

A Call For Greater Clarity Around SEC Cooperation Credit

By **Robert Cohen and Brook Jackling** (April 8, 2021, 2:14 PM EDT)

The U.S. Securities and Exchange Commission recently announced settlements with Gulfport Energy Corp., a gas exploration and production company, and its former CEO for failing to disclose perks the CEO received over several years.[1]

In announcing the settlement, acting Director of Enforcement Melissa Hodgman said that the company's "timely remediation and cooperation in our investigation were key factors in the Commission's decision not to impose a penalty against the company." [2]

After discovering the disclosure failures, the company made key personnel changes, developed internal audit and enterprise risk management programs, strengthened policies and procedures, and implemented new review and tracking processes.[3]

The company also conducted its own investigation after receiving internal reports of the misconduct and disclosed its findings and the CEO's resignation in its Form 10-Q.[4]

The SEC's decision to reward the company by not imposing a penalty is a positive development. But the case also highlights a weakness in the SEC's cooperation program: the lack of certainty about the benefits that a company can expect to receive for cooperation.

Although the SEC regularly encourages cooperation, it has not issued guidance on the quantifiable benefits that companies may receive.

Deciding whether to cooperate — such as by self-reporting a violation or proactively bringing less-than-favorable facts to the staff's attention — can be a difficult decision.

Particularly in contrast to other federal agencies, the SEC can do more to explain the benefits of corporate cooperation. Improved guidance would benefit companies across industries and likely would increase the amount and type of cooperation that the SEC seeks.

SEC Cooperation Guidance

The SEC has long promoted self-reporting, timely remediation and cooperation in investigations. In 2001, the SEC released a report of investigation and statement that articulated a framework for evaluating a company's cooperation, known as the Seaboard factors.[5]



Robert Cohen



Brook Jackling

The Seaboard factors include four broad categories: discovering misconduct, self-reporting misconduct once discovered, remediation and cooperation with law enforcement authorities during an investigation.[6]

The Seaboard factors also include details for each category. Although the Seaboard factors remain in effect today, they do not explain what type of cooperation will lead to particular outcomes, such as a declination or a resolution without a penalty.

There are not many instances of the SEC explaining publicly that it had declined to bring an enforcement case based on these factors.

In one of the few examples, in 2006, the SEC explained that it was not bringing an enforcement action against a registered transfer agent when the agent promptly self-reported, shared the results of an independent internal investigation, terminated and disciplined wrongdoers, paid full restitution, attorney and consultant fees to its affected clients, and implemented new controls.[7]

The SEC cited the agent's "swift, extensive and extraordinary cooperation" and brought charges only against individuals.[8] While the SEC does not generally disclose declination decisions, it took the opportunity to discuss the decision when announcing the individual charges.

In 2010, the SEC announced a new cooperation initiative, including updated enforcement tools such as cooperation agreements, deferred prosecution agreements, and nonprosecution agreements.[9]

In 2015, SEC staff said that a company must self-report to be eligible for a deferred prosecution agreements or nonprosecution agreements in the Foreign Corrupt Practices Act context, and that cooperating companies must provide all relevant facts to the SEC, including those that implicate individuals.[10]

But this guidance has limited usefulness because the SEC has entered into only 10 corporate deferred prosecution agreements and nonprosecution agreements since 2010.[11]

Cooperation Frameworks From Other Federal Agencies

Other federal agencies provide specific guidance about the benefits of cooperation. For example, the U.S. Department of Justice introduced a pilot program in 2016, formalized it in 2017 as the FCPA Corporate Enforcement Policy, and extended the policy beyond FCPA cases in 2018 as nonbinding guidance concerning any corporate investigation.[12]

Pursuant to the policy, a company that voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates will receive the presumption of a declination, absent certain aggravating circumstances.[13]

If aggravating circumstances exist, such as pervasiveness of misconduct, companies may receive "a 50% reduction off the low end of the U.S. Sentencing Guidelines fine range." [14] Companies that do not self-disclose but otherwise cooperate and undertake remediation will receive at most a 25% discount off the bottom of the sentencing guidelines range.[15]

The U.S. Environmental Protection Agency similarly awards penalty reductions for voluntary disclosure,

cooperation and remediation under its audit policy. The policy establishes nine conditions for penalty mitigation, which include voluntary discovery, prompt disclosure, and correction and remediation within 60 days of discovery.[16]

Entities that satisfy all nine conditions may receive a 100% reduction of severity-based penalties.[17] Entities that satisfy all but one condition — violation detection through a systematic discovery process — may receive a 75% reduction of severity-based penalties.[18] For both, the EPA also will recommend no criminal prosecution.[19]

The Federal Energy Regulatory Commission also allows for cooperation-based penalty reductions. FERC models its penalty guidelines in part on the U.S. sentencing guidelines. Under the FERC's guidelines, organizations receive culpability scores based on increases or reductions in points for a number of factors, which inform the minimum and maximum multipliers for fines.[20]

An organization may decrease its culpability score by up to five points for self-reporting, cooperating, accepting responsibility, and resolving the matter before formal hearings are necessary.[21] FERC's guidelines also allow for organizations that take some, but not all, of these measures to receive smaller decreases in culpability scores.[22]

Recommendation

In SEC matters, it can be difficult to respond when a client asks, "What will I get for cooperating?" The SEC can do more to answer this question.

