

Securities and Exchange Commission
Division of Enforcement



Enforcement Manual

Office of Chief Counsel

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1. Introduction

1.1. Purpose and Scope

The Enforcement Manual (“Manual”¹) is a reference for staff in the Division of Enforcement (the “Division”) of the U.S. Securities and Exchange Commission (“SEC” or “Commission”) in the investigation of potential violations of the federal securities laws. It contains various general policies and procedures and is intended to provide guidance only to the staff of the Division, in the exercise of its responsibilities to the Commission for conducting enforcement activities. The Manual is not intended to and does not constitute a rule, regulation, or statement of the Commission. It is not binding on the Commission and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal.

1.2. Origin

The Manual was prepared under the general supervision of the Division’s Office of Chief Counsel (“OCC”). This Manual expresses the policies and common practices of the Division in the exercise of its responsibilities to the Commission. OCC and the Office of the Director of the Division coordinate periodic revision of the Manual, which will be updated and posted on an annual basis. The Manual is intended to provide general guidance, but decisions about particular individual investigations, cases, and charges are made based on the specific facts and circumstances presented.

1.3. Public Disclosure

The Manual is United States government property. It is to be used in conjunction with official SEC duties. This Manual is publicly available at sec.gov/divisions/enforce/enforcementmanual.pdf.

1.4. Fundamental Considerations

1.4.1. Mission Statement

The Division’s mission is to protect investors and the markets by investigating potential violations of the federal securities laws and litigating the SEC’s enforcement actions. Values integral to that mission are:

- Integrity: acting honestly, forthrightly, and impartially in every aspect of our work.
- Fairness: assuring that everyone receives fair and respectful treatment, without regard to wealth, social standing, publicity, politics, or personal characteristics.

¹ For an alphabetical list of all defined terms and acronyms used through this Manual, see Section 7.

- Commitment: recognizing the importance of, and caring deeply about, our mission of protecting investors and markets.
- Engagement: engaging with harmed investors and other members of the public in a professional manner.
- Teamwork: working collaboratively with colleagues within the Division and in the SEC's other divisions and offices, as well as with other fellow law enforcement professionals.

1.4.2. Ethics and Professional Responsibility

Maintaining and fostering a culture of integrity and professionalism is a Division priority. The Office of Government Ethics ("OGE") regulation titled "Standards of Ethical Conduct for Employees of the Executive Branch" lays out the basic obligation of public service:

Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee must respect and adhere to the principles of ethical conduct[.] (5 C.F.R. § 2635.101(a))

The SEC has a number of resources from which Division staff can obtain guidance on questions regarding ethical conduct and professional responsibility. Chief among them are the SEC's Office of Ethics Counsel ("Ethics Office") and the SEC's Professional Responsibility Counsel (in the Office of the General Counsel ("OGC")), which ensure that the staff adheres to the canons of ethics set out in 17 C.F.R. § 200.50, *et. seq.* Staff should not hesitate to consult with the attorney staff in the SEC's Ethics Office on any question of ethics and may consult Ethics Office bulletins and applicable statutes and regulations available from the Ethics Office. Attorneys can also consult with the Commission's Professional Responsibility Counsel on compliance with applicable rules of professional conduct governing attorneys. State rules of professional conduct, including the rule regarding candor in tribunals, and other laws apply to many aspects of Commission attorneys' work. Attorneys should review the rules of professional conduct for each jurisdiction in which they are licensed and any other jurisdictions whose rules govern their conduct.

Licensed accountants should consider state board of accountancy laws and other rules in the relevant jurisdictions where licensed.

Division staff maintaining any other licenses or credentials should consider all applicable professional obligations, including those arising from federal or state regulations.

Considerations:

- If staff is uncertain about an ethical issue, staff should seek guidance from the Ethics Office or Professional Responsibility Counsel *before* acting.

- Staff should remain alert to new rules and updates posted by the Ethics Office.
- Staff should be aware of ethical issues that may arise, including policies on:
 - Confidentiality and the protection of nonpublic information;
 - Attorney responsibility (under the OGE Standards of Ethical Conduct for Employees of the Executive Branch, the rules of professional conduct for each jurisdiction in which the attorney is licensed to practice law, and the rules of professional conduct of the jurisdiction in which the attorney is appearing on behalf of the Commission before a tribunal or otherwise engaging in such other behavior as may be considered the practice of law under the rules of professional conduct of that jurisdiction);
 - Securities transactions by employees;
 - Conflicts of interest (including financial and personal interests);
 - Recusals (including applicable recusal policies for Division staff);
 - Referral of professional misconduct;
 - Publication and outside speaking engagement guidelines;
 - Gifts and invitations;
 - Outside employment and activities;
 - Requirements under the Hatch Act of 1939;
 - Misuse of public office for private gain;
 - Pro bono activity; and
 - Seeking and negotiating employment outside the SEC.

Further Information:

For further information about ethics and professional responsibility, *see* the OGE Standards of Ethical Conduct for Employees of the Executive Branch, [5 C.F.R. Part 2635, et seq.](#), the OGE compilations of federal ethics laws, available at [OGE: Standards of Ethical Conduct](#), and the criminal conflict of interest statutes, including 18 U.S.C. §§ 203, 205, 207–9 and other related statutes, available at [OGE: Criminal Conflict of Interest Laws](#).

1.4.3. Consultation

Although this Manual is intended to be a reference for Division staff responsible for investigations, no set of procedures or policies can replace the need for active and ongoing consultation with colleagues, supervisors, other divisions and offices at the SEC, and internal

experts. Investigations often require careful legal and technical analysis of complicated issues, culminating in difficult decisions that may affect market participants, individuals, issuers, and investors. Therefore, when an issue arises for which colleagues or other divisions or offices may hold particular expertise, the staff will consult with those experts as appropriate. In addition, staff should keep other divisions and offices informed regarding issues of interest that arise during investigations and consult with relevant divisions and offices before making recommendations for action to the Commission, including as set forth in [Section 2.5.2](#).

1.4.4. Updating Internal Systems

The Division uses several internal systems, including the Hub and the Tips, Complaints, and Referrals system (“TCR System”), to help manage case information. The reliability and usefulness of each of the Division’s internal systems is dependent upon timely and accurate entry of information by the staff.

2. A Guide to Matters Under Inquiry and the Stages of Investigations

2.1. Tips, Complaints, and Referrals

2.1.1. Complaints and Tips from the Public

Introduction:

Public complaints and tips are primarily received through the SEC’s TCR System or through contact with staff at any of the SEC’s offices. The vast majority of complaints and tips received by the Division are in electronic form and the Division encourages the public to communicate with it through the TCR System. Complaints are assessed for apparent reliability, detail, and potential violations of the federal securities laws. After review, the complaint or tip generally is processed according to the guidelines below.

