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SEC Values Cooperation and Remediation

Insight — September 15, 2022

The SEC's Division of Enforcement talks a lot about valuing voluntary and proactive cooperation and remediation by companies. Yet less often do companies see some tangible evidence that such efforts can actually translate to meaningful benefits. That's because the decision not to pursue an enforcement action (an ideal cooperation benefit) is generally non-public. And extensive publicity about a cooperation benefit just draws more attention to the circumstances, perhaps complicating the cooperating company's public relations considerations.

A recent low-key, settled administrative order, however, offers some tangible evidence. In brief, the company buys and sells freight capacity to transport goods. A former trader at the company allegedly overstated the value of some contracts. A supervisor learned about an instance of that and management looked into the situation over the next month. The company then initiated an internal investigation (which also identified more issues) and self-reported the situation to the SEC.

The SEC's order identifies the company's cooperation and remediation steps and resolves the matter on favorable terms – neither-admit-nor-deny basis, cease and desist non-fraud charges (books & records and internal controls), fairly minimalist recitation of the factual circumstances, no disgorgement, no civil penalty, no undertakings, and no press release or speech. Per the order, the company:

- “provided relevant documents” to the SEC;
- “made employees available for interviews” by the SEC;
- “provided assistance in obtaining relevant information from third parties”; and
- “presented findings from its internal investigation” to the SEC.

The company's other remediation efforts included:

- “creation of an internal controls remediation steering committee”;
- “retention of outside experts to analyze and correct its control failures”;
- “hiring of additional personnel to bolster its internal controls processes”;
- “adopting policies, procedures, controls, and training to prevent the recurrence of similar events”;
- terminating the trader who allegedly overvalued the contracts;
- the company “later terminated, demoted, or placed on performance

improvement plans additional employees for their insufficient oversight"; and

- "without the staff's prompting or involvement…[the company] pursued and clawed back incentive compensation from 26 current or former [company] officers and directors due to [the company's] false financial statements."

The company ultimately restated some of its financials (due mostly, but not entirely, to conduct by the trader, who is litigating separately against the SEC).

Takeaway: If a potential issue arises, entities should promptly consult with independent outside counsel to discuss the proactive investigatory, self-remediation, and self-reporting steps that may make sense given the particular circumstances. Obviously, the SEC can't and won't agree up front to resolve a matter on certain terms. Yet entities that decline to undertake any such proactive compliance measures certainly decrease their chances at obtaining an outcome akin to the above.

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