

Securities/White Collar Crime Alert

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SEC Enforcement Director Cutler Outlines Aggressive Agenda

By R. Scott Thompson and Matthew M. Oliver

Stephen M. Cutler, Director of the SEC's Division of Enforcement, recently confirmed what most lawyers who represent entities and individuals in connection with investigations, administrative proceedings, and civil cases brought by the Commission have known for some time - the Division of Enforcement has become increasingly aggressive in the initiation, conduct, and resolution of its investigations and enforcement actions.

Director Cutler began his recent speech to the District of Columbia Bar Association with a frank acknowledgment that the Division of Enforcement has felt the pressure of the spate of high-profile securities industry cases prosecuted and publicized by New York Attorney General Elliot Spitzer. In light of competitive pressures generated by Mr. Spitzer's aggressive forays into the IPO allocation process, analyst conflicts of interest, and most recently the mutual fund industry, Cutler acknowledged that public perception of the Division's capabilities, and the Division's own aspirations, have shifted. Rather than the enforcement function continuing to occupy its traditional "reactive" role, Cutler outlined various ways in which the Division has been working to make enforcement a more proactive function. The goal of these structural changes, Cutler explained, is to foster a "cultural change within the enforcement

program to encourage more risk taking"; that is, to create a climate in which the Division will pursue investigations even where there may be no clear violation of the securities laws.

Proactive and Aggressive Investigation Initiation: Structural Changes to the Enforcement Division

Cutler delineated various structural changes in order to position the Division to more proactively and aggressively initiate investigations, including:

- The formation of an inter-divisional committee with representatives from Enforcement, Investment Management, and Compliance Inspections and Examinations which will enable Enforcement to take advantage of the experience of other Divisions;
- Regular meetings of the chief accountants of the Commission and the various Divisions to identify high-risk areas in financial reporting;
- The formation of risk assessment committees to identify trends, practices, and risks in capital markets that can be exploited; and
- Training and hands-on experience to junior Enforcement staff by working them into the broker-dealer inspection and examination process.

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Proactive and Aggressive Investigative Activity: The Focus Shifts to Document Retention and Record-Keeping and the SEC Raises the Bar for Cooperation

Cutler outlined changes to the manner in which the Division conducts its investigations, including:

- More aggressive pursuit and greater emphasis on production and preservation of documentary evidence. Cutler discussed a number of specific, recent enforcement actions charging document destruction and failure to preserve evidence, as well as the implications of failure to comply with a subpoena from the Division.
- SEC investigators - now the question is not whether an entity or individual has cooperated with an investigation, but “how much” and “how often”. In addition to subjecting the actions (or inactions) of an entity or individual to greater scrutiny, the cooperation determination will also include an assessment of any preventive or remedial programs and activities in place.

Settlements and Awards: The Stakes Are Higher

Finally, Director Cutler highlighted the Division’s success in seeking and obtaining monetary settlements and awards, and bar orders,

that represent significant increases over historical results achieved by the Division both in terms of the magnitude and frequency.

Director Cutler’s remarks affirmed what securities law practitioners have known for some time - dealing with the Division is now markedly different, and more difficult, than it was just a few years ago. The Division is more aggressive, more concerned with the conduct of investigations, and much more focused on obtaining sizable and high profile awards and settlements. The game has changed, and the stakes are commensurately higher.

The full text of Director Cutler’s speech is available on the SEC’s website at <http://www.sec.gov/news/speech/spch021104smc.htm>

For additional information on this or any other white collar criminal defense matter, please contact R. Scott Thompson, Chair of Lowenstein Sandler’s White Collar Criminal Defense Practice Group, at 973-597-2532 or rthompson@lowenstein.com. You can also contact Matthew M. Oliver, a member of the firm’s White Collar Criminal Defense Practice Group, at 973-597-2318 or moliver@lowenstein.com.