

6. Fostering Cooperation

The staff should carefully consider the use of cooperation by individuals and companies to advance its investigations and related enforcement actions.

6.1. Initial Considerations

6.1.1. Framework for Evaluating Cooperation by Individuals

17 CFR § 202.12 Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions.

Cooperation by individuals and entities in the Commission's investigations and related enforcement actions can contribute significantly to the success of the agency's mission. Cooperation can enhance the Commission's ability to detect violations of the federal securities laws, increase the effectiveness and efficiency of the Commission's investigations, and provide important evidence for the Commission's enforcement actions. There is a wide spectrum of tools available to the Commission and its staff for facilitating and rewarding cooperation by individuals, ranging from taking no enforcement action to pursuing reduced charges and sanctions in connection with enforcement actions. As with any cooperation program, there exists some tension between the objectives of holding individuals fully accountable for their misconduct and providing incentives for individuals to cooperate with law enforcement authorities. This policy statement sets forth the analytical framework employed by the Commission and its staff for resolving this tension in a manner that ensures that potential cooperation arrangements maximize the Commission's law enforcement interests. Although the evaluation of cooperation requires a case-by-case analysis of the specific circumstances presented, as described in greater detail below, the Commission's general approach is to determine whether, how much, and in what manner to credit cooperation by individuals by evaluating four considerations: the assistance provided by the cooperating individual in the Commission's investigation or related enforcement actions ("Investigation"); the importance of the underlying matter in which the individual cooperated; the societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct; and the appropriateness of cooperation credit based upon the profile of the cooperating individual. In the end, the goal of the Commission's analysis is to protect the investing public by determining whether the public interest in facilitating and rewarding an individual's cooperation in order to advance the Commission's law enforcement interests justifies the credit awarded to the individual for his or her cooperation.

- (a) Assistance provided by the individual. The Commission assesses the assistance provided by the cooperating individual in the Investigation by considering, among other things:
 - (1) The value of the individual's cooperation to the Investigation including, but not limited to:

- (i) Whether the individual's cooperation resulted in substantial assistance to the Investigation;
 - (ii) The timeliness of the individual's cooperation, including whether the individual was first to report the misconduct to the Commission or to offer his or her cooperation in the Investigation, and whether the cooperation was provided before he or she had any knowledge of a pending investigation or related action;
 - (iii) Whether the Investigation was initiated based on information or other cooperation provided by the individual;
 - (iv) The quality of cooperation provided by the individual, including whether the cooperation was truthful, complete, and reliable; and
 - (v) The time and resources conserved as a result of the individual's cooperation in the Investigation.
- (2) The nature of the individual's cooperation in the Investigation including, but not limited to:
- (i) Whether the individual's cooperation was voluntary or required by the terms of an agreement with another law enforcement or regulatory organization;
 - (ii) The types of assistance the individual provided to the Commission;
 - (ii) Whether the individual provided non-privileged information, which information was not requested by the staff or otherwise might not have been discovered;
 - (iv) Whether the individual encouraged or authorized others to assist the staff who might not have otherwise participated in the Investigation; and
 - (v) Any unique circumstances in which the individual provided the cooperation.
- (b) Importance of the underlying matter. The Commission assesses the importance of the Investigation in which the individual cooperated by considering, among other things:

- (1) The character of the Investigation including, but not limited to:
 - (i) Whether the subject matter of the Investigation is a Commission priority;
 - (ii) The type of securities violations;
 - (iii) The age and duration of the misconduct;
 - (iv) The number of violations; and
 - (v) The isolated or repetitive nature of the violations.
- (2) The dangers to investors or others presented by the underlying violations involved in the Investigation including, but not limited to:
 - (i) The amount of harm or potential harm caused by the underlying violations;
 - (ii) The type of harm resulting from or threatened by the underlying violations; and
 - (iii) The number of individuals or entities harmed.¹
- (c) Interest in holding the individual accountable. The Commission assesses the societal interest in holding the cooperating individual fully accountable for his or her misconduct by considering, among other things:
 - (1) The severity of the individual's misconduct assessed by the nature of the violations and in the context of the individual's knowledge, education, training, experience, and position of responsibility at the time the violations occurred;
 - (2) The culpability of the individual, including, but not limited to, whether the individual acted with scienter, both generally and in relation to others who participated in the misconduct;
 - (3) The degree to which the individual tolerated illegal activity including, but not limited to, whether he or she took steps to prevent the violations from occurring or continuing, such as notifying the Commission or other appropriate law enforcement agency of the misconduct or, in the case of a violation involving a business organization, by notifying members of management not

