-vanilla language describing a company's cooperation: "In determining to accept the Offer of Settlement, the commission considered remedial acts promptly undertaken and cooperation afforded the commission staff." That practice appears to be changing, as more and more settled orders—including those with broker-dealers and investment advisers—are featuring specific descriptions of a company's cooperation with the division. For example, when the SEC recently settled charges against Credit Suisse alleging that it misrepresented a performance metric to overstate the new business obtained by its wealth management business, the settled order described Credit Suisse's cooperation as "meaningful," and specifically noted

that the company "actively facilitated the production of witnesses and documents from outside the United States" and "voluntarily conducted an internal investigation and provided the results of that inquiry to the staff."

Cooperation also played a critical role in the settlements of private equity funds WL Ross & Co. and Blackstone Management Partners. The SEC was particularly effusive with praise in the case of Blackstone, noting that "throughout the staff's investigation, Blackstone voluntarily and promptly provided documents and information to the staff … met with the staff on multiple occasions and provided detailed factual summaries of relevant information, [and] was extremely prompt and responsive in addressing staff inquiries."

At the recent 49th Annual Los Angeles County Bar Association Securities Regulation Seminar held Oct. 21, 2016, Ceresney and other SEC officials specifically noted a trend toward including more thorough cooperation language to encourage more of it. In addition to the benefit of reduced penalties, a statement from the SEC praising a company for its cooperation can make a significant difference in the way an investigation is perceived by investors, employees or customers. Companies will wish to quote such language in any press release, and the SEC order—which is publicly available—will likely be one of the first things seen when searching online for information concerning the investigation.

Investment advisers, in particular, should consider employing strategies from the inception of their response to an SEC investigation designed to earn this type of credit. In the current climate, they face enormous pressure to achieve attractive returns even as management and incentive fees are pushed lower. To the extent that an investment adviser cannot extract itself from an SEC investigation, it should be focused on positioning itself for the specific reference to its cooperation in the settled order—the very type of "significant" and "tangible" benefit that Ceresney described. Indeed, such language could be the core component of an investment adviser's public and investor relations response to an enforcement proceeding.

With the commission set to shift to a majority of Republican appointees following the inauguration of President-elect Donald Trump, the future scope of the division's cooperation program is unclear. Recent trends, however, suggest that the government's use of a carrot of cooperation credit should persist under the next round of leadership at the SEC, and clients should plan to continue to evaluate the benefits of cooperation, particularly given the SEC's ability to refer cases for criminal investigation to the Department of Justice. In that regard, it is clear that the relevant question when a client is the target of an SEC investigation is not "should we cooperate with the SEC" but rather "how can we cooperate with the SEC" in order to achieve the best possible result? That question is, of course, complex, and the answer varies with the facts of each investigation. There are, however, key steps that both in-house and outside counsel should take each time they are faced with an SEC investigation in order to best position a company for credit.

STEP 1: Identify the Issue and Triage

When a company first learns of an SEC investigation, it is imperative that the company and its counsel (whether in-house or outside) immediately seek to determine the scope of the investigation. Understanding the company's position in the overall investigation can be difficult, as the division is often reluctant to share information in the early stages of an investigation. However, any information that can be obtained about the nature and scope of the investigation can facilitate preventive action and planning to mitigate further damage. For example, if the investigation concerns suspicious trading by an individual in a personal account, the company should consider immediately freezing that employee's ability to trade pending further internal review. Such remedial measures are often viewed favorably by the division, and can inure to the company's benefit during later stages of the investigation.

Document preservation and collection processes should also begin at this time. Companies should immediately preserve all documents and begin to identify relevant custodians for subsequent electronic document searches. The company can also begin to interview employees with potentially relevant information. The company should also determine whether it owes any disclosure obligations to an auditor or other constituency.