Like other agencies, the SEC could establish specific parameters for waiving or reducing penalties, or declining to bring a case altogether, based on an entity's level of self-policing, self-reporting, remediation and cooperation. A clear road map to a declination or case without a penalty is particularly important if the SEC wants to incentivize self-reporting.

In light of the wide range of possible SEC approaches to penalty calculations,[23] any quantitative guidance about cooperation credit would be tremendously useful. Such guidance also would align with the policies of other agencies in parallel proceedings.

This would be especially useful in FCPA cases, when companies deciding whether to self-report do not know whether the SEC will afford the same credit that they can expect under the DOJ Corporate Enforcement Policy.[24]

In addition, if and when the SEC decides not to bring a case based on self-reporting and cooperation, all would benefit if the SEC were to disclose the decision. This would not require that the SEC identify the company; simply explaining the general circumstances, including the company's actions that led to the decision, would be a valuable data point for companies and counsel.

Disclosure is core to the SEC's mission. Greater transparency from the SEC about how it assesses cooperation, and the specific benefits for companies that cooperate, would incentivize cooperation and enable more informed corporate decision making.

Clear guidance also would address the current perception that cooperation credit can vary significantly across different SEC enforcement teams. Increased transparency could result in more self-reports and shorter investigations.

For example, companies dealing with potential FCPA violations may be more likely to self-report with clear guidance from both the DOJ and SEC. This would benefit corporations, investors and the SEC. The SEC's incoming new leadership has an opportunity to strengthen this important part of the enforcement program.

Robert Cohen is a partner and Brook Jackling is an associate at Davis Polk & Wardwell LLP.

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[1] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Gas Exploration and Production Company and Former CEO with Failing to Disclose Executive Perks (Feb. 24, 2021), <https://www.sec.gov/news/press-release/2021-33>.

[2] *Id.*

[3] Gulfport Energy Corp., Exchange Act Release No. 91196, 2021 WL 754895, ¶ 30 (Feb. 24, 2021).

[4] *Id.* ¶¶ 28–29.

[5] Report of Investigation Pursuant to 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 (Oct. 23, 2001).

[6] *Id.*

[7] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Six Former Officers of Putnam Fiduciary Trust Company with Defrauding Clients of \$4 Million (Jan. 3, 2006), <https://www.sec.gov/news/press/2006-2.htm>.

[8] *Id.*

[9] Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), <https://www.sec.gov/news/press/2010/2010-6.htm>.

[10] Andrew Ceresney, Dir. Div. of Enforcement, U.S. Sec. & Exch. Comm'n, ACI's 32nd FCPA Conference Keynote Address (Nov. 17, 2015), <https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html>.

[11] See U.S. Sec. & Exch. Comm'n, Spotlight on Enforcement Cooperation Program, <https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml>.

[12] See, e.g., Office of Public Affairs, Dep't of Justice, Principal Deputy Assistant Attorney General John P. Cronan of the Justice Department's Criminal Division Delivers Remarks at the Latin Lawyer/Global Investigations Review Anti-Corruption and Investigations Conference (Oct. 18,

2018), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-0>.

[13] FCPA Corporate Enforcement Policy, Dep't of Justice (Mar. 2019), <https://www.justice.gov/criminal-fraud/file/838416/download>.

[14] Id.

[15] Id.

[16] EPA's Audit Policy, U.S. Envtl. Protection Agency, <https://www.epa.gov/compliance/epas-audit-policy>.

[17] Id.

[18] Id.

[19] Id.

[20] Enforcement of Statutes, Orders, Rules, and Regulations, Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216 (2010).

[21] Id.

[22] Id.

[23] See Robert Cohen, Stefani Myrick and Benjamin Wasserman, 4 Ways to Prepare for SEC or CFTC Penalty Negotiations, Law360 (Aug. 28, 2020), <https://www.law360.com/articles/1304857/4-ways-to-prepare-for-sec-or-cftc-penalty-negotiations> ("A critical component of penalty negotiations is determining the number of acts, omissions, or violations. This issue is particularly important because there is little case law on the issue, and whether actions are characterized as separate and distinct violations or part of a single course of conduct can have a significant impact on the maximum permissible penalty.").

[24] See Organisation for Economic Co-Operation and Development, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: United States B.4.A.iv (Nov. 17, 2020), <http://www.oecd.org/daf/anti-bribery/United-States-Phase-4-Report-ENG.pdf> (noting that "some legal practitioners and company representatives expressed reluctance to self-report [FCPA] violations to the DOJ . . . without knowing how the SEC would apply its factors to the same misconduct"). This is not to suggest that the SEC and DOJ guidance should be mirror images, as payments in an SEC settlement—especially disgorgement—can be a relevant factor for a DOJ declination decision.