¹ Cooperation in Investigations that involve priority matters or serious, ongoing, or widespread violations will be viewed most favorably.

involved in the misconduct, the board of directors or the equivalent body not involved in the misconduct, or the auditors of such business organization of the misconduct:

- (4) The efforts undertaken by the individual to remediate the harm caused by the violations including, but not limited to, whether he or she paid or agreed to pay disgorgement to injured investors and other victims or assisted these victims and the authorities in the recovery of the fruits and instrumentalities of the violations; and
 - (5) The sanctions imposed on the individual by other federal or state authorities and industry organizations for the violations involved in the Investigation.
- (d) Profile of the individual. The Commission assesses whether, how much, and in what manner it is in the public interest to award credit for cooperation, in part, based upon the cooperating individual's personal and professional profile by considering, among other things:
- (1) The individual's history of lawfulness, including complying with securities laws or regulations;
 - (2) The degree to which the individual has demonstrated an acceptance of responsibility for his or her past misconduct; and
 - (3) The degree to which the individual will have an opportunity to commit future violations of the federal securities laws in light of his or her occupation -- including, but not limited to, whether he or she serves as: a licensed individual, such as an attorney or accountant; an associated person of a regulated entity, such as a broker or dealer; a fiduciary for other individuals or entities regarding financial matters; an officer or director of public companies; or a member of senior management -- together with any existing or proposed safeguards based upon the individual's particular circumstances.

Note to § 202.12. Before the Commission evaluates an individual's cooperation, it analyzes the unique facts and circumstances of the case. The above principles are not listed in order of importance nor are they intended to be all-inclusive or to require a specific determination in any particular case. Furthermore, depending upon the facts and circumstances of each case, some of the principles may not be applicable or may deserve greater weight than others. Finally, neither this statement, nor the principles set forth herein creates or recognizes any legally enforceable rights for any person.

6.1.2. Framework for Evaluating Cooperation by Companies

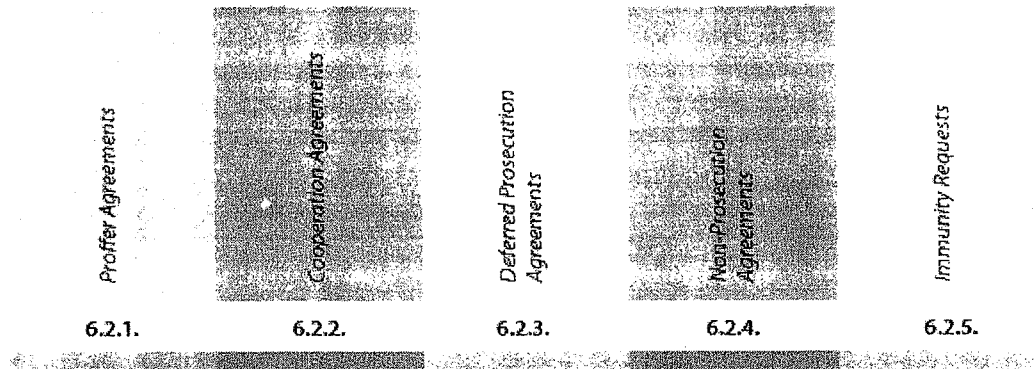
In October 2001, the Commission issued a Report of Investigation and Statement explaining its decision not to take enforcement action against a public company it had investigated for financial statement irregularities. *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Rel. Nos. 34-44969 and AAER-1470 (Oct. 23, 2001)(<http://www.sec.gov/litigation/investreport/34-44969.htm>.) In this report, commonly referred to as the Seaboard Report, the Commission articulated an analytical framework for evaluating cooperation by companies. The report detailed the many factors the Commission considers in determining whether, and to what extent, it grants leniency to investigated companies for cooperating in its investigations and for related good corporate citizenship. Specifically, the report identifies four broad measures of a company's cooperation:

- Self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
- Self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;
- Remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
- Cooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.