2.1.1.1. Processing Tips and Complaints from the Public

Guidelines for Processing Public Complaints and Tips:

- Complaints that appear to be credible, probative, and substantive are usually forwarded to staff in the Home Office or the appropriate regional office or Specialized Unit for more detailed review, and may result in the opening of a “matter under inquiry” (“MUI”).
- Credible, probative, and substantive complaints that relate to an existing MUI or investigation are generally forwarded to the staff assigned to that existing matter.
- Credible, probative, and substantive complaints that involve the specific expertise of another division or office within the SEC are routinely forwarded to staff in that particular division or office for further analysis, including, as appropriate, for assistance in evaluating the merit of the TCR.
- Consistent with Commission policy, complaints that fall within the jurisdiction of another federal or state agency should be referred to that agency, consistent with the

considerations and procedures set forth in [Sections 5.6.4, et seq.](#) Referrals of complaints to the Department of Justice (“DOJ”) should be made consistent with the Commission’s “Policy Statement Concerning Agency Referrals for Potential Criminal Enforcement,” Exchange Act Release No. 34-103277 (effective June 20, 2025) (“[Criminal Referral Policy Statement](#)”), issued pursuant to [Executive Order 14294](#) and codified at [17 C.F.R. § 202.14](#). See [Section 5.6.1](#). Because of statutory requirements to protect the identity of whistleblowers, staff should consult with the Division’s Office of the Whistleblower (“OWB”) before sharing any information with other agencies that may reasonably identify a whistleblower.

- Complaints that relate to the private financial affairs of an investor or a discrete investor group are usually forwarded to the SEC’s Office of Investor Education and Advocacy (“OIEA”). Comments or questions about agency practice or the federal securities laws are also forwarded to OIEA.

Searching the TCR System:

Staff are encouraged to search the TCR System periodically to ensure that they are aware of tips, complaints, and referrals related to their MUIs and investigations. Staff should search the system as frequently as needed and before making material decisions about a matter, including whether to open a MUI or investigation, or to add a related party. Prior to closing a matter, staff should use their best judgment in considering whether to search the TCR system, taking into account whether the existence of a related TCR potentially could affect the decision to close the matter. Staff may request the assignment of any related tip, complaint, or referral discovered as a result of their search.

Further Information:

Staff should address any questions regarding the handling of tips, complaints, and referrals to their group’s TCR point of contact.

2.1.1.2. Whistleblower Award Program

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd–Frank Act”) provides that the Commission shall pay awards to eligible whistleblowers in certain statutorily-defined, covered judicial or administrative actions and related actions. The Dodd-Frank Act provides that the Commission, subject to applicable regulations, shall pay awards of not less than 10 percent and not more than 30 percent of what has been collected of the total monetary sanctions imposed in the covered action. The Dodd–Frank Act also prohibits retaliation by employers against whistleblowers and provides them with a private cause of action in the event that they are discharged or discriminated against by their employers in violation of the Act. Whistleblower information is highly confidential and there are strict limitations on its disclosure. Subject to certain exceptions, the Dodd-Frank Act prohibits disclosure of information that could reasonably be expected to reveal the identity of a whistleblower. See [Section 5.1](#).

Further Information:

For further information on the SEC's whistleblower award program, staff should consult OWB.

2.1.2. Other Referrals

2.1.2.1. Referrals Involving Bank Secrecy Act Material

Enacted in 1970 and amended by the USA PATRIOT Act, the Bank Secrecy Act ("BSA") is designed to prevent financial institutions, including broker-dealers, from being used as vehicles through which criminals hide the transfer of illegally obtained funds. The recordkeeping and reporting requirements of the BSA create a paper trail for federal, state, and local law enforcement to investigate the movement of funds in money laundering and other illegal schemes. The BSA is codified at 31 U.S.C. § 5311, *et seq.* The regulations implementing the BSA are located at 31 C.F.R. Chapter X.

For the SEC, the primary mechanism for enforcing compliance by brokers and dealers with the requirements of the BSA is Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 17a-8 thereunder. Under Rule 17a-8, every registered broker or dealer must comply with the reporting, recordkeeping, and record retention provisions of 31 C.F.R. Chapter X, Rule 17a-8, 17 C.F.R. § 240.17a-8. In the investment company context, the registered "funds" must comply with Rule 38a-1 of the Investment Company Act of 1940 ("Investment Company Act"). Rule 38a-1 states that funds must adopt and implement written policies and procedures reasonably designed to prevent violation of the "Federal Securities Laws," by the fund which, for purposes of that rule, include the BSA. Rule 38a-1(e)(1), 17 C.F.R. § 270.38a-1(e)(1).

BSA information is highly confidential, and subject to the strict limitations set out by the Financial Crimes Enforcement Network ("FinCEN"), a bureau in the Department of the Treasury. Enforcement staff has access to and reviews certain electronic reports filed under the BSA.

The Division's BSA Review Group handles, evaluates, and assigns BSA information for consideration by divisions and offices within the Commission. Enforcement staff may receive information from the BSA Review Group about Suspicious Activity Reports ("SARs") or other BSA reports that either relate to open Enforcement matters or warrant further Enforcement consideration.

Handling Referrals Based on Bank Secrecy Act Information:

Certain BSA information, particularly SARs and related materials that would reveal the existence of a SAR, is highly sensitive and must be handled with great care. All SAR materials must be segregated and marked to indicate that they contain sensitive SAR information.

Further Information:

Staff should contact the Division’s BSA Review Group for specific information and guidance about how to handle BSA materials properly. See [Sections 3.2.10.](#) and [4.7.](#)

2.1.2.2. Referrals from the Public Company Accounting Oversight Board

Basics:

The enforcement staff of the Public Company Accounting Oversight Board (“PCAOB”) may forward referrals or tips to the staff of the Division. The Division’s Office of Market Intelligence (“OMI”) and, depending on the referral or tip, the Division’s Office of the Chief Accountant, makes an initial assessment regarding whether an investigation may be warranted and, if so, the matter is assigned to investigative staff for further action.

If appropriate, staff will then get approval to open a MUI. See [Section 2.2.1.](#)

Considerations:

If necessary, staff and their supervisors should notify the Division’s Office of the Chief Accountant about obtaining documents and information regarding the tip.

Further Information:

Please refer any questions about receiving a tip from the PCAOB to the Division’s Office of the Chief Accountant.

2.1.2.3. Referrals from State Securities Regulators

Basics:

State securities regulators enforce state-wide securities laws known as “blue sky laws.” The Division receives information and referrals from state securities regulators. These referrals should be entered into the TCR System for tracking and assignment purposes. Most of the state securities regulators have relationships with the SEC regional office that covers the territory in which they are located, and the state regulators direct their referrals to that office.

Considerations:

- Staff should discuss the information received from state securities regulators promptly with their supervisors.
- Consider ongoing coordination with the state securities regulator, as appropriate.

Further Information:

If the opening of a MUI is appropriate, staff will follow the instructions for opening a MUI. See [Section 2.2.1.](#)

2.1.2.4. Referrals from Congress

Basics:

The SEC frequently receives complaints and other information from members of Congress on behalf of the constituents whom they represent. Most of these letters are directed to the Commission's Office of Legislative and Intergovernmental Affairs or the Office of the Chairman and then assigned to the appropriate division or office within the SEC. The Commission's Office of the Chairman tracks the responses to congressional letters. As with complaints and other information received from other sources, complaints and tips received by the Division from Congress and congressional constituents are carefully reviewed by staff.