Finally, and perhaps most critically, this early stage offers the company and counsel an opportunity to build a positive rapport with the staff attorney or other professional from the division handling the investigation. This "line-level" staff member wields substantial discretion in developing the factual record, guiding the investigation and ultimately recommending a disposition of the investigation.

STEP 2: Respond to Requests and Subpoenas

SEC staff attorneys are used to hearing counsel say, "My client intends to cooperate." The proof of this intention,

of course, comes through conduct, not words, and there is no easier way to demonstrate cooperation than through timely and thorough compliance with requests for documents and testimony. The SEC may use several different tools for gathering information during investigations. It can serve a subpoena on a company or an individual. It also may use more informal books and records requests with registered entities. When responding to these requests, counsel should always give serious thought to privilege issues, and be thoughtful in the order in which they produce documents.

As the company and counsel work with the SEC staff attorney and with their own staff to comply with document requests, it is essential to remember who will be on the receiving end of the document production. Often it will be the case that one person will be digging through hundreds of thousands of documents. Knowing this fact should shape the timing of production; it also provides an opportunity to demonstrate cooperation and professionalism to an SEC staff attorney by presenting documents in an organized and intuitive manner.

STEP 3: Engage With the Staff

Once the SEC has utilized its resources and tools to gather documents and testimony, it will review the evidence it has obtained in order to fine-tune its legal theory. Its staff will also determine at this point whether it will recommend that the SEC pursue action against individuals as well as the company. Much like the September 2015 "Yates Memo," which provides DOJ guidance regarding the handling of individuals involved in an investigation, current SEC policy requires the division to evaluate potential liability for individuals in its internal memoranda to the commission on proposed enforcement. Under Ceresney's leadership, an increasing number of enforcement actions have included named individuals. A company's cooperation during the investigation will facilitate an open and frank discussion about individual liability, and give counsel the best possible chance at advocating successfully for no individuals to be named in a settled action.

As the investigation winds down, division staff will decide whether to recommend that the commission authorize the closing of the investigation, a settlement or litigation involving some combination of the various remedies available to the SEC. Cooperation, again, will give counsel the best possible insight into the possible paths of disposition.

STEP 4: Take Action

The end of an investigation presents a major fork in the road. Absent the closing of an investigation, will the enforcement action be settled or litigated? Settlement offers the quickest resolution, and the company has the ability to negotiate the language in the order. Assuming that the company cooperated thoroughly with the SEC throughout the process, the settlement negotiations provide an opportunity to obtain favorable language memorializing the settlement—a public document—and to obtain reduced remedies.

Absent a settlement, which is often the most favorable way to resolve an SEC investigation, the case will proceed toward litigation, typically with a Wells notice preceding public action in which the SEC discloses to the company its intention to bring an enforcement action. As is the case with private litigation, proceeding to litigation is risky for both the SEC and the company. At that point, a company's cooperation will no longer have any meaningful value.

The Bottom Line

While no two SEC investigations are identical, most will follow roughly the path outlined above. It is imperative for counsel to remember, as an investigation unfolds, that regardless of the facts or details of a particular investigation, maintaining an open, professional and respectful line of communication with the SEC staff is key. While counsel must always be vigorous advocates for the client, zealous advocacy often requires thoughtful and reasonable cooperation with the SEC. Engaging in such cooperation at each stage of the investigation is the best method to achieve an optimal outcome.

Neal Marder *is a partner in the litigation practice at Akin Gump Strauss Hauer & Feld, with an emphasis on the defense of consumer fraud class and mass actions. He also works on complex business and commercial litigation, white-collar and internal investigations and intellectual property disputes.* ***Peter Altman*** *is senior counsel at the firm representing investment management firms, financial institutions, private and public companies and individuals in white-collar and other government enforcement and regulatory matters and litigations. He is a former senior counsel in the SEC's enforcement division.* ***Josh Rubin*** *is an associate at the firm who previously served as a law clerk to Judge Margaret Morrow of the U.S. District Court for the Central District of California.*