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August 2009

BUSINESS LITIGATION UPDATE**SEC Enforcement Director Revamping Division, Emphasizing Speed and Specialization**

In his first significant public speech since taking over as director of the Enforcement Division of the Securities and Exchange Commission (SEC), Robert Khuzami earlier this month detailed several significant structural and policy changes that signal tougher and swifter action by the Enforcement Division.¹ These initiatives provide some specifics to implement Khuzami's pledge to his staff on his first day in office—that the division would be as strategic, swift, smart and successful as possible. They aim to provide staff with more autonomy and speed up the pace of the division's efforts. In many respects, Khuzami seems to be aiming to remake the division in the image of the U.S. Attorney's office where he was once a prosecutor.

The most significant changes are discussed below.

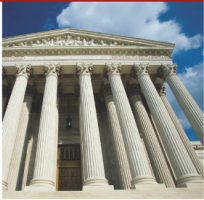
FORMAL ORDERS

The SEC has delegated to the Enforcement Division the authority to issue formal orders of investigation. Formal orders enable the Enforcement staff to issue subpoenas to compel the production of documents and testimony. Previously, the commissioners had to vote to issue such an order, which acted as an early-stage review of the staff's pursuit of a particular matter. Now, formal orders can be issued by the director, the deputy director, associate directors, regional directors and associate regional directors. The result of giving this added discretion to the staff is likely to be a faster escalation of informal inquiries to formal investigations.

SPECIALIZATION

Khuzami is creating five specialized units designed to build and develop expertise on particular products, practices and markets. This step goes toward the pledge to "get smart" and thereby make investigations move faster and efficiently. The units are:

- Foreign Corrupt Practices Act unit, designed to enhance the SEC's ability to identify FCPA violations;
- Asset management unit, responsible for investment advisers, hedge funds and private equity firms;
- Municipal securities and public pensions unit, which will focus on the municipal securities market and public pension funds;
- Structured and new products unit, to address complex derivatives and other financial products; and



- Market abuse unit, which will focus on large-scale market abuses and complex manipulation schemes.²

STREAMLINED CASE MANAGEMENT AND DECISION-MAKING

Khuzami is “flattening” the management structure of the division by eliminating the branch chief position, which has acted as the first level of review of investigative teams. In addition, he announced that he is delegating the authority to approve “routine case decisions” from the deputy director to associate directors and regional directors. Like the change to the formal order approval process, this step is designed to give greater latitude to those who are closer to an investigation and facilitate quicker decision-making.

TOLLING AGREEMENTS

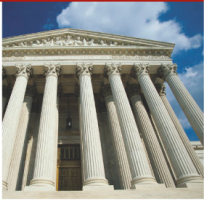
While the thrust of many of Khuzami’s initiatives is to give staff conducting investigations greater autonomy, he is doing the opposite with respect to tolling agreements, e.g., agreements to extend or “toll” the statute of limitations. Such agreements have been most frequently reached at the behest of Enforcement staff, and Khuzami has emphasized that they have become far too common. He wants the enforcement process to move quickly and believes that the easy availability of tolling agreements has led to delays. Going forward, tolling agreements will require the approval of the director of the division.

COOPERATION

Khuzami reiterated the importance of cooperation to the work of the division and also outlined four specific steps designed to promote cooperation by individuals:

- Developing standards for evaluating cooperation by individuals along the lines of the so-called “Seaboard factors” that are used to assess cooperation by corporations³;
- Delegating to the division director the authority to make immunity requests to the Justice Department;
- Under appropriate circumstances, providing oral assurances to witnesses that the Enforcement Division does not intend to pursue charges against them; and
- Employing deferred prosecution agreements, under which the SEC would forego bringing charges provided that an individual or entity undertook particular actions.

Khuzami also signaled that Enforcement may be raising the bar for giving credit for cooperation, stating that he expects responsiveness and cooperation with Enforcement inquiries, and that only “extraordinary cooperation” will be rewarded.



OFFICE OF MARKET INTELLIGENCE

Khuzami is creating an Office of Market Intelligence to process tips and referrals that come to the Enforcement Division, which apparently number in the hundreds of thousands each year. This office will develop criteria for evaluating this information to enable the division to appropriately direct its efforts.

These initiatives by the new director will mean swift and aggressive action by his division. While this approach by the SEC may be good for the public's view of the markets and of the agency, it remains to be seen whether the interests and rights of those who are under investigation will suffer. The mere pendency of an investigation can harm a company or an individual to such a degree that those under investigation will want a speedy resolution. But they have a greater interest in ensuring that the agency's power is exercised judiciously and that there is a fair opportunity to air their positions on the facts and the law to SEC staff whose views of a case are likely to be more detached than those of the staff on the front line of the investigation.

FOR MORE INFORMATION

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¹ Robert Khuzami, Director, SEC Division of Enforcement, remarks before the New York City Bar: "My First 100 Days as Director of Enforcement" (Aug. 5, 2009) available at <http://sec.gov/news/speech/2009/spch080509rk.htm>.

² The Subprime Working Group, established by the Enforcement Division in 2007 in response to the credit crisis, will continue to operate and work cooperatively with these new units.

³ 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, SEC Release No. 34-44969 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.