Considerations:

- Because disclosure of nonpublic information requires Commission approval, staff should not share nonpublic information, including whether the staff has or will commence an investigation, with the complainants or members of Congress.
- Staff should provide timely responses to congressional letters, using the appropriate format and meeting the deadlines required by the Office of Legislative and Intergovernmental Affairs or the Office of the Chairman.
- If staff believes the information obtained from the congressional letter warrants the opening of a MUI, staff should follow the instructions for opening a MUI. *See* [Section 2.2.1](#).

Further Information:

Staff should consult the Office of Legislative and Intergovernmental Affairs and the Office of the Chairman when drafting responses to congressional letters.

2.1.2.5. Referrals from Self-Regulatory Organizations

Basics:

OMI is the primary point of contact for referrals by self-regulatory organizations ("SROs"). Each equity and option exchange is responsible for monitoring its own markets and enforcing exchange rules and regulations and the federal securities laws. If an SRO discovers potentially violative conduct and believes that it has jurisdiction, it may conduct its own investigation and/or refer one or more potential violations to the SEC. If an SRO determines that it does not have jurisdiction, it will refer the potential violations to the SEC.

Considerations:

Consider ongoing consultation with SROs, as appropriate.

Further Information:

If the referring SRO continues with a parallel investigation, please refer to the policy on parallel investigations. See [Section 3.1.4](#).

2.2. Matters Under Inquiry and Investigations

2.2.1. Opening a MUI

Introduction:

The purpose of the procedures and policies for the review and approval of new MUIs is to help ensure efficient allocation of resources.

Opening a MUI requires that the staff assigned to a MUI (at the Assistant Director² level and below) first conduct preliminary analyses to determine: (1) whether the facts underlying the MUI show that there is potential to address conduct that violates the federal securities laws; and (2) whether the assignment of a MUI to a particular office, Associate Director group, or unit will be the best use of resources for the Division as a whole. If the preliminary analyses indicate that a MUI should be opened, then the staff should follow the procedures below for opening a MUI within the internal system and seeking approval of the assigned Associate Director/Unit Chief. Prior to any other considerations, the staff should consult the Hub for related investigations. Staff should also search the TCR System for related TCRs. If a related investigation or TCR is found, the staff assigned to that investigation or TCR should be consulted. In addition, staff should determine whether there are any open examinations of any of the entities or individuals potentially involved in the new MUI.

Prior to opening a MUI, the assigned staff (Assistant Director and below) should determine whether the known facts show that an Enforcement investigation would have the potential to address conduct that violates the federal securities laws. The Division receives information from a variety of sources that may warrant the opening of a new MUI, including newspaper articles, complaints from the public, whistleblowers, and referrals from other agencies or SROs. Assigned staff are encouraged to use their discretion and judgment in making the preliminary determination of whether it is appropriate to open a MUI. The considerations described below are suggestions only and should not discourage the opening of a MUI based on partial information. MUIs are preliminary in nature and typically involve incomplete information. The threshold determination for opening a new MUI is low because the purpose of a MUI is to gather additional facts to help evaluate whether an investigation would be an appropriate use of resources.

² “Assistant Director” is used to refer both to Assistant Directors in the Home Office and in the regional offices. Similarly, “Associate Director” is used to refer both to Associate Directors in the Home Office and in the Regional Offices. “Unit Chief” refers to the heads of the Division’s five national specialized units: the Asset Management Unit, the Cyber and Emerging Technologies Unit, the Complex Financial Instruments Unit, the Market Abuse Unit, and the Public Finance Abuse Unit. “Deputy Director” refers to Deputy Directors of the Division, who report to the Director of the Division. Separately, the Division’s Trial Unit is led by the Division’s Chief Litigation Counsel and Deputy Chief Litigation Counsel, and the Division’s accountants are led by the Division’s Chief Accountant.

To determine whether to open a MUI, the staff attorney, in conjunction with the Assistant Director, should consider whether a sufficiently credible source or set of facts suggests that a MUI could lead to an enforcement action that would address a violation of the federal securities laws. Basic considerations used when making this determination may include, but are not limited to:

- The statutes or rules potentially violated;
- The egregiousness of the potential violations;
- The potential magnitude of the potential violations;
- The potential losses involved or harm to an investor or investors;
- Whether the potentially harmed group is particularly vulnerable or at risk;
- Whether the conduct is ongoing;
- Whether the conduct can be investigated efficiently and within the statute of limitations period; and
- Whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct.

The presence or absence of U.S. investors should be a factor considered, but should not control, whether to open a MUI. After determining that a MUI has the potential to address conduct that violates the federal securities laws, the assigned staff should evaluate whether, from a resource standpoint, it is reasonable for their office, unit, or Associate Director group (“Investigative Group”) to handle the investigation. Basic considerations used when making this determination may include, but are not limited to:

- The location of the potentially wrongful conduct;
- The location of the potential wrongdoers;
- The location of the issuer’s, entity’s, or SRO’s headquarters;
- The location of most witnesses or potentially harmed investors; and
- The resources and expertise of the Investigative Group.

If an Investigative Group believes it has compelling reasons to handle a MUI or investigation for which another Investigative Group may have a substantial nexus, it must consult with the other group to determine which group should pursue the MUI or investigation, or whether the two Investigative Groups should jointly pursue the MUI or investigation. There may be some exceptions to the general guidance. For example, if a MUI is closely related to a previous investigation, a determination should be made whether the Investigative Group that

handled the previous investigation should handle the new MUI, regardless of whether that Investigative Group has a nexus to the new MUI.

If it later becomes clear that a MUI or investigation is centered in a specific region, consideration should be given to referring the investigation to that regional office, depending on available staff in the regional office and the stage of the MUI or investigation. In some situations, such as where witnesses are dispersed or where an Investigative Group has special expertise, it may make sense for staff from more than one Investigative Group to work together on a matter.

Procedures for Opening a MUI:

- (1) Log into the Hub and select “Open a MUI/INV.”
- (2) Fill out the required and other applicable fields to request the opening of a MUI, including a MUI Opening Narrative, Primary Classification, Origin, etc. Click “Submit.”
- (3) The request will be routed to the designated Associate Director/Unit Chief for consideration.
- (4) The Associate Director/Unit Chief should review the request promptly and, if satisfied that the MUI has the potential to address conduct that may violate the federal securities laws, approve the opening of the MUI in the Hub.
- (5) Supervisors at the level of Associate Director or above will receive a weekly report of all MUIs opened during the prior week.

Considerations:

As a general matter, MUIs should be closed or converted to an investigation within sixty days. Staff should follow the policies and procedures for closing a MUI or converting a MUI. See [Section 2.2.2](#).

Further Information:

For more information on filling out MUI forms, please check for instructions on the Hub or contact one of the Division’s Case Management Specialists.

2.2.2. Opening an Investigation and Converting or Closing a MUI

Introduction:

Investigations are opened in two ways: (1) the investigation is opened when a MUI is converted to an investigation, or (2) an investigation is opened independent of a MUI. In both cases, the opening of an investigation requires that the assigned staff (at the Assistant Director level and below) conduct an evaluation of the facts to determine the investigation’s potential to address conduct that violates the federal securities laws. The analysis for whether to convert a MUI to an investigation, or open an investigation, differs from the analysis for whether to open a MUI. While a MUI can be opened on the basis of very limited information, an investigation

generally should be opened after the assigned staff has done additional information gathering and analysis. If the investigation was opened from a MUI, it may also be appropriate at this time to revisit whether the Investigative Group has a sufficient nexus to the matter.

