

Securities and Exchange Commission
Division of Enforcement



Enforcement Manual

Office of Chief Counsel

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6.2.2 Deferred Prosecution Agreements

Basics:

A deferred prosecution agreement is a written agreement between the Commission and a potential cooperating individual or company in which the Commission agrees to forego an enforcement action against the individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in the Commission's investigation and related enforcement actions; (2) enter into a long-term tolling agreement; (3) comply with express prohibitions and/or undertakings during a period of deferred prosecution; and (4) in most cases, agree either to admit or not to contest underlying facts that the Commission could assert to establish a violation of the federal securities laws. If the agreement is violated during the period of deferred prosecution, the staff may recommend an enforcement action to the Commission against the individual or company without limitation for the original misconduct as well as any additional misconduct. Furthermore, if the Commission authorizes the enforcement action, the staff may use any factual admissions made by the cooperating individual or company to file a motion for summary judgment, while maintaining the ability to bring an enforcement action for any additional misconduct at a later date.

Procedures:

- Deferred prosecution agreements must be approved by the Commission.
- Staff should retain with the case file a copy of each deferred prosecution agreement and the memorandum documenting the basis for entering into the agreement.
- Unless the Commission directs otherwise, deferred prosecution agreements will be made available on the Commission's website.

Considerations:

- To determine whether to recommend that the Commission enter into a deferred prosecution agreement, the staff should use the standard cooperation analysis set forth in [Section 6.1](#) of the Manual.
- An admission or an agreement not to contest the relevant facts underlying the alleged offenses generally is appropriate.
- A deferred prosecution agreement should generally include the following terms:
 - the cooperating individual or company agrees to cooperate truthfully and fully, as directed by the Division's staff, in investigations and related enforcement proceedings including, but not limited to, producing all potentially relevant non-privileged documents and materials to the Commission, responding to all inquiries, appearing for interviews, and testifying at trials and other judicial proceedings as requested by the staff, and waiving the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure;

- the cooperating individual or company agrees to toll the applicable statute of limitations period;
 - the cooperating individual or company agrees not to violate the securities laws;
 - the cooperating individual or company shall make any agreed upon disgorgement or penalty payments;
 - if the cooperating individual or company satisfies the terms of the deferred prosecution agreement during the term of the agreement, the Commission will not pursue any further enforcement action concerning the matter referenced in the agreement;
 - if the individual or company violates the agreement during its term, the Division may recommend and the Commission may pursue an enforcement action against the individual or company without limitation;
 - the cooperating individual or company agrees that the Commission may use statements, information, and materials provided pursuant to the agreement against him/her/it if the individual or company violates the terms of the agreement; and
 - additional prohibitions and undertakings designed to protect the investing public.
- The term of a deferred prosecution agreement should not exceed five years. In determining the appropriate term, the staff should consider whether there is sufficient time to ensure that the undertakings in the agreement are fully implemented and the related prohibitions have adequately reduced the likelihood of future securities law violations.

6.2.3 Non-Prosecution Agreements

Basics:

A non-prosecution agreement is a written agreement between the Commission and a potential cooperating individual or company, entered in limited and appropriate circumstances, that provides that the Commission will not pursue an enforcement action against the individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in the Commission's investigation and related enforcement actions; and (2) comply, under certain circumstances, with express undertakings. If the agreement is violated, the staff retains its ability to recommend an enforcement action to the Commission against the individual or company without limitation.

Procedures:

- Non-prosecution agreements must be approved by the Commission.
- Staff should retain with the case file a copy of each non-prosecution agreement and the memorandum documenting the basis for entering into the agreement.

6. Cooperation

The staff should carefully consider the use of different tools to encourage and facilitate cooperation by individuals and companies to advance its investigations and related enforcement actions.

6.1 Analytical Frameworks

6.1.1 Framework for Evaluating Cooperation by Individuals

In January 2010, the Commission issued a policy statement articulating a framework for evaluating cooperation by individuals in the Commission's investigations and actions. Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, Securities Exchange Act Release No. 61340 (Jan. 13, 2010) (<http://www.sec.gov/rules/policy/2010/34-61340.pdf>). This policy statement can be found at 17 CFR § 202.12. The policy statement identified four general considerations to use in assessing cooperation:

- (a) Assistance provided by the individual. The Commission assesses the assistance provided by the cooperating individual in the Commission's investigation or related enforcement actions ("Investigation") by considering, among other things:
 - (1) The value of the individual's cooperation to the Investigation including, but not limited to:
 - (i) Whether the individual's cooperation resulted in substantial assistance to the Investigation;
 - (ii) The timeliness of the individual's cooperation, including whether the individual was first to report the misconduct to the Commission or to offer his or her cooperation in the Investigation, and whether the cooperation was provided before he or she had any knowledge of a pending investigation or related action;
 - (iii) Whether the Investigation was initiated based on information or other cooperation provided by the individual;
 - (iv) The quality of cooperation provided by the individual, including whether the cooperation was truthful, complete, and reliable; and
 - (v) The time and resources conserved as a result of the individual's cooperation in the Investigation.
 - (2) The nature of the individual's cooperation in the Investigation including, but not limited to:

