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In This Issue

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Is Cooperation Credit Worthwhile? Considerations in Self-Reporting to the SEC


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Whether or not to self-report misconduct to government regulators, such as the U.S. Securities and Exchange Commission (SEC), is a question regulated entities and individuals must increasingly consider. In certain situations, it is in a company's or an individual's best interest to self-report misconduct and cooperate with the regulator's investigation, with the hope that the company or individual will be rewarded. The SEC offers real benefits—such as reduced charges or penalties, deferred prosecution agreements or non-prosecution agreements—to those who self-report and cooperate.[1] The SEC has also warned companies that they may face enhanced penalties if the SEC learns that a company knew of violations and decided not to report them.[2] Andrew Ceresney (Ceresney), Director of the SEC's Division of Enforcement, recently touted self-reporting as "critical to the success of the SEC's cooperation program."[3] The SEC will measure a company's cooperation efforts at the end of an investigation, rather than at the time of a self-report. In short, self-reporting opens the door to many of the tangible benefits of cooperation. However, a favorable result is by no means guaranteed.

The SEC has a variety of ways to reward cooperation. For example, it may decline to bring an enforcement action, reduce or waive penalties, be flexible in its disgorgement analysis, offer the company or individual the opportunity to negotiate more favorable language in the settlement order or publicly acknowledge the company's or individual's cooperation in a settlement order and related announcements. In certain cases, those who self-report securities law violations and provide substantial assistance to the SEC are able to enter into written cooperation agreements with the agency to receive credit in the form of reduced charges and penalties.

In January 2010, the SEC's Division of Enforcement launched its formal cooperation program which identified self-policing, self-reporting, remediation and cooperation as the primary factors to be considered in determining appropriate charges and remedies.[4] This guidance stems from what is known as the Seaboard Report, which was released by the SEC in 2001 and remains the primary playbook for companies and their counsel to consider when seeking cooperation credit from the SEC. As set forth in the Seaboard Report,

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1 Andrew Ceresney, Director, Division of Enforcement, *Keynote Address at the American Conference Institute's 32nd FCPA Conference* (Nov. 17 2015) at 2, available at https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html [hereinafter Ceresney FCPA Address].

2 *Id*.

3 *Id*.

4 *See* SEC Press Release 2010-6, *SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations* (Jan. 13, 2010), *available at* https://www.sec.gov/news/press/2010/2010-6.htm. The program articulated a range of incentives potentially available to individuals and companies who voluntarily report violations and assist the SEC in enforcement actions, as set forth in the so-called Seaboard Report detailing the SEC's framework for evaluating cooperation by companies (*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), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm) [hereinafter Seaboard Report] as well as the SEC policy statement setting forth the factors the SEC will consider in determining cooperation by individuals (SEC Release 34-61340, *Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions* (Jan. 13, 2010), *available at* https://www.sec.gov/rules/policy/2010/34-61340.pdf).

when considering what, if any, cooperation credit to award a company, the SEC will assess how promptly the self-report was made, the completeness of the information provided and the company's willingness to voluntarily disclose information.[5] Additionally, the SEC takes into account any remediation efforts by the company, including whether any culpable employees were fired and whether victims of the wrongdoing were appropriately compensated.[6] Lastly, the SEC will consider the amount and quality of cooperation by the company in the SEC's investigation and/or enforcement action.[7] The weight the SEC places on each cooperation factor may vary based on the circumstances of each case. In order to receive maximum credit, companies should be prepared to proactively provide the SEC with meaningful information, such as key documents, summaries of their internal findings and supporting evidence, as well as access to witnesses.

At the "SEC Speaks in 2016" conference, Sharon Binger, Regional Director of the SEC's Philadelphia office, announced that since the beginning of its formal cooperation program, the SEC has signed over 103 cooperation agreements, six non-prosecution agreements and nine deferred prosecution agreements in a wide variety of enforcement matters.

The SEC has highlighted the importance of cooperation in cases involving violations of the Foreign Corrupt Practices Act (FCPA), in which the SEC has historically offered reduced civil penalties based on the level of cooperation received.[8] In its first disgorgement-only settlement, *In the Matter of The Goodyear Tire & Rubber Company*, the SEC rewarded the company for self-reporting bribes made in violation of the FCPA and engaging in prompt remedial acts and significant cooperation with the SEC.[9] Instead of having to pay a penalty equal to the amount of the disgorgement ($14,122,525)—as is typical—Goodyear avoided paying a penalty altogether.

