

Deciphering Cooperation in SEC Investigations

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Recently, the SEC has emphasized that timely cooperation not only enhances credibility but also improves the chances of securing favorable outcomes for investigation targets.

The SEC outlined specific behaviors that qualify as cooperation, such as providing documents that are not compelled, conducting internal investigations and waiving privileges to facilitate the development of a comprehensive record.

However, not all actions are considered cooperative. Merely complying with subpoenas and document requests is expected and does not necessarily qualify as cooperation. Moreover, there are behaviors, according to the SEC, that can hinder cooperation efforts and negatively impact credibility. The SEC warned against unreasonable delays in document production, spurious privilege claims, witness coaching, conflicts of interest and attacks on SEC staff, labeling such conduct as “lawyers behaving badly.”

The SEC has provided a framework that outlines the range of tools available to facilitate and reward cooperation, emphasizing its importance in fulfilling the agency’s mission of protecting investors and maintaining fair and efficient markets.

By actively engaging with the SEC, individuals and entities can contribute to the detection of violations, enhance the effectiveness of investigations and potentially avoid or minimize sanctions.

What Is Cooperation?

The established guidelines for evaluating cooperation by individuals and entities involved in its investigations. These guidelines consider factors such as:

- The value and nature of the cooperation
- The importance of the underlying matter
- The accountability of the individual or entity
- The acceptance of responsibility for misconduct

Similarly, the SEC has articulated measures for evaluating cooperation by companies, including self-policing, self-reporting of misconduct, remediation efforts, and cooperation with law enforcement authorities.

Cooperation in SEC investigations and enforcement actions can take various forms, ranging from providing valuable information to actively assisting in the investigation process. The benefits of cooperation can be substantial, including reduced charges and sanctions, or even the possibility of no enforcement action being taken at all. This incentivizes individuals and entities to proactively engage with the SEC and contribute to the resolution of matters under investigation.

Cooperation with the SEC is not only a regulatory requirement but also a strategic approach for mitigating potential enforcement actions. By actively engaging with the SEC, individuals and entities can contribute to the detection of violations, enhance the effectiveness of investigations and potentially avoid or minimize sanctions. Understanding what constitutes cooperation and adhering to ethical conduct can significantly influence the outcome of SEC inquiries, underscoring the importance of transparency and accountability in the regulatory process.

Minimizing Penalties Through Cooperation

There are a couple of examples that illustrate how cooperating with the SEC resulted in minimized or reduced penalties.

- In the first instance, a company avoided financial penalties by promptly identifying wrongdoers, internally addressing misconduct, conducting a thorough and impartial investigation, replacing ineffective management and taking steps to rectify harm to investors and improve deficient policies.
- Similarly, in another matter the company demonstrated cooperation by voluntarily reporting to the SEC, conducting an internal investigation and promptly sharing preliminary findings, witnesses and key documents with the staff. They facilitated testimony from former employees, worked to rectify accounting discrepancies, replaced management and board members, and overhauled accounting procedures.

Ultimately, the company reached a settlement with the SEC, agreeing to cease violating negligence-based anti-fraud provisions of the Securities Act of 1933, among other agreed-to terms (notably, the company's bankruptcy likely influenced the terms of the settlement).

Navigating SEC-Related Exposures

Should your company encounter any SEC investigation or enforcement action, seeking guidance from seasoned legal counsel is critical. Coupled with ensuring that your management or professional liability insurance policy offers coverage for SEC-related matters, these measures can potentially save your company significant time and millions of dollars in defense expenses.

For a discussion on what insurance coverage may be available for investigations of individuals and the company, NFP's professionals are available to assist and navigate the diverse exposures your business may encounter.



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