Since every enforcement matter is different, this analytical framework sets forth general principles but does not limit the Commission's broad discretion to evaluate every case individually, on its own unique facts and circumstances. Similar to the Commission's treatment of cooperating individuals, credit for cooperation by companies may range from taking no enforcement action to pursuing reduced charges and sanctions in connection with enforcement actions. For greater detail regarding the analytical framework used by the Commission to evaluate cooperation by companies, the staff should review the Seaboard Report (<http://www.sec.gov/litigation/investreport/34-44969.htm>).

6.2. Cooperation Tools

There is a wide spectrum of tools available to the staff for facilitating and rewarding cooperation in its investigations and related enforcement actions. A non-exclusive list of cooperation tools appears below. Since every enforcement matter is unique, the appropriate use of a cooperation tool invariably depends upon a careful analysis of the facts and circumstances of each case. In some cases, multiple cooperation tools may be appropriate.



6.2.1. Proffer Agreements

Introduction:

Proffers by attorneys and cooperating individuals are an important vehicle used by the staff to assess the probable value of cooperation by individuals and companies and for those individuals and companies to initiate discussions regarding the benefits that may be available if they cooperate. Proffer agreements are regularly used by the staff to facilitate proffer sessions.

Basics:

A proffer agreement is a written agreement providing that any statements made by a person, on a specific date, may not be used against that individual in subsequent proceedings, except that the Commission may use statements made during the proffer session as a source of leads to discover additional evidence and for impeachment or rebuttal purposes if the person testifies or argues inconsistently in a subsequent proceeding. The Commission also may share the information provided by the proffering individual with appropriate authorities in a prosecution for perjury, making a false statement or obstruction of justice.

Procedures:

Proffer agreements must be signed by a supervisor at or above the level of Assistant Director.

Considerations:

- In most cases, the staff should require a potential cooperating individual to make a detailed proffer before selecting and utilizing other cooperation tools.
- The Commission may use information provided at a proffer session to advance its investigation or to generate leads to new evidence that the staff might not otherwise have discovered.
- To avoid potential misunderstandings regarding the nature of proffer sessions, with few exceptions, proffer sessions should be conducted pursuant to written proffer agreements.
- The staff uses a standard proffer agreement. Modifications to the standard agreement should not be made without first consulting with staff in the Office of Chief Counsel or the Chief Litigation Counsel.
- If the staff conducts a joint proffer session with criminal authorities, the staff should address any potential substantive or procedural issues with his or her supervisors, as well as the Assistant United States Attorney or state prosecutor on the case, before the proffer begins. In cases where the staff participates in a proffer with the criminal authorities and the cooperating individual has not asked for a proffer letter from the Commission, the staff should remind the individual that the proffer agreement with the criminal authorities does not apply to the Commission.

Related Tool:

- Oral Assurances—Where the available evidence indicates that an individual or company has not violated the federal securities laws such as to warrant an enforcement action, Assistant Directors, with the approval of a supervisor at or above the level of Associate Director, may orally inform the individual or company that the Division does not anticipate recommending an enforcement action against the individual or company based upon the evidence currently known to the staff.
 - Oral assurances are only authorized when the investigative record is adequately developed. Accordingly, prior to providing an oral assurance, the staff should preferably receive proffers from the potential cooperating individuals and companies or have sufficient information regarding the potential cooperators' conduct and their ability to provide substantial assistance to the Commission's investigations or related enforcement actions.
 - Whenever oral assurances are provided, the staff should clearly inform the potential cooperating individual or company that oral assurances are based

upon the evidence currently known to the staff, the Division's enforcement recommendations may change if new evidence is subsequently discovered and that the Commission has final authority to accept or reject enforcement recommendations.

- After an oral assurance has been provided, the staff should contemporaneously prepare and retain a brief memorandum to file summarizing the assurance provided.

