

# CORPORATE AND SECURITIES LAW

## ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

### **SEC Announces New Initiatives Aimed at Fostering Cooperation**

January 12, 2010

On January 13, 2010, the SEC announced groundbreaking new initiatives designed to encourage greater cooperation from individuals and companies in SEC investigations and enforcement actions. Similar to tools long available to criminal prosecutors, but not previously available to the SEC in civil actions, the new initiatives allow the SEC to offer various levels of full to qualified immunity to those who willingly provide information related to violations of securities laws. A proponent of the initiatives, Director Khuzami hailed them as “a potential game-changer” for the Division of Enforcement (the “Division”).

#### ***Guidance for Evaluating Cooperation***

In a new policy statement similar to the Seaboard Report, the SEC provides several factors it will use in evaluating whether and to what extent it will credit cooperation by individuals. Noting that the evaluation of cooperation requires a case by case analysis, the SEC’s primary considerations will be:

- (1) the assistance provided by the cooperating individual;
- (2) the importance of the underlying matter in which the individual cooperated;
- (3) the societal interest in ensuring the individual is held accountable for his or her misconduct; and
- (4) the appropriateness of cooperation credit based upon the profile of the cooperating individual.

#### ***New Cooperation Tools***

The Division of Enforcement also introduced a number of tools for facilitating and rewarding cooperation. While there is no guarantee which, if any, of the tools the SEC will use in a given instance, individuals and companies weighing the potential risks and rewards of volunteering information about wrongdoing to the SEC should be aware of their options. The new tools include:

- *Proffer Agreements* - Written agreements providing that any statements made by a person on a specific date may not be used against that individual in subsequent proceedings, with certain exceptions.
- *Cooperation Agreements* - Written agreements whereby the Division agrees to recommend to the SEC that a cooperator providing or likely to provide substantial assistance receive credit for the cooperation ultimately provided.
- *Deferred Prosecution Agreements* - Written agreements whereby the SEC agrees to forego an enforcement action against a cooperator, provided the cooperator agrees to cooperate fully and

truthfully, enter into a long-term tolling agreement, submit to certain prohibitions or undertakings, and, in some instances, admit to underlying facts in connection with wrongdoing.

- *Non-Prosecution Agreements* - Written agreements whereby the SEC agrees not to pursue an enforcement action against a cooperator in exchange for his or its cooperation and agreement to comply with express undertakings.
- *Immunity Requests* - Allows the Division to seek immunity to prevent information provided by a cooperator from being used against the cooperator in a criminal proceeding.

Bass, Berry & Sims PLC's SEC Priorities and Enforcement Subgroup is comprised of corporate attorneys who monitor and advise on developments in securities laws and SEC enforcement actions and initiatives. Our attorneys have a wide array of expertise and provide advice to companies as well as individual executives and directors. If you have any questions regarding the issues addressed in this Corporate and Securities Law Alert please feel free to contact any of your regular contacts in our Corporate and Securities Group or any of the attorneys in our SEC Priorities and Enforcement Subgroup listed below.

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### Bass, Berry & Sims PLC Corporate and Securities Group

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