Analysis of Whether the Investigation Has the Potential to Substantively and Effectively Address Conduct that Violates the Federal Securities Laws:

The assigned staff, in consultation with the assigned Associate Director/Unit Chief, should evaluate the information gathered to determine whether it is an appropriate use of resources to open an investigation (either through conversion of the MUI or independent of a MUI). While the threshold analysis for opening a MUI is relatively low, determining whether the MUI should be converted to an investigation or whether to open an investigation is typically a more detailed evaluation that is based on additional information.

The evaluation for whether to convert a MUI to an investigation (or open an investigation) turns on whether, and to what extent, the investigation has the potential to address conduct that violates the federal securities laws. Threshold issues to consider when evaluating the facts include:

- Do the facts suggest a possible violation of the federal securities laws involving fraud or other serious misconduct?
- If yes, is an investment of resources by the staff merited by:
 - the magnitude or nature of the potential violation;
 - the size of the potentially harmed investor group;
 - the amount of potential or actual losses to investors;
 - for potential insider trading or other manipulative trading, the amount of profits or losses avoided; or
 - for potential financial reporting violations, materiality?
- If yes, is the conduct:
 - ongoing; or
 - within the statute of limitations period?

In addition to the threshold issues identified above, staff should consider the following supplemental factors:

- Is there a need for immediate action to protect investors or to minimize losses suffered by harmed investors?
- Does the conduct affect the fairness or liquidity of the U.S. securities markets?

- Does the conduct involve a recidivist?
- Has the SEC or Division designated the subject matter a priority?
- Does the matter fulfill a programmatic goal of the SEC and the Division?
- Does the matter involve a possibly widespread industry practice that should be addressed?
- Does the matter give the SEC an opportunity to be visible in a community that might not otherwise be familiar with the SEC or the protections afforded by the securities laws?
- Does the matter present a good opportunity to cooperate with other civil and criminal agencies?

As always, the presence or absence of U.S. investors should be considered as a factor but should not, in itself, control whether to open an investigation.

Considerations:

Assigned staff are encouraged to revisit whether the Investigative Group still has a sufficient nexus under the new facts learned during the period of the MUI. If the staff's understanding of the relevant facts has changed, assigned staff should consider whether it is appropriate to contact another Associate Director group, office, or unit that may be better suited to handle the investigation.

Prior to the conversion of a MUI to an investigation, the staff should endeavor to identify any threshold issues of law or policy that may be relevant to the investigation and any possible violations of the securities laws. As appropriate, the staff will consult with internal subject matter experts and the Division's liaisons to other offices and divisions within the SEC to assess relevant investigative steps and legal issues.

Procedures for Converting a MUI to an Investigation:

As a general matter, MUIs should be closed or converted to an investigation within sixty days as follows:

- (1) The assigned staff, in consultation with an assigned Associate Director/Unit Chief as necessary, should evaluate the facts gathered during the MUI, using the factors listed above, to determine whether, and to what extent, the investigation will have the potential to address conduct that violates the federal securities laws.
- (2) If it is determined that it is appropriate to proceed with the investigation, then the assigned staff will request approval to convert the MUI to an investigation in the Hub by completing an Investigation Opening Narrative and clicking "Convert." The request will be routed to the designated Associate Director/Unit Chief for consideration.

- (3) The Associate Director/Unit Chief should review the request promptly, and, if satisfied that an investigation has the potential to address conduct that violates the federal securities laws, approve the conversion of the MUI to an investigation in the Hub.
- (4) If the assigned staff, in consultation with an assigned Associate Director/Unit Chief, determines that the investigation does not have the potential to address conduct that violates the federal securities laws, or there is another reason that the investigation would be an inappropriate use of resources, then the assigned staff, in consultation with the assigned Associate Director/Unit Chief, should close the MUI. To close the MUI, the assigned staff should enter a closing narrative in the Hub explaining why the matter is being closed and request that the assigned Case Management Specialist designate the MUI as closed in the Hub.

Procedures for Opening an Investigation, Independent of a MUI:

In certain circumstances, it is appropriate to open an investigation without having opened a MUI. As when opening a MUI, the staff should consult the Hub for related investigations. Staff should also search the TCR System for related TCRs. If a related investigation or TCR is found, the staff assigned to that investigation or TCR should be consulted. In addition, staff should determine whether there are any open examinations of any of the entities or individuals potentially involved in the new investigation.

To open an investigation, independent of a MUI:

- Log into the Hub and select “Open a MUI/INV.”
- Fill out the required and other applicable fields to request opening of an investigation, including an Opening Narrative, Primary Classification, Origin, etc. Click “Submit.”
- The request will be routed to the designated Associate Director/Unit Chief for consideration.
- The Associate Director/Unit Chief should review the request promptly, and, if satisfied that the investigation has the potential to address conduct that violates the federal securities laws, approve the opening of the investigation in the Hub.
- Supervisors at the level of Associate Director or above will receive a weekly report of all investigations opened independent of a MUI during the prior week.

2.2.3. Formal Orders of Investigation

The federal securities laws authorize the SEC, or any officer designated by the SEC, to issue subpoenas requiring a witness to provide documents and testimony under oath. *See* Section 19(c) of the Securities Act of 1933 (“Securities Act”), Section 21(b) of the Exchange Act, Section 209(b) of the Investment Advisers Act of 1940 (“Advisers Act”), and Section 42(b) of the Investment Company Act. The Commission designates members of the staff to act as officers of the Commission in an investigation by issuing a Formal Order of Investigation (“Formal Order”).

The staff may request that the Commission issue a Formal Order in an investigation to determine whether a violation of the federal securities laws may have occurred or may be occurring. As such, the Formal Order does not represent a determination that any violations have occurred and is more properly viewed as an early step in an investigation rather than the conclusion of one.

The Formal Order serves two important functions. First, it generally describes the nature of the investigation that has been authorized. Second, it designates specific staff members to act as officers for the purposes of the investigation and empowers them to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of documents and other materials. Attorneys and non-attorneys, such as staff accountants, analysts, and investigators, may be designated as officers and empowered to take testimony and issue subpoenas.

Investigative proceedings are nonpublic unless otherwise ordered by the Commission.

2.2.3.1. Formal Order Process

Basics:

The staff should first convert the relevant MUI to an investigation in the Hub if the staff has not done so already. A Formal Order can only be issued in an investigation.

To seek a Formal Order in an investigation, the staff should prepare and submit a memo describing the investigation and need for a Formal Order, along with a proposed Formal Order, for review by the Division's Office of the Director. The memo should succinctly describe the relevant conduct, along with the potential violations of relevant laws, rules, or regulations at issue in the investigation. Once reviewed and approved by the Office of the Director, the staff should submit the memo and proposed Formal Order to the Commission. If approved by the Commission, the Formal Order will be issued by the Office of the Secretary ("OS").

Considerations:

When considering whether to seek issuance of a Formal Order, the staff should assess a variety of factors, including, but not limited to, the need to subpoena witnesses for testimony, subpoena documents and communications from entities and people who may not otherwise be obligated to preserve and produce relevant materials to the staff, and enforce deadlines for the expeditious production of relevant materials to the staff.