6.2.2. Cooperation Agreements

Basics:

A cooperation agreement is a written agreement between the Division of Enforcement and a potential cooperating individual or company prepared to provide substantial assistance to the Commission's investigation and related enforcement actions. Specifically, in a cooperation agreement, the Division agrees to recommend to the Commission that the individual or company receive credit for cooperating in its investigation and related enforcement actions and, under certain circumstances, to make specific enforcement recommendations if, among other things: 1) the Division concludes that the individual or company has provided or is likely to provide substantial assistance to the Commission; 2) the individual or company agrees to cooperate truthfully and fully in the Commission's investigation and related enforcement actions and waive the applicable statute of limitations; and 3) the individual or company satisfies his/her/its obligations under the agreement. If the agreement is violated, the staff may recommend an enforcement action to the Commission against the individual or company without any limitation.

Procedures:

- Prior to seeking authority to enter into cooperation agreements, the staff should preferably receive proffers from the potential cooperating individuals and/or companies or have sufficient information regarding their ability to provide substantial assistance to the Commission's investigations or related enforcement actions.
- The Director and those senior officers designated by the Director have the authority to enter into cooperation agreements on behalf of the Division.
- The staff should prepare a contemporaneous memorandum to the file documenting the basis for entering into the cooperation agreement. This memorandum, along with a copy of the executed agreement, should be maintained by the senior officer who executed the agreement.

Considerations:

- In addition to the standard cooperation analysis set forth in Section 6.1 of the Manual, when assessing whether to recommend that the Division enter into a cooperation agreement with an individual or company, the staff should consider:
 - whether other means of obtaining the desired cooperation are available and likely to be timely and effective; and
 - whether the individual or company has entered into or is likely to enter into a plea agreement with criminal prosecutors that will require the individual or company to cooperate in the Commission's investigation and related enforcement actions.
- The staff should advise potential cooperating individuals or companies that cooperation agreements entered into with the Division do not bind the Commission and that the Division cannot, and does not, make any promise or representation as to whether or how the Commission may act on enforcement recommendations made by the Division.
- Cooperation agreements should generally include the following terms:
 - the cooperating individual or company agrees to cooperate truthfully and fully, as directed by the Division's staff, in investigations and related enforcement proceedings including, but not limited to, producing all potentially relevant non-privileged documents and materials to the Commission, responding to all inquiries, appearing for interviews, and testifying at trials and other judicial proceedings as requested by the staff, and waiving the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure;
 - the cooperating individual or company agrees to waive the applicable statute of limitations period;
 - the cooperating individual or company agrees not to violate the securities laws;
 - the cooperating individual or company acknowledges that the agreement does not constitute a final disposition of any potential enforcement action;
 - the Division will bring the assistance provided by the cooperating individual or company to the attention of the Commission and other regulatory and law enforcement authorities requested by the cooperating individual or company; and
 - the cooperating individual or company acknowledges that, although the Division has discretion to make enforcement recommendations, only the

Commission has the authority to approve enforcement dispositions and accept settlement offers.

- If the Division agrees to make a specific enforcement recommendation to the Commission, the staff should consider the settlement terms of other similar cases to identify prior precedent involving similar alleged misconduct and include the following terms in the cooperation agreement:
 - the federal securities laws alleged to have been violated;
 - the cooperating individual or company agrees to resolve the matter without admitting or denying the alleged violations;
 - the specific enforcement recommendation the Division expects to make if the cooperating individual or company satisfies the terms of the agreement; and
 - any agreement to make a specific enforcement recommendation to the Commission shall be conditioned upon the Division's assessment that the cooperating individual or company has rendered substantial assistance in a Commission investigation or related enforcement action.
- The Division uses a standard form of cooperation agreement to be adapted to the specific circumstances of the investigation or related enforcement action.

Related Tools:

- **Settlement Recommendations**—Even in the absence of a cooperation agreement, the staff may take into account an individual or company's cooperation in connection with recommending sanctions or charges associated with the alleged misconduct and, under certain circumstances, forgoing enforcement actions against a cooperating individual or company.
 - To determine whether, how much, and in what manner to recommend cooperation credit, the staff should consider the settlement terms of other similar cases to identify prior precedent involving similar alleged misconduct and apply the factors outlined in Section 6.1 of the Manual.
 - Where cooperation credit is being recommended to or has been authorized by the Commission in settlements, the staff should include standard language relating to cooperation in the related Offers or Consents, unless such disclosure would not advance the goals of the Commission's cooperation program or would adversely affect related ongoing investigations or proceedings. Modifications to this standard language should not be made without first consulting with staff in the Office of Chief Counsel or the Chief Litigation Counsel.