Recently, on July 12, 2016, the SEC announced a settlement with Johnson Controls Inc. (Johnson), in which the company agreed to pay $14 million to settle SEC charges that it violated the books and records and internal accounting controls provisions of the FCPA. The SEC order included language recognizing Johnson's self-report of the FCPA violation, its retention of outside counsel to conduct an internal investigation and its "thorough, complete, and timely cooperation throughout the investigation."[10] The order noted that Johnson's cooperation involved providing the results of its investigation and related documentation to the SEC in real time, including factual chronologies, interview summaries and English translations of numerous documents and e-mails.

5 Seaboard Report.

6 *Id.*

7 *Id.*

8 *See* SEC Press Release 2014-240, *SEC Charges Texas-Based Layne Christensen Company with FCPA Violations* (Oct. 27, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857; *see also* SEC Press Release 2015-62, *SEC Charges Oregon-Based Defense Contractor with FCPA Violations* (Feb. 24, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-38.

9 *See* SEC Press Release 2015-38, *SEC Charges Goodyear with FCPA Violations* (Feb. 24, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-38.html.

10 *In the Matter of Johnson Controls, Inc.*, Rel. No. 78287 (July 11, 2016), *available at* https://www.sec.gov/litigation/admin/2016/34-78287.pdf.

In a limited number of cases, the SEC will offer cooperators a deferred prosecution agreement or non-prosecution agreement in exchange for self-reporting violations and cooperating with the SEC's investigation.[11] These agreements allow a company or an individual to defer or eliminate an SEC enforcement action in exchange for full cooperation and compliance with certain undertakings imposed by the SEC, such as retention of a corporate monitor or compliance consultant to strengthen the organization's compliance program. In the FCPA context, Ceresney recently stated that a company is *required* to self-report potential violations in order to even be eligible for a deferred prosecution agreement or a non-prosecution agreement.[12] In practice, self-reporting has become a prerequisite to eligibility for a deferred prosecution agreement or non-prosecution agreement in all SEC investigations.

There are several recent examples of companies and individuals receiving deferred prosecution or non-prosecution agreements because they fully embraced the SEC's cooperation guidelines. In March 2016, the SEC entered into a deferred prosecution agreement with a former chairman of Uni-Pixel Inc. after he agreed to fully cooperate with an investigation regarding misrepresentations the company made to investors in violation of the Securities Act of 1933.[13]

Furthermore, on June 7, 2016, the SEC announced that it had entered into non-prosecution agreements with two unrelated companies after those companies agreed to forfeit ill-gotten gains made as a result of bribes paid to Chinese officials by foreign subsidiaries.[14] This was only the second time the SEC used a non-prosecution agreement in connection with FCPA violations, after the agency reached a similar agreement in 2013 with Ralph Lauren. In announcing these non-prosecution agreements, the SEC highlighted the companies' prompt decisions to self-report misconduct, along with the companies' extensive cooperation in the resulting SEC investigations, which included translating documents from Chinese to English, providing summaries of witness interviews, making witnesses from China available for interviews and sharing detailed findings of their internal investigations with the government.

Specifically, Akamai Technologies Inc. (Akamai) agreed to pay nearly $670,000 in disgorgement and interest as a result of its foreign subsidiary arranging for $40,000 in payments to induce government-owned entities to purchase more services than those entities needed. Nortek Inc. (Nortek) agreed to pay $320,000 in disgorgement and interest as a consequence of $290,000 in improper payments and gifts being made to Chinese officials by Nortek's subsidiary in order to receive preferential treatment, relaxed regulatory oversight and reduced customs duties, taxes and fees. The non-prosecution agreements with these companies stipulate

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[11] *See* SEC Press Release 2015-13, *SEC Charges Former Executive at Tampa-Based Engineering Firm with FCPA Violations* (Jan. 22, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-13.html. The SEC entered into a deferred prosecution agreement with The PBSJ Corporation as a result of its self-reporting and subsequent cooperation with the SEC's investigation.

[12] Ceresney FCPA Address at 2.