Staff may determine that it is important to communicate to the recipients of investigative requests that the absence or presence of a Formal Order does not signify anything, in and of itself, about the staff's views on the matter under investigation.

2.2.3.2. Supplementing a Formal Order

Once a Formal Order has been issued, the Director of the Division ("Director") has delegated authority to issue supplemental orders adding or removing staff members as officers

empowered to act pursuant to the order or removing previously named staff. *See* 17 C.F.R. § 200.30-4(a)(1) and (4).

2.2.3.3. Requests for a Copy of the Formal Order

Basics:

Rule 7(a) of the SEC's Rules Relating to Investigations provides that a person who is compelled or requested to furnish documentary evidence or testimony at a formal investigative proceeding shall, upon request, be shown the Formal Order. However, a copy of the Formal Order shall not be furnished to that person for retention without the express approval of a Division official at the level of Assistant Director or higher. *See* 17 C.F.R. § 203.7(a).

Procedures for Responding to a Request for a Copy of the Formal Order:

When a member of the staff receives a request for a copy of the Formal Order, staff should keep in mind the following procedures when determining whether the request should be granted:

- The request must be made by a person or counsel for a person who has been asked to furnish documents or testimony in the investigation for which the person is requesting a copy of the Formal Order.
- The request for a copy of the Formal Order must be in writing. A copy of the Formal Order may not be provided on the basis of an oral request. Therefore, staff should advise the person to submit the request in writing to the Assistant Director assigned to the investigation.
- The written request for the Formal Order must include representations to show that approval of the request is "consistent both with the protection of privacy of persons involved in the investigation and with the unimpeded conduct of the investigation." 17 C.F.R. § 203.7(a).
- Only an Assistant Director or higher-level Division official may approve a written request for a copy of a Formal Order. There may be circumstances that warrant denial of the request, such as when there is evidence that the requester intends to use the Formal Order for purposes outside the representation in the matter, or does not intend to keep the Formal Order confidential. *See* 17 C.F.R. § 203.7(a) ("Such approval shall not be given unless the person granting such approval, in his or her discretion, is satisfied that there exist reasons consistent both with the protection of privacy of persons involved in the investigation and with the unimpeded conduct of the investigation.").

Even if a request for a copy of the Formal Order is denied, a requesting person who is compelled or requested to furnish documentary evidence or testimony at a formal investigative proceeding is still entitled to review the Formal Order without retaining a copy. 17 C.F.R. § 203.7(a).

2.2.4. Ranking Investigations and Allocating Resources

Introduction:

The Division handles a number of investigations that vary in their size, complexity, and programmatic importance. Devoting appropriate resources to investigations that are more significant will help ensure high quality investigations and maximize desired program outcomes. To make effective decisions regarding resources and priorities, Associate Directors/Unit Chiefs are required to designate their “Top 5” priority matters, based on potential programmatic significance, on each of their dockets. Associate Directors/Unit Chiefs will review and, as appropriate, update their Top 5 lists on a quarterly basis.

Considerations When Ranking an Investigation:

In compiling their Top 5 lists, Associate Directors/Unit Chiefs should consider the following criteria:

- Whether the matter involves potentially widespread and extensive harm to investors;
- Whether the matter presents an opportunity to send a particularly strong and effective message of deterrence, including with respect to emergent issues in the market, or involves matters that present limited opportunities to detect wrongdoing and thus to deter misconduct;
- Whether the matter involves particularly egregious or extensive misconduct;
- Whether the matter involves misconduct by persons occupying positions of substantial authority or responsibility, or who owe fiduciary or other enhanced duties and obligations to a broad group of investors or others;
- Whether the matter involves potential wrongdoing as clearly prohibited under newly enacted legislation or regulatory rules;
- Whether the potential misconduct occurred in connection with products, markets, transactions, or practices that pose particularly significant risks for investors or involve a systemically important sector of the market;
- Whether the matter involves a substantial number of potential harmed investors and/or particularly vulnerable harmed investors;
- Whether the matter involves products, markets, transactions, or practices that the Division has identified as priority areas; and
- Whether the matter provides an opportunity to pursue priority interests shared by other law enforcement agencies on a coordinated basis.

Although determining the overall significance of an investigation should take the above factors into consideration, the ranking of an investigation is a judgment to be made based on all of the facts and circumstances known to date.

Considerations When Allocating Resources Among Investigations:

Allocating resources among investigations requires that Associate Directors, Unit Chiefs, Deputy Unit Chiefs, and Assistant Directors engage in active supervision of staff, exercising flexibility and creativity in that process. Associate and Assistant Directors and Unit Chiefs will normally assign staff to more than one investigation at a time, specifying the priorities of competing investigations so that staff members may plan their work.

Priorities among investigations may change rapidly depending on the stage of the investigation. For example, two significant investigations may compete for resources, but staff may be assigned to review and analyze evidence in one investigation while waiting for documents to be produced in another investigation. Therefore, when allocating resources among competing investigations, Associate and Assistant Directors and Unit Chiefs should take into account not only the significance of the investigation, but the phase of the investigation, considering, among other things:

- Whether there is an urgent need to file an enforcement action, such as an investigation into ongoing fraud or conduct that poses a threat of imminent harm to investors;
- The volume of evidence that the staff must collect and review, such as trading records, corporate documents, and electronic communications;
- The level of analysis required for complex data and evidence, such as auditor workpapers, trading records, or financial data;
- The number and locations of harmed investors and other witnesses, and the scheduling of testimony;
- Travel requirements;
- Timelines for preparing internal memoranda, evaluation of the matter by relevant SEC offices and divisions, the Wells notice process, and the Commission's consideration of recommendations from the Division; and
- Coordination with and timing considerations of other state and federal authorities.

For investigations included in their Top 5 lists, Associate Directors/Unit Chiefs should consider assigning a minimum of two staff attorneys to ensure that there is continuity on the investigation in the event of absences or staff transitions. In addition, the assignment of at least two attorneys may contribute to a collaborative approach that improves the quality of the investigation and promotes accountability. Additional attorneys may be assigned depending on the phase and needs of the investigation.

2.2.5. Quarterly Reviews of Investigations and Status Updates

Introduction:

The Division has established a practice of conducting quarterly case reviews that is designed to facilitate communication among staff members and enhance the quality and effectiveness of our investigations. Quarterly reviews are not intended to substitute for the ongoing case meetings and discussions between Associate Directors, Unit Chiefs, Assistant Directors and other staff members that take place in the ordinary course of investigations.

Quarterly Case Review Meetings by Assistant Directors:

Each Assistant Director will conduct a quarterly case review meeting with each staff member under the Assistant Director's supervision. Unless a decision has been made not to prepare an investigative plan, Assistant Directors should instruct staff members under their supervision to prepare, for each active matter, a written investigative plan either in the Hub or as a separate standalone document to assist with case tracking and planning. The investigative plan should be shared with team members and periodically revised, and should provide a vehicle for productive conversations during quarterly reviews.

