



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

Division of Enforcement

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The Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
152 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senator Grassley:

As the Director of the Division of Enforcement of the Securities and Exchange Commission ("SEC"), Chairman Schapiro asked that I respond to your February 8, 2011 letter requesting information relating to communications and interactions between the SEC and the Department of Justice ("DOJ") on matters involving potential violations of the federal securities laws. In that letter, you reference comments I made at the Practising Law Institute's 42<sup>nd</sup> Annual Institute on Securities Regulation and express concern about a possible conflict between guidance in the SEC's Enforcement Manual relating to parallel criminal investigations and the SEC's new cooperation initiative. As described in more detail below, I can assure you our cooperation initiative is entirely consistent with our Enforcement Manual guidance.

The cooperation initiative, modeled after its DOJ counterpart and adopted in January 2010, allows the SEC to offer potentially reduced SEC sanctions to cooperating persons in exchange for full and truthful testimony and other cooperation that substantially assists an SEC investigation. The program is designed to encourage "insiders" and others to provide high-quality evidence of wrongdoing early so we can minimize investor loss and take action against the organizers, leaders, and managers of unlawful schemes.

Under Section 5.2.1 of the Enforcement Manual, SEC staff is not permitted to provide potential cooperators or their counsel with information about parallel criminal investigations.<sup>1</sup> SEC staff cannot provide those persons with basic point of contact information for DOJ staff, absent DOJ authorization. Any and all substantive discussions concerning the criminal

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<sup>1</sup> Section 5.2.1 of the Enforcement Manual provides that if SEC staff is asked about the existence of a parallel criminal investigation by counsel or an individual, staff should refer counsel or the individual to SEC Form 1662 dealing with "Routine Uses of Information" and state the Commission's general policy of not commenting on investigations conducted by criminal law enforcement authorities. If questioned as to whether there is a parallel criminal investigation, SEC staff should invite any person raising such issues to contact criminal authorities directly. If asked which criminal authorities to contact, SEC staff is directed to decline to answer unless authorized by the relevant criminal authority.

investigation – whether they concern status, settlement or any other topic – are exclusively between the DOJ and those individuals. At no time may SEC staff make representations on behalf of criminal authorities when communicating with individuals, or be a conduit for such communications.

My comments at the PLI Institute were prompted by a recognition that potential cooperators, before they agree to cooperate in an SEC investigation, may want to understand if there is a parallel DOJ (or other law enforcement authority) investigation into the same conduct, and, if so, how the DOJ views their clients' role in that conduct. In recognition of this issue, and to secure the benefits of the cooperation program, my comments were designed to note that this type of inquiry would result in more frequent discussions between the SEC and the DOJ concerning the potential cooperator. My comments did not endorse any deviation from the principle that criminal matters are the exclusive province of the DOJ, or alter the standard protocol that DOJ and only DOJ decides if it wishes to engage with the potential cooperator on criminal matters. The full text of my comments at the PLI Institute makes this clear:

But, with respect to the Justice Department, I think what [the cooperation program] has meant is that most defense counsel obviously may well pause before signing up their client to the SEC without knowing what the Justice Department is doing. So what it has resulted in, which we also anticipated, was that there is going to be earlier and more frequent collaboration between us and Justice when an individual wants to sign up with us. And, we are working to try and get those individuals answers as to whether there is criminal interest in the case . . . so that defense counsel can have as much information as possible in deciding whether or not to choose to sign up their client. (emphasis added).

These comments recognize the possible need for discussions between the SEC and the DOJ only about potential cooperators, which is entirely consistent, and in fact encouraged, under the policies set forth in the Enforcement Manual.<sup>2</sup> I was not sanctioning SEC staff to provide potential cooperators with criminal investigative information, nor am I authorized to do so. My remarks simply reflected the reality that the cooperation program, to be successful, may require “earlier and more frequent collaboration between us and Justice.” The reference to “get [ting] those individuals answers” refers to SEC staff communicating with DOJ that a potential SEC cooperator has asked the staff about his or her status at DOJ. It would then be left to DOJ whether it wishes to engage the potential cooperator in discussions.

Indeed, we cannot and do not speak for DOJ with respect to cooperating witnesses for a number of reasons, including: (i) we often do not know the full contours of the DOJ's case against a potential cooperator; (ii) we are prohibited from learning certain information in a criminal investigation, such as grand jury information pursuant to Rule 6(e) of the Federal Rules

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<sup>2</sup> See Section 5.2.1 (“In furtherance of the SEC’s mission and as a matter of public policy, the staff is encouraged to work cooperatively with criminal authorities, to share information, and to coordinate their investigations with parallel criminal investigations when appropriate”); (“Generally, sharing information with criminal prosecutors is permissible, even though the sharing of information is intended to and does in fact assist criminal prosecutors.”)

of Criminal Procedure; and (iii) DOJ has its own extensive procedures and considerations for evaluating and handling potential cooperators which they would not and could not delegate to the SEC. What SEC staff can do, if authorized by the relevant criminal authorities, is to refer potential cooperators to the criminal authority for discussion about criminal investigations, if any. The SEC staff can also discuss with DOJ the reasons for our interest in the potential cooperator, and if DOJ determines that a criminal investigation is implicated, it discusses that matter directly with the potential cooperator. The SEC does not participate in that discussion. As such, the cooperation initiative operates in complete accord with long-standing SEC practice and the guidance in the Enforcement Manual.

In addition to the above issue, your letter requested copies of written guidance on collaboration and communication between DOJ and the SEC. It also requested a description of the nature and extent of communications between the SEC and DOJ concerning the DOJ's intentions to pursue criminal charges in the Goldman Sachs or Pequot matters, as well as the SEC's decisions to settle in those matters. We are in the process of gathering this information and will provide it to you under separate cover in the near future.

I hope this addresses your concerns. Please call me at (202) 551-4894 or have your staff call Eric Spitler, Director of the Office of Legislative and Intergovernmental Affairs, at (202) 551-2010 if you have any questions or comments.

Sincerely,

A handwritten signature in blue ink that reads "Robert Khuzami". The signature is written in a cursive, slightly slanted style.

Robert S Khuzami