[13] *See* SEC Press Release 2016-45, *SEC: Tech Company Misled Investors About Key Product* (Mar. 9, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-45.html.

[14] *See* SEC Press Release No. 2016-109, *SEC Announces Two Non-Prosecution Agreements in FCPA Cases* (June 7, 2016), *available at* http://www.sec.gov/news/pressrelease/2016-109.html.

that the companies are not charged with violations of the FCPA and that the companies will not pay additional monetary penalties.

Notably, the U.S. Department of Justice (DOJ) issued declination letters to Akamai and Nortek relating to the same conduct—the first declination letters issued by the DOJ since the DOJ launched its pilot program this past April.[15] The DOJ issued a similar declination letter in the Johnson case because of the company's cooperation. In rare instances, typically when individuals provide extraordinary cooperation that results in charges against others, cooperation may lead to the closing of an investigation against the cooperator.[16]

It is critical that companies invest the resources necessary to develop a compliance program with controls capable of detecting and mitigating risks in their businesses in an effort to effectively self-police and identify potential violations. It is equally important that registrants set an appropriate "tone at the top" that values compliance throughout the organization. With this framework in place, when a registrant identifies a potential federal securities law violation, it is able to conduct its own internal investigation into the misconduct, with the assistance of in-house or outside counsel and/or other advisors, to determine the best course of action.

Self-reporting and cooperation with regulators is not a "check the box" strategy. It is critical that companies and individuals engage experienced and sophisticated counsel to navigate the often-murky waters of potential cooperation with the SEC. While self-reporting and cooperating do not guarantee that a positive outcome will be achieved with the SEC, Ceresney recently noted that, "companies are gambling if they fail to self-report."[17] In many cases, self-reporting and cooperation will yield substantial benefits to a company or individual who can resolve an SEC enforcement action on better terms than would be available to a company or individual who did not self-report or cooperate. However, once a company decides to self-report and cooperate, it should be prepared to present the SEC with evidence of a thorough internal investigation, remedial efforts taken in response to the issues identified by the company, and improvements to internal processes implemented as a result of the misconduct. If the SEC discovers the misconduct through other channels—such as through its whistleblower program or through a self-report made by an individual—the company could potentially lose the opportunity to earn cooperation credit for self-reporting and could risk facing steeper charges and/or penalties.

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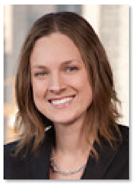
15 While not discussed here in detail, on April 5, 2016, the DOJ announced a new one-year FCPA "pilot program" that outlines a concrete set of standards defining what constitutes cooperation and what credit companies can expect to earn for that cooperation when facing potential criminal charges. The guidance identifies voluntary self-disclosure, full cooperation, timely and appropriate remediation and disgorgement as requirements for a company to qualify for mitigation credit. *See* Press Release, Department of Justice Office of Public Affairs, *Criminal Division Launches New FCPA Pilot Program* (Apr. 5, 2016) *available at* https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

16 *See* SEC Litigation Release 22298, *SEC Credits Former AXA Rosenberg Executive for Substantial Cooperation during Investigation* (Mar. 19, 2012), *available at* https://www.sec.gov/litigation/litreleases/2012/lr22298.htm.

17 Andrew Ceresney, Director, SEC Division of Enforcement, *The SEC's Cooperation Program: Reflections of Five Years of Experience* (May 13, 2015), *available at* https://www.sec.gov/news/speech/sec-cooperation-program.html.

SEC Adopts Amendments to Rules Governing Administrative Proceedings



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On July 13, 2016, the U.S. Securities and Exchange Commission (SEC) announced that it had formally adopted amendments to the rules of practice governing its administrative proceedings.[1] The SEC proposed the amendments last September after facing criticism from attorneys who raised concerns about inadequate due process rights and bias in the agency's in-house tribunal. Last year, a study by the *Wall Street Journal* found that the SEC enjoys a "home-court advantage" when bringing cases in front of its administrative law judges (ALJs) rather than in federal courts.[2] According to the *Wall Street Journal's* analysis, from October 2010 to March 2015, the SEC won approximately 90% of the time in administrative proceedings compared to 69% of the time in federal court.[3]

The amendments begin to address these concerns and involve a number of changes, including the following:

- **Expansion of Timeline:** Under Amended Rule 360, the prehearing period—the time between the start of a proceeding and a hearing before the ALJ—has increased from the current four-month limit to a maximum of ten months for complex matters. A maximum of ten months is now allowed for cases designated as 120-day proceedings, a maximum of six months is allowed for 75-day proceedings and a maximum of four months is allowed for 30-day proceedings. The expanded period will provide defendants with more time to prepare their cases.