The purpose of the quarterly review is to ensure that ongoing investigations are proceeding on course, to revise investigative plans as appropriate and to provide an opportunity for dialogue on major open issues. Prior to each quarterly review, the Assistant Director should confirm that staff members under their supervision have updated the Hub to reflect the current status of each ongoing investigation in their inventory. Suggested topics to cover during quarterly case review meetings include:

- Progress in meeting investigative goals and objectives for each investigation assigned to the staff member;
- Identification of major issues in open investigations that need further attention or discussion;
- Whether target deadlines are being met, and identification of causes for any delay and development of a plan to address that delay and move the investigation toward resolution;
- Allocation of staff members' time among assigned investigative matters, matters in litigation, and other responsibilities;
- Engagement with potentially harmed investors;
- Coordination issues with state and federal authorities; and
- Any other topics that the Assistant Director or staff member would like to raise for discussion.

Quarterly Case Review Meetings Between Assistant Directors and Associate Directors or Unit Chiefs:

Each Associate Director/Unit Chief should conduct a quarterly review meeting with each Assistant Director on ongoing investigations under the Associate Director/Unit Chief's direct supervision. These reviews may be combined with the above-referenced reviews involving the Assistant Director and staff members. Suggested topics to cover during these meetings include the status of significant ongoing investigations or investigations at significant inflection points, a discussion of any major issues presented, estimated completion time of investigations, and the need for any assistance or additional resources to advance investigations to completion.

Periodic Case Review Meetings Between Associate Directors/Unit Chiefs and Director/Deputy Directors:

In their discretion, the Director and/or appropriate Deputy Director may conduct periodic review meetings with each Associate Director/Unit Chief. Topics to be covered may include the status of significant matters, any major issues presented, coordination with other law enforcement agencies, estimated completion time of investigations, and the need for any assistance or resources to advance investigations to completion.

Processes, Confirmation, and Reporting:

For each quarterly review period, Associate Directors/Unit Chiefs and/or Assistant Directors should confirm that quarterly reviews for each applicable ongoing investigation have taken place. This should be done in a manner determined by the Office of the Director.

Ongoing Updates to the Hub System:

- The assigned staff should review and periodically update in the Hub the status of an ongoing investigation.
- The Executive Summary in the Hub should summarize what the matter is about, the activity to date, current status, and plans for the upcoming period. For example, the staff might note that they are engaging with harmed investors, taking testimony, or conducting settlement negotiations, or that a potential party to an enforcement action has been indicted.
- Any inaccurate or out-of-date information should be corrected.

2.3. The Wells Process

The Commission's Wells Rule:

Rule 5(c) of the SEC's Rules on Informal and Other Procedures states that "[p]ersons who become involved in . . . investigations may . . . submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation." (a "Wells submission"). The rule further provides that, "[u]pon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the

indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding.” (a “Wells notice”) 17 C.F.R. § 202.5(c).

The practice reflected in Rule 5(c) evolved from recommendations made by an advisory committee chaired by John Wells. The objective of the practice is, as the Commission stated in its 1972 release (the “Wells Release”), for the Commission “not only to be informed of the findings made by its staff but also, where practicable and appropriate, to have before it the position of persons under investigation at the time it is asked to consider enforcement action.” See “[Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations](#),” Securities Act of 1933 Release No. 5310 (Sept. 27, 1972). As the Commission stated in the Wells Release, “[t]he Commission, however, is also conscious of its responsibility to protect the public interest. It cannot place itself in a position where, as a result of the establishment of formal procedural requirements, it would lose its ability to respond to violative activities in a timely fashion.” The Commission made clear in the Wells Release that the practice is “informal” and involves the exercise of discretion by the staff. However, the expectation is that such staff discretion will be exercised with the goals of the Wells Release in mind.

Providing a Wells Notice:

The staff is required to obtain an Associate Director’s or Unit Chief’s approval and then approval from the Office of the Director before issuing a Wells notice or determining to recommend an enforcement action without issuing a Wells notice.

A Wells notice will be provided in most cases in which the staff makes a preliminary determination to recommend that the Commission file an action or institute a proceeding. However, as the Commission explained in the Wells Release, it has a “responsibility to protect the public interest” and “is often called upon to act under circumstances which require immediate action if the interests of investors or the public interest are to be protected.” In assessing whether or when to provide a Wells notice, staff should consider all of the relevant facts and circumstances, including but not limited to:

- Whether the investigation is substantially complete as to the recipient of the Wells notice;
- Whether immediate enforcement action is necessary for the protection of investors. If prompt enforcement action is necessary to protect investors, providing a Wells notice and waiting for a submission may not be practical (for example, a recommendation to file an

emergency action requesting a temporary restraining order and asset freeze to stop an ongoing fraud);

- Whether providing a Wells notice may alert potential defendants to a possible asset freeze or otherwise put at risk investor funds that the recommendation is intended to protect; and
- Whether there is a parallel covert criminal investigation that may be adversely affected by providing a Wells notice.

The Wells Notice:

A Wells notice is a communication from the staff to a person involved in an investigation that: (1) informs the person the staff has made a preliminary determination to recommend that the Commission file an action or institute a proceeding against them; (2) identifies the securities law violations that the staff has preliminarily determined to include in the recommendation; and (3) provides notice that the person may make a submission to the Division and the Commission concerning the proposed recommendation.

Recipients of a Wells notice should recognize that such a notice is provided only after the staff, including an Associate Director/Unit Chief, have thoroughly evaluated and discussed the evidence developed during the investigation and the proposed charges, remedies, and sanctions. As a practical matter, most recipients of a Wells notice have been aware of the investigation for some time and, whether through news articles alleging misconduct, document requests (on a voluntary basis or subject to a subpoena), or interviews by staff (voluntary or subject to a subpoena) both know the area or areas of interest and have had multiple interactions and communications with staff prior to the Wells notice.

The Content of the Wells Notice:

A Wells notice should be in writing when possible and follow the general guidance below. The staff should, when feasible, give advance notice of the intention to send a written Wells notice to the recipient or the recipient's counsel orally, such as by telephone (a "Wells call"), and should promptly follow the Wells call with a written Wells notice. As in a Wells notice, the substance of a Wells call should follow the general guidance below.

The written Wells notice and Wells call should:

- Identify the specific charges and type(s) of relief the staff has made a preliminary determination to recommend to the Commission;
- Inform the recipient of the Wells notice of the opportunity to provide a voluntary statement in writing or via video format, setting forth the recipient's position with respect to the proposed recommendation, which in the recipient's discretion may include arguments why the Commission should not bring an action or why proposed charges or remedies should not be pursued, or bring any relevant facts to the Commission's attention in connection with its consideration of the matter;

- Set reasonable limitations on the length of any submission made by the recipient (typically, written submissions should be limited to 40 pages, not including exhibits, and video submissions should not exceed 12 minutes), including, in the absence of timing constraints, a four-week time period allowed for the recipient to provide a Wells submission. Requests for extensions of time should be made in writing, clearly state the basis for the request, and be directed to the appropriate Assistant Director. The staff may determine not to grant a request for an extension of time for good cause, including but not limited to the bases for and/or the length of the extension requested;
- Advise the recipient that any Wells submission should be addressed to the appropriate Assistant Director;
- Inform the recipient that any Wells submission may be used by the Commission in any action or proceeding that it brings and may be discoverable by third parties in accordance with applicable law;
- Include a link to (or attach a copy of) the Wells Release, which is posted on the Commission’s website at sec.gov/divisions/enforce/wells-release.pdf; and
- Include a link to (or attach a copy of) the SEC’s “Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena,” which is posted on the Commission’s website at sec.gov/about/forms/sec1662.pdf. (“SEC Form 1662”).