- Where cooperation language is included in settlement papers, the staff generally should include a reference to the individual or company's cooperation in the Commission's related litigation and/or press releases.
- Cooperation Letters—Upon the written request of cooperating individuals and companies, supervisors at or above the level of Associate Director may submit letters describing the fact, manner and extent of assistance provided by such cooperating individuals and companies to the attention of courts, regulatory organizations, or law enforcement authorities. Requests for cooperation letters and copies of the letters sent by Commission staff should be retained by the senior officers who sign them.

Further information:

- For assistance in drafting cooperation agreements, please consult with staff in the Office of the Chief Counsel or the Chief Litigation Counsel.

6.2.3. Deferred Prosecution Agreements

Basics:

A deferred prosecution agreement is a written agreement between the Commission and a potential cooperating individual or company in which the Commission agrees to forego an enforcement action against the individual or company if the individual or company agrees to, among other things: 1) cooperate truthfully and fully in the Commission's investigation and related enforcement actions; 2) enter into a long-term tolling agreement; 3) comply with express prohibitions and/or undertakings during a period of deferred prosecution; and 4) under certain circumstances, agree either to admit or not to contest underlying facts that the Commission could assert to establish a violation of the federal securities laws. If the agreement is violated during the period of deferred prosecution, the staff may recommend an enforcement action to the Commission against the individual or company without limitation for the original misconduct as well as any additional misconduct. Furthermore, if the Commission authorizes the enforcement action, the staff may use any factual admissions made by the cooperating individual or company to file a motion for summary judgment, while maintaining the ability to bring an enforcement action for any additional misconduct at a later date.

Procedures:

- Prior to seeking authority to enter into a deferred prosecution agreement, the staff should receive proffers from the cooperating individual and/or company.
- Deferred prosecution agreements must be approved by the Commission.

- Unless the Commission directs otherwise, deferred prosecution agreements will be made available to the public upon request.

Considerations:

- To determine whether to recommend that the Commission enter into a deferred prosecution agreement, the staff should use the standard cooperation analysis set forth in Section 6.1 of the Manual.
- An admission or an agreement not to contest the relevant facts underlying the alleged offenses generally is appropriate and should be carefully considered for the following:
 - licensed individuals, such as attorneys and accountants;
 - regulated individuals, such as registered brokers or dealers;
 - fiduciaries for other individuals or entities regarding financial matters;
 - officers and directors of public companies; and
 - individuals or companies with a prior history of violating the securities laws.
- A deferred prosecution agreement should generally include the following terms:
 - the cooperating individual or company agrees to cooperate truthfully and fully, as directed by the Division's staff, in investigations and related enforcement proceedings including, but not limited to, producing all potentially relevant non-privileged documents and materials to the Commission, responding to all inquiries, appearing for interviews, and testifying at trials and other judicial proceedings as requested by the staff, and waiving the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure;
 - the cooperating individual or company agrees to toll the applicable statute of limitations period;
 - the cooperating individual or company agrees not to violate the securities laws;
 - the cooperating individual or company shall make any agreed upon disgorgement or penalty payments;
 - if the cooperating individual or company satisfies the terms of the deferred prosecution agreement during the term of the agreement, the Commission

will not pursue any further enforcement action concerning the matter referenced in the agreement;

- if the individual or company violates the agreement during its term, the Division may recommend and the Commission may pursue an enforcement action against the individual or company without limitation;
 - the cooperating individual or company agrees that the Commission may use statements, information, and materials provided pursuant to the agreement against him/her/it if the individual or company violates the terms of the agreement; and
 - additional prohibitions and undertakings designed to protect the investing public.
- The term of a deferred prosecution agreement should not exceed five years. In determining the appropriate term, the staff should consider whether there is sufficient time to ensure that the undertakings in the agreement are fully implemented and the related prohibitions have adequately reduced the likelihood of future securities law violations.

Further information:

- For assistance in drafting deferred prosecution agreements, please consult with the staff in the Office of the Chief Counsel or the Chief Litigation Counsel.