- **Increased Discovery Rights:** Under Amended Rule 233, parties in 120-day proceedings are now allowed to take three depositions per side in single-respondent cases and five depositions per side in multi-respondent cases. Each side also has the right to request two additional depositions under an "expedited procedure."

- **Requirement of Disclosing Reliance Defense:** Amended Rule 220 requires respondents to disclose in their answer to an order instituting proceedings whether they will be asserting a reliance defense and "whether they relied on the advice of counsel, accountants, auditors, or other professionals regarding any claim, alleged violation, or remedy sought." Importantly, the failure to assert a reliance defense in an answer may be

1 *See* SEC Press Release 2016-142, *SEC Adopts Amendments to Rules of Practice for Administrative Proceedings* (July 13, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-142.html.

2 *See* Jean Eaglesham, "SEC Wins With In-House Judges," *Wall Street Journal*, May 6, 2015, http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

3 *See id.*

deemed a waiver, and the respondent may not be allowed to assert the defense later in the proceeding.

- **Motions for Summary Disposition:** Amended Rule 250 provides that three specific types of dispositive motions may be filed at different stages of a proceeding and clarifies the procedures governing them. A motion for a ruling on the pleadings may be brought by either party no later than 14 days after a respondent's answer has been filed. In 30- or 75-day proceedings, a motion for summary disposition may be brought by either party after a respondent's answer has been filed and documents have been made available to that respondent for inspection. In 120-day proceedings, a motion for summary disposition may be brought only with leave of the hearing officer. A motion for a ruling as a matter of law may be brought by either party after the SEC has presented its case in chief.

- **Admissibility of Evidence:** Amended Rule 320 provides that irrelevant, immaterial or unreliable evidence is excluded. However, hearsay may be admitted into evidence if it is relevant and bears "satisfactory indicia of reliability."

- **Appeals of Initial Decisions:** Whereas Rule 410 currently requires petitioners to state the specific findings and conclusions of the initial decision to which exception is taken, Amended Rule 410 requires petitioners only to state a summary of the statement of issues presented for review. Additionally, the amended rule limits the petitions for review to three pages and prohibits the incorporation of pleadings or filings by reference.

SEC Chair Mary Jo White lauded the amendments as adding "flexibility to the timelines of our administrative proceedings, while continuing to promote the fair and timely resolution of the proceedings."[4] However, critics argue that the amendments do not go far enough and fail to address one of the biggest flaws of the system: the SEC continues to have the discretion to determine whether a case will be heard in-house or in federal court, where defendants have the right to a jury trial.[5]

The amended rules of practice are effective 60 days after publication in the Federal Register and will apply to proceedings commenced on or after that date. A copy of the text of the final rule can be found at https://www.sec.gov/rules/final/2016/34-78319.pdf.

Note: We appreciate and want to recognize the contribution of Summer Associate, Nusra Ismail from Washington University in St. Louis School of Law, in the preparation of this article.

4 *See* SEC Press Release, *supra* note 1.

5 *See* Peter J. Henning, "A Small Step in Changing S.E.C. Administrative Proceedings," *New York TImes*, Sept. 18, 2015, http://www.nytimes.com/2015/09/29/business/dealbook/a-small-step-in-changing-sec-administrative-proceedings.html.

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Eighth Circuit Reverses Class Certification with Defendants' Post-*Halliburton II* Rebuttal of Fraud-on-the-Market Presumption

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The U.S. Court of Appeals for the Eighth Circuit recently recognized a significant defense against class certification for defendants in federal securities fraud cases. In *IBEW Local 98 Pension Fund v. Best Buy Co.*,[1] the Eighth Circuit held that the defendants rebutted the fraud-on-the-market presumption of class-wide reliance, and in doing so, the Eighth Circuit became the first federal appellate court to issue such a ruling after the Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (*Halliburton II*). The Eighth Circuit's ruling, which reversed the district court's decision to certify the securities fraud class, may provide defendants with a meaningful opportunity to challenge class certification by demonstrating that their alleged misrepresentations had no impact on the price of the stock at issue. Notably, in early June 2016, the Eighth Circuit declined to reconsider its prior reversal of class certification.

