

### ***Factors for a NPA for an Individual in a SEC Enforcement Action***

I have previously written about what conduct can help your company if it is under an investigation by the Department of Justice (DOJ) for Foreign Corrupt Practices Act (FCPA) violations. The key seems to be “extra-ordinary cooperation.” Today we will take a look at a recent Securities and Exchange Commission (SEC) matter where an individual received a Non-Prosecution Agreement (NPA). In an article in the June issue of the Compliance Week magazine, entitled “*How Individuals Win Non-Prosecution Agreements*”, author Jaclyn Jaeger wrote about the recent NPA reached with an individual, as opposed to a corporate defendant. Jaeger called this a “first-of-a-kind case” due to the fact that it is the first time an individual has been given a NPA by the SEC. The case referenced by Jaeger involved an “un-named former senior executive of the institutional money management firm AXA Rosenberg.” Although the matter did not involve any alleged violations of the FCPA, the NPA is certainly instructive for considering how to resolve a SEC action under the FCPA if you are caught up in an individual enforcement action.

In January 2010, the SEC released its Enforcement Cooperation Initiative. Under this Initiative, the SEC established a series of incentives for individuals and companies to assist the SEC in ongoing investigations and during the pendency of enforcement actions. As a part of this Initiative, the SEC released a Cooperation Policy Statement which described four factors that the SEC would consider to “determine whether, how much, and in what manner to credit cooperation.” The four factors were: (1) how much assistance the individual provides; (2) the importance of the underlying matter; (3) the SEC’s interest in holding the individual accountable; and (4) the prior background of the cooperating individual.” The SEC provided the following commentary on each of the four factors.

***Assistance provided.*** Under this factor, Jaeger noted that the individual in question had offered his voluntary cooperation to the SEC at the outset of the investigation. She noted that his “intimate knowledge” of certain quantitative measures the firm used was important to the SEC’s investigation. This voluntary cooperation was provided by the individual to the SEC “without conditions” which the SEC believed enhanced his credibility.

***Importance of the underlying matter.*** The SEC viewed the investigation and enforcement matter as significant because “it was the first ever arising from errors in a computer-based, quantitative investment model”. His cooperation led to the recovery of “big dollars for victims” due to two separate enforcement actions the SEC brought.

***Interest in holding the individual accountable.*** The SEC believed that the individual played a limited role in the events surrounding the violation but also noted that while still an employee, he had advocated that the error which led to the enforcement action be disclosed to the company President. The SEC noted that the individual’s cooperation “maximized the SEC’s law

enforcement interests by facilitating the quick and successful resolution of its enforcement action”.

***The Executive’s profile.*** The individual was not “an associated person of a regulated entity, a fiduciary for other individuals or entities regarding financial matters, or an officer or director of any company.” Further, he did not have any black marks in the way of prior disciplinary actions on his record. Lastly, after the investigation was concluded, he resigned from AXA Rosenberg.

In her article, Jaeger spoke to some industry experts regarding the effect of this NPA. All people interviewed emphasized the fact specific nature of the resolution. The two key factors which may differentiate this resolution from others, the first being the role this person had in the violation. Jaeger quoted Tom Gorman who said that “Whether you get no prosecution or just diminished sanctions will really be a function of the individual’s role in the underlying conduct”. The second factor, I believe, is that the individual in question is no longer working in the industry and therefore he is no longer in a position to commit future violations of federal securities laws.

Jaeger contracted the AXA Rosenberg matter with another case involving John Cinderey, which showed “a good look at each end of the spectrum” of enforcement. In the Cinderey matter, he received credit for his “substantial assistance” in a SEC investigation but, at the end of the day, Cinderey was named as a defendant in the SEC’s enforcement action against United Commercial Bank. Although the SEC extracted no fine against Cinderey for his role in misleading the bank’s auditors regarding the risks the bank faced in certain outstanding loans, it was noted that he did pay a fine related to action brought by the Federal Deposit Insurance Corporation (FDIC). Cinderey did agree to a permanent injunction proffered by the SEC.

Jaeger quoted Keith Miller for the proposition that the key takeaway for companies and individuals in SEC enforcement actions should be “setting the tone with the staff at the onset of any investigation is very important, because the foundation for how the SEC is going to view and treat you later. However, Tom Gorman emphasized that it is the individual’s involvement in the underlying wrongful conduct which will be very important. While credit and a diminished penalty are possible, he does not believe that the SEC will “give them a pass if they’re one of the major players” in the fraud or violation.

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