6.2.4. Non-Prosecution Agreements

Basics:

A non-prosecution agreement is a written agreement between the Commission and a potential cooperating individual or company, entered in limited and appropriate circumstances, that provides that the Commission will not pursue an enforcement action against the individual or company if the individual or company agrees to, among other things: 1) cooperate truthfully and fully in the Commission's investigation and related enforcement actions; and 2) comply, under certain circumstances, with express undertakings. If the agreement is violated, the staff retains its ability to recommend an enforcement action to the Commission against the individual or company without limitation.

Procedures:

- Prior to seeking authority to enter into a non-prosecution agreement, the staff should receive proffers from the cooperating individual and/or company.
- Non-prosecution agreements must be approved by the Commission.

Considerations:

- In virtually all cases, for individuals who have previously violated the federal securities laws, non-prosecution agreements will not be appropriate and other cooperation tools should be considered.
- Non-prosecution agreements should not be entered into in the early stages of an investigation when the role of the cooperating individuals or companies and the importance of their cooperation are unclear.
- In addition to the standard cooperation analysis set forth in Section 6.1 of the Manual, when attempting to determine whether to recommend that the Commission enter into a non-prosecution agreement, the staff should consider:
 - whether the individual or company has entered into or is likely to enter into a plea agreement with criminal prosecutors that will require them to cooperate in the Commission's investigation and related enforcement actions; and
 - whether other means of obtaining the desired cooperation are available and likely to be timely and effective.
- A non-prosecution agreement should generally include the following terms:
 - the cooperating individual or company agrees to cooperate truthfully and fully, as directed by the Division's staff, in investigations and related enforcement proceedings including, but not limited to, producing all potentially relevant non-privileged documents and materials to the Commission, responding to all inquiries, appearing for interviews, and testifying at trials and other judicial proceedings as requested by the staff, and waiving the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure;
 - the cooperating individual or company shall make any agreed-upon disgorgement or penalty payments;
 - additional undertakings designed to protect the investing public; and
 - if the individual or company violates the agreement, the Division may recommend and the Commission may pursue an enforcement action against the individual or company without limitation and not subject to the applicable statute of limitations; and
 - the cooperating individual or company agrees that the Commission may use statements, information, and materials provided pursuant to the

agreement against him/her/it if the individual or company violates the terms of the agreement.

Related Tool:

- Termination Notices—When an investigation has been completed as to a potential cooperating individual or company and the Division has determined, for any reason, not to recommend to the Commission an enforcement action against the individual or company, supervisors at or above the level of Assistant Director may, and in some cases are required, to send a letter informing the individual or company of the determination. If the potential cooperating individual or company is likely to provide substantial assistance and the Division has not entered into a cooperation agreement with the individual or company, these notices may be provided before the Commission's investigation is closed or before a determination has been made as to every other potential defendant or respondent in the case.

Further information:

- For assistance in drafting non-prosecution agreements, please consult with staff in the Office of the Chief Counsel or the Chief Litigation Counsel.
- For additional information about termination notices, please consult Section 2.6.2 of the Manual.

6.2.5. Immunity Requests

Introduction:

In certain circumstances, individuals may not be willing to provide testimony or cooperate without receiving protection against criminal prosecution. In appropriate circumstances, to obtain testimony and/or facilitate cooperation that will substantially assist in the enforcement of the federal securities laws, the staff may seek immunity orders or letters in order to obtain testimony and/or witness cooperation.

Basics:

When witnesses assert their Fifth Amendment privilege against self-incrimination in enforcement proceedings, the Commission may seek one of two types of immunity: statutory immunity or letter immunity. Statutory immunity permits the Commission, pursuant to 18 U.S.C. Sections 6001-6004, to seek a court order compelling the individual to give testimony or provide other information that may be necessary to the public interest, if the request is approved by the U.S. Attorney General. In contrast, letter immunity is immunity conferred by agreement between the individual and a U.S. Attorney's Office. Both types of immunity prevent the use of statements or other information provided by the individual, directly or indirectly, against the individual in

any criminal case, except for perjury, giving a false statement, or obstruction of justice. Neither an immunity order nor an immunity letter, however, prevents the Commission from using the testimony or other information provided by the individual in its enforcement actions, including actions against the individual for whom the immunity order or letter was issued.