The *Best Buy* case involved allegations that the company made fraudulent statements when it released guidance in connection with its earnings. Best Buy made the alleged misstatements on September 14, 2010, both in a press release before the stock market opened and in a conference call with analysts later that day. Before the plaintiffs moved for class certification, however, the district court ruled that the company's statements in its press release were protected by the federal safe harbor securities laws regarding "forward looking" statements. Nevertheless, the district court refused to dismiss the plaintiffs' claims related to the alleged misstatements made by the company's CFO during the conference call with stock analysts.

The plaintiffs moved for class certification based upon the well-established fraud-on-the-market presumption of reliance, which was derived from the U.S. Supreme Court's decision in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), and reaffirmed in *Halliburton II*. However, in *Halliburton II*, the U.S. Supreme Court also held that defendants have the right to rebut the presumption of reliance by, *inter alia*, providing evidence to demonstrate that the stock price was not actually affected by the alleged misrepresentations. In *Best Buy*, the defendants' expert established that the stock price increased only because of the press release

1 *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016).

before the stock market opened, and that the stock price before the conference call with the analysts was essentially the same as the price at that day's closing. Nevertheless, the district court certified the class after holding that the "price impact can be shown by a decrease in price following a revelation of the fraud" and that the defendants failed to offer "evidence to show that Best Buy's stock price did not decrease when the truth [of the stock's performance] was revealed."[2] The district court then granted the defendants' request for an interlocutory appeal.

In a 2-1 decision, the Eighth Circuit reversed the district court's class certification and held that the district court "misapplied the price impact analysis mandated by *Halliburton II*."[3] While both the district and appellate courts found that the plaintiffs adequately demonstrated a "*prima facie* case" to apply the fraud-on-the-market presumption of reliance, the Eighth Circuit found that the defendants presented "strong evidence" to establish that the alleged misrepresentations during the conference call with analysts did not impact Best Buy's stock price.[4] Specifically, the defendants' expert demonstrated that Best Buy's stock price increased immediately after the company issued its press release and before the conference call at issue. Additionally, the defendants' expert established that there was no change in Best Buy's stock price after the conference call. As such, the appellate court found that the increase in the stock price occurred "after the press release but *before* the call."[5]

Lastly, the majority of the Eighth Circuit soundly rejected the plaintiffs' theory that the conference call statements "effected a gradual increase in stock price."[6] Specifically, the appellate court held that such an argument runs contrary to the very premise of the fraud-on-the-market presumption from the *Basic* case: that the market will rapidly incorporate public information into a stock's price. The Eighth Circuit further noted that even the plaintiffs' own expert acknowledged that investors gave "great weight" to the press release statements.[7]

Notably, the Eighth Circuit did not require the *Best Buy* defendants to also show that the stock price's later decline—at the time of the purported "corrective disclosure"—was the result of the stock price's earlier inflation. Thus, the *Best Buy* decision demonstrates that, when defendants set forth a meaningful rebuttal of the fraud-on-the-market theory consistent with *Halliburton II*, district courts in the Eighth Circuit cannot certify a class based solely upon speculation as to whether the defendants' purported misrepresentations "might have"

[2] *Id.* at 782.
[3] *Id.* at 777.
[4] *Id.* at 782.
[5] *Id.* at 779 (emphasis in original).
[6] *Id.* at 782.
[7] *Id.* at 782.

prevented a stock price from declining or otherwise caused the artificial inflation of a stock price.

The *Best Buy* decision potentially creates a split in authority between the federal circuits. Specifically, as the dissenting opinion noted in *Best Buy*, the Seventh Circuit and the Eleventh Circuit have already upheld securities fraud claims in which the plaintiffs alleged that a company's stock price remained artificially inflated as a result of the defendants' supposedly false statements.[8] Nevertheless, in light of *Halliburton II* and the Eighth Circuit's recent decision in *Best Buy,* the viability of plaintiffs' "price maintenance" theory appears to be in dispute, at least in the context of class certification.

8 *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 419 (7th Cir. 2015); *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1314 (11th Cir. 2011).

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