As part of the Wells process, staff should inform the recipient of the Wells notice of the salient, probative evidence that the staff has gathered or received, which the staff may have or should have reason to believe may not be known to the recipient (subject to confidentiality or other constraints for sharing of information).

Acceptance of a Wells Submission:

As discussed above, a Wells notice informs a recipient that the recipient may make a voluntary submission to the Commission regarding the staff’s proposed recommendation. However, there are limited circumstances in which the staff may reject a Wells submission:

- If the Wells submission exceeds the limitations on length specified in the Wells notice, the staff may reject the submission;
- If the Wells submission is submitted after the deadline, including any extensions of time granted by the staff, the staff may reject the submission. Requests for extensions of time should be made in writing, clearly state the basis for the request, and be directed to the appropriate Assistant Director. The staff may determine not to grant a request for an extension of time for good cause, including but not limited to the bases for and/or the length of the extension requested;
- The staff will reject a Wells submission if the person making the submission seeks to limit (including by reserving the right to limit) either its admissibility under Federal Rule

of Evidence 408 or the Commission's ability to use the submission for the purposes described in [SEC Form 1662](#); or

- The staff will reject a Wells submission if the submission contains or discusses a settlement offer. Offers of settlement may not be combined with, or included in, Wells submissions, and instead must be made in a separate document.

Wells submissions that are accepted by the staff will be provided to the Commission along with any recommendation from the staff for an enforcement action against the recipient of the Wells notice. Wells submissions that are rejected on one of the bases above generally will not be provided to the Commission, and the basis for rejecting the Wells submission will be provided to the Commission.

Accepted Wells submissions are most helpful when they focus on disputed factual or legal issues, or raise significant legal risks or policy or programmatic concerns. In general, accepted Wells submissions that are helpful:

- Accurately reflect the evidence, legal issues, and precedent;
- Focus on disputed factual or legal issues;
- Acknowledge and address evidence and precedent in support of the staff's position, while highlighting exculpatory evidence and adverse precedent;
- Address legal elements required to establish violations and explain why the evidence would not satisfy those elements;
- Address litigation risks or policy or programmatic concerns that would arise if the staff recommended the charges or sought the relief in the Wells notice;
- Provide documents or citations to the investigative record or legal precedent to support key factual or legal arguments;
- If applicable, discuss the factors described in the "[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](#)," [Securities Exchange Act Release No. 44969 \(Oct. 23, 2001\)](#) ("Seaboard Report"). See [Section 6.1.2.](#); or
- Finally, where charges are particularly complex or technical, an expert report may add to the effectiveness of a Wells submission.

The Post-Notice Wells Process:

- Recipients of Wells notices occasionally request to review portions of the staff's investigative file. In the interests of increasing transparency and efficiency of the investigative process and the Commission's deliberations, the staff should be forthcoming about the content of the investigative file. On a case-by-case basis, the staff should make reasonable efforts to allow the recipient of the Wells notice to review

relevant portions of the investigative file that are not privileged, do not implicate Whistleblower information, do not contain BSA information, and are not subject to other confidentiality restrictions or statutes. In considering a request for access to portions of the staff's investigative file, the staff should keep in mind, among other things:

- Whether access to portions of the file would be a productive way for both the staff and the recipient of the Wells notice to assess the strength of the evidence that forms the basis for the staff's proposed recommendation;
 - Whether access to portions of the file would facilitate the ability of the recipient of the Wells notice to respond meaningfully to the staff's proposed recommendation;
 - Whether the prospective defendant or respondent was unresponsive to staff requests, failed to cooperate, or otherwise refused to provide information during the investigation; and
 - The stage of the investigation with regard to other persons, witnesses, or harmed investors, including whether certain witnesses have yet to provide testimony, and whether there is a parallel criminal or regulatory investigation or proceeding that may be adversely affected by granting access to the staff's investigative file.
- Recipients of Wells notices may request meetings with the staff to discuss the substance of the staff's proposed recommendation after their Wells submission. Requests should be addressed to the staff assigned to the investigation. Assigned staff should consult with appropriate supervisors if a request is made. Requests for a post-Wells notice meeting are typically granted, but a Wells recipient generally will not be accorded more than one post-Wells notice meeting.
 - A post-Wells notice meeting should be scheduled to occur within a reasonable time after the recipient makes a Wells submission, but in any event no later than four weeks after receipt of the Wells submission.
 - The post-Wells notice meeting will include a member of senior leadership at the Associate Director level or above.
 - The staff may engage in appropriate settlement discussions with the recipient of the Wells notice. However, the staff may choose to inform the recipient that the staff will not engage in ongoing settlement discussions that would delay timely consideration of the matter by the Commission.

Further Information:

Staff should consult with OCC concerning any questions relating to the Wells process.

2.4. White Papers and Other Materials (excluding Wells Submissions)

During an investigation, persons may produce to the staff, on a voluntary basis, substantive materials other than in response to Wells notices, including, for example, white

papers, legal memos, or letter briefs (collectively “White Papers”). The Commission may use the information contained in a White Paper as an admission, or in any other manner permitted by the Federal Rules of Evidence, or for any of the “Routine Uses of Information” described in [SEC Form 1662](#). White Papers also may be discoverable by third parties in accordance with applicable law. White Papers that are accepted by the staff will generally be provided to the Commission along with any recommendation from the staff for an enforcement action against the submitting party.

Staff may reject a White Paper if:

- The person producing the White Paper seeks to limit (including by reserving the right to limit) either its admissibility under Federal Rule of Evidence 408 or the Commission’s ability to use the White Paper for the purposes described in [SEC Form 1662](#);
- The White Paper contains or discusses a settlement offer. Offers of settlement should not be included in White Papers that also address other topics, and instead, must be made in a separate document; or
- The White Paper exceeds 40 pages in length, not including exhibits.

Further Information:

- Staff should consult with OCC concerning any questions relating to acceptance of White Papers. See [Section 2.3](#), for information relating to Wells submissions.

2.5. Enforcement Recommendations

2.5.1. Relief

The Division may recommend, and the Commission may seek, various types of relief in enforcement actions, including injunctive relief, payment of ill-gotten gains (called disgorgement) and prejudgment interest thereon, civil money penalties, bars or suspensions from future involvement in the securities industry, and/or other prospective or prophylactic relief.

Considerations:

- The Division may recommend that the Commission forgo seeking civil penalties, or seek reduced civil penalties, against an entity in consideration of any self-policing, self-reporting, remediation, and cooperation by the entity. See [Seaboard Report](#), [Section 6.1.2.](#), and [Section 6.2.5](#). The Division may also recommend that the Commission forgo, or seek reduced civil penalties, against individuals. See [Section 6.1.1](#).
- The Commission has adopted a [small entity enforcement penalty reduction policy](#) in compliance with Section 223 of the Small Business Regulatory Enforcement Fairness Act. See 17 C.F.R. § 202.9.