Procedures:

- Prior to seeking approval to request an immunity order or letter from the Department of Justice, the staff should preferably receive a proffer of the individual's expected testimony or have significant and reliable evidence regarding his or her ability to provide substantial assistance to the Commission's investigation or related enforcement actions.
- The Commission has delegated authority to the Director and senior officers with sub-delegated authority to make immunity requests to the Department of Justice. 17 C.F.R. Section 200.30-4(a).
- Prior to requesting authorization to seek an immunity order or letter from the Director of Enforcement or a designated senior officer, unless exigent circumstances exist, the staff should complete the Department of Justice witness immunity request form found at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00721.pdf. This form will be used for three purposes.
 - First, the form will help the staff document its basis for seeking an immunity order or letter.
 - Second, the completed form will assist senior leadership in the Division and the U.S. Department of Justice in evaluating the appropriateness of seeking an immunity order or letter.
 - Finally, if an immunity order is appropriate, the completed form will be submitted by the relevant federal prosecutor's office to the Witness Immunity Unit of the Office of Enforcement Operations at the Department of Justice for approval—expediting the processing of the Commission's witness immunity requests.
- Upon receiving a letter of authority to seek an order to compel the testimony of a witness from the Department of Justice, a motion and proposed immunity order may be filed with the court *ex parte*.
- Unless the court and/or Commission directs otherwise, immunity orders and letters will be treated as public documents.

- A copy of the draft Department of Justice witness immunity request form submitted to the Director of Enforcement or a designated senior officer and a copy of the immunity order or letter should be maintained by the senior officer submitting the request to the Department of Justice.

Considerations:

- As a general rule, immunity orders or letters should not be requested in the early stages of an investigation when the role of the cooperating individuals and the benefits of their cooperation may be unclear.
- Pursuant to 18 U.S.C. Sections 6001-6004, an immunity order should be sought only if:
 - the testimony or other information from the witness may be necessary to the public interest; and
 - the witness has refused, or is likely to refuse, to testify or provide other information on the basis of his or her privilege against self-incrimination.
- When attempting to determine whether to recommend that an immunity order or letter be sought, the staff should conduct the standard analysis set forth in Section 6.1 of the Manual.
- Since the Supreme Court has interpreted the Fifth Amendment privilege against self-incrimination to include the act of producing business records by a sole proprietorship, the Commission may request immunity for the limited purpose of obtaining such documents. *United States v. Doe*, 465 U.S. 605 (1984). However, the witness immunity request form submitted to the Department of Justice should expressly state the purpose of the application.

Further information:

For additional information regarding cooperation with the criminal authorities, please consult Sections 5.2.1 and 5.2.2 of the Manual.

6.3. Publicizing the Benefits of Cooperation

Basics:

The staff should provide sufficient information to the public about the nature of the Commission's cooperation program and its significant benefits.

Procedures:

As discussed in Section 6.2.2 of the Manual, where cooperation credit is being recommended to or has been authorized by the Commission in settlements, the staff should include standard language relating to cooperation in Offers, Consents, or other dispositions and reference the individual or company's cooperation in the supporting paragraphs of the related litigation and/or press releases, unless such disclosure would not advance the goals of the Commission's cooperation program or would adversely affect related ongoing investigations or proceedings.

Considerations:

- In most cases, the Commission's enforcement program is enhanced by publicizing the benefits associated with cooperating in a Commission investigation or related enforcement actions. Nevertheless, the staff retains discretion regarding whether and how to disclose the fact, manner, and extent of an individual or company's cooperation in documents filed or issued by the Commission in connection with an enforcement action.
- Since information obtained or generated during Commission investigations is generally confidential, the staff should ensure that its public statements and releases do not inadvertently disclose non-public information.
- In disclosing information regarding the benefits of cooperation in specific cases, the staff should take care to protect the identity of cooperating individuals and companies unless:
 - the identity of the individual or company has already been or will be disclosed in a public document such as an Offer, Consent, or Deferred Prosecution Agreement; or the cooperating individual or company has consented to the disclosure of his/her/its identity by the Commission.