- (i) Whether the individual's cooperation was voluntary or required by the terms of an agreement with another law enforcement or regulatory organization;
 - (ii) The types of assistance the individual provided to the Commission;
 - (ii) Whether the individual provided non-privileged information, which information was not requested by the staff or otherwise might not have been discovered;
 - (iv) Whether the individual encouraged or authorized others to assist the staff who might not have otherwise participated in the Investigation; and
 - (v) Any unique circumstances in which the individual provided the cooperation.
- (b) Importance of the underlying matter. The Commission assesses the importance of the Investigation in which the individual cooperated by considering, among other things:
- (1) The character of the Investigation including, but not limited to:
 - (i) Whether the subject matter of the Investigation is a Commission priority;
 - (ii) The type of securities violations;
 - (iii) The age and duration of the misconduct;
 - (iv) The number of violations; and
 - (v) The isolated or repetitive nature of the violations.
 - (2) The dangers to investors or others presented by the underlying violations involved in the Investigation including, but not limited to:
 - (i) The amount of harm or potential harm caused by the underlying violations;
 - (ii) The type of harm resulting from or threatened by the underlying violations; and
 - (iii) The number of individuals or entities harmed.⁶

⁶ Cooperation in Investigations that involve priority matters or serious, ongoing, or widespread violations will be viewed most favorably.

- (c) Interest in holding the individual accountable. The Commission assesses the societal interest in holding the cooperating individual fully accountable for his or her misconduct by considering, among other things:
- (1) The severity of the individual's misconduct assessed by the nature of the violations and in the context of the individual's knowledge, education, training, experience, and position of responsibility at the time the violations occurred;
 - (2) The culpability of the individual, including, but not limited to, whether the individual acted with scienter, both generally and in relation to others who participated in the misconduct;
 - (3) The degree to which the individual tolerated illegal activity including, but not limited to, whether he or she took steps to prevent the violations from occurring or continuing, such as notifying the Commission or other appropriate law enforcement agency of the misconduct or, in the case of a violation involving a business organization, by notifying members of management not involved in the misconduct, the board of directors or the equivalent body not involved in the misconduct, or the auditors of such business organization of the misconduct;
 - (4) The efforts undertaken by the individual to remediate the harm caused by the violations including, but not limited to, whether he or she paid or agreed to pay disgorgement to injured investors and other victims or assisted these victims and the authorities in the recovery of the fruits and instrumentalities of the violations; and
 - (5) The sanctions imposed on the individual by other federal or state authorities and industry organizations for the violations involved in the Investigation.
- (d) Profile of the individual. The Commission assesses whether, how much, and in what manner it is in the public interest to award credit for cooperation, in part, based upon the cooperating individual's personal and professional profile by considering, among other things:
- (1) The individual's history of lawfulness, including complying with securities laws or regulations;
 - (2) The degree to which the individual has demonstrated an acceptance of responsibility for his or her past misconduct; and
 - (3) The degree to which the individual will have an opportunity to commit future violations of the federal securities laws in light of his or her occupation -- including, but not limited to, whether he or she serves as: a licensed individual, such as an attorney or accountant; an associated person of a regulated entity, such as a broker or dealer; a fiduciary for

other individuals or entities regarding financial matters; an officer or director of public companies; or a member of senior management -- together with any existing or proposed safeguards based upon the individual's particular circumstances.

The policy statement also noted that these principles are not listed in order of importance; they are not intended to be all-inclusive; and that facts and circumstances of a particular case may render some of the principles inapplicable or worthy of lesser or greater weight.

6.1.2 Framework for Evaluating Cooperation by Companies

In October 2001, the Commission issued a Report of Investigation and Statement explaining its decision not to take enforcement action against a public company it had investigated for financial statement irregularities. *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Securities Exchange Act Release No. 44969 and AAER-1470 (Oct. 23, 2001) (<http://www.sec.gov/litigation/investreport/34-44969.htm>). In this report, commonly referred to as the Seaboard Report, the Commission articulated an analytical framework for evaluating cooperation by companies. The report detailed the many factors the Commission considers in determining whether, and to what extent, it grants leniency to investigated companies for cooperating in its investigations and for related good corporate citizenship. Specifically, the report identifies four broad measures of a company's cooperation:

- Self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
- Self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;
- Remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
- Cooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.

Since every enforcement matter is different, this analytical framework sets forth general principles but does not limit the Commission's broad discretion to evaluate every case individually, on its own unique facts and circumstances. Similar to the Commission's treatment of cooperating individuals, credit for cooperation by companies may range from taking no enforcement action to pursuing reduced charges and sanctions in connection with enforcement actions. For greater detail regarding the analytical framework used by the Commission to evaluate cooperation by companies, the staff should review the Seaboard Report.