2.5.2. The Action Memo Process

The filing or institution of any enforcement action must be authorized by the Commission. In addition, while the Commission has delegated certain authority to the Director or the OS, most settlements of previously authorized enforcement actions, as well as certain aspects of civil litigation, among other things, require Commission authorization. Staff will consult with the supervising Associate Director/Unit Chief, OCC, and, if appropriate, OGC, before taking action to ensure that proper authorization is requested.

Commission authorization is sought by submitting an action memo to the Commission that sets forth a Division recommendation. The action memo provides a comprehensive and objective explanation of the recommendation's factual and legal foundations and objectively addresses significant evidentiary issues, litigation risks, and the primary arguments in any Wells submissions and White Papers that were accepted. An action memo will also detail whether Wells notices were provided, an explanation for any Wells notices that were not provided, and an explanation for any Wells submissions or White Papers that were rejected.

Before an action memo is submitted to the Commission, OCC, OGC, and other relevant SEC divisions or offices are provided an opportunity to review and comment on the proposed recommendation. The staff must also receive approval from the supervising Associate Director/Unit Chief, as well as approval from the Office of the Director prior to submitting an action memo to the Commission.

2.5.2.1. Simultaneous Consideration of Enforcement Settlement Recommendations and Waiver Requests

In September 2025, the Commission restored its prior practice of permitting a settling entity to request that the Commission simultaneously consider an offer of settlement and any related request for Commission waivers from automatic disqualifications and other collateral consequences that result from the underlying enforcement action. In those matters, staff will present for the Commission's simultaneous consideration both the offer of settlement and the waiver request, along with recommendation(s) from the relevant Division(s). If the Commission accepts the settlement offer, but rejects the waiver request, Enforcement and the relevant Division staff will promptly notify the prospective defendant or respondent and will request a decision from the prospective defendant or respondent (typically within five business days) about moving forward with that portion of the settlement offer accepted by the Commission. If the prospective defendant or respondent does not promptly notify the staff of its agreement to move forward with the portion of the settlement offer put forward to the Commission or otherwise withdraws its offer of settlement, the staff will determine whether to negotiate and recommend a new settlement or recommend a litigated proceeding.

2.5.3. Commission Authorization

After the Division presents a recommendation to the Commission, the Commission will consider the recommendation and vote on whether to approve or reject the recommendation. The Commission's consideration of the recommendation takes place in a closed Commission meeting, by seriatim consideration, or by Duty Officer consideration.

Before any recommendation is considered by the Commission, the staff must identify the parties and relevant witnesses to the proposed enforcement action and their counsel, so that the Commissioners may determine whether to recuse themselves from considering the matter.

2.5.3.1. Closed Meetings

The Commission considers and votes on some of the Division's recommendations in "closed meetings," which are meetings that the Commission, pursuant to exemptions in the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. § 552b, has voted to close to the public. For each matter which will be considered in a closed meeting, the staff prepares a Sunshine Act certification, to be signed by the General Counsel of the Commission or the General Counsel's designee, certifying that the matter falls within one of the exemptions provided by the Sunshine Act and the Commission's Sunshine Act regulations, 17 C.F.R. § 200.402(a). Generally, recommendations that are eligible to be considered at a closed Commission meeting include recommendations to institute, modify, or settle an enforcement action or to consider an offer of settlement or other proposed disposition of an enforcement action.

At a closed meeting, staff orally present a recommendation to the Commission and answer any questions before the Commission votes on the recommendation. As necessary and appropriate, other divisions and offices may be represented at the meeting to discuss substantive issues of securities law and to advise the Commission on aspects of the recommendation. The Office of General Counsel is always present at such closed meetings and may articulate views pertinent to the Commission's deliberation.

Except in unusual circumstances, the Commissioners receive a copy of the Division's written recommendation and any Wells submissions and White Papers that were accepted prior to the closed Commission meeting. Staff should be prepared to answer the questions that are likely to be asked by the Commissioners and should contact the Commissioners' offices prior to the meeting to learn of any particular concerns or questions about the recommendation, consistent with the preferences of the Commissioners' offices.

2.5.3.2. Seriatim Consideration

If the Chairman of the Commission ("Chairman") or the Duty Officer (*see* [Section 2.5.3.3.](#)) determines that consideration of a recommendation at a closed meeting is "unnecessary in light of the nature of the matter, impracticable, or contrary to the requirements of agency business," but that the recommendation should be the subject of a vote by the entire Commission, the recommendation may be acted upon separately by each Commissioner in turn – in other words, by seriatim consideration. Seriatim consideration may be used when the date of a closed meeting is too distant to meet the timing needs of a particular recommendation, or the matter is routine. Matters that urgently require action before the next available closed meeting, but raise issues sufficient to warrant consideration by the entire Commission, may circulate on an expedited basis for rapid seriatim consideration. Staff should consult OCC and the OS for the specific procedures required for submitting seriatim items.

Each Commissioner will record a disposition on the recommendation electronically. Even if a majority of the Commission enters a vote approving a seriatim recommendation, the matter is not authorized until each Commissioner has either recorded a vote or entered another type of disposition such as not participating, recused, or abstained. Seriatim circulations may be withdrawn and instead placed on a closed Commission meeting agenda for further consideration, with the timing of subsequent consideration determined by the Chairman. At the request of any one Commissioner, a matter circulated for seriatim voting will be withdrawn from seriatim consideration and scheduled instead for joint Commission deliberation. 17 C.F.R. § 200.42(b).

2.5.3.3. Duty Officer Consideration

The Commission delegates one of its members (other than the Chairman) as the Duty Officer on a rotating basis, empowering the Duty Officer to act, in that Commissioner's discretion, on behalf of the entire Commission when urgent action is required before a recommendation can be considered at a closed meeting or by seriatim. 17 C.F.R. § 200.43. Actions taken by the Duty Officer are deemed to be actions of the Commission. All decisions of the Duty Officer subsequently circulate among the other Commissioners for affirmation.

Generally, requests for Duty Officer consideration should result from an unavoidable and pressing external need. Typically, Duty Officer consideration is sought when there is risk of imminent potential harm to investors, and the Division intends to recommend an emergency enforcement action, such as an immediate trading suspension or a civil action for a temporary restraining order or asset freeze. Duty Officer consideration should, as a general matter, not be sought where an enforcement recommendation presents close legal issues regarding jurisdiction or liability. Additionally, Duty Officer consideration is generally not an appropriate means to obtain approval of a proposed settlement. Staff should consult with OCC and the OS to determine whether Duty Officer consideration might be appropriate.

2.5.4. Delegations of Commission Authority

The Commission has delegated certain limited aspects of its authority to the various divisions and offices, including delegations to the Director to, among other things, issue supplemental Formal Orders, submit witness immunity order requests, and file subpoena enforcement actions, and delegations to the OS to issue certain orders in administrative proceedings. 17 C.F.R. § 200.30-4.

Supplemental Formal Orders:

To expedite the investigative process, the Commission has delegated authority to the Director to issue supplemental Formal Orders adding or removing staff members as officers empowered to act pursuant to a previously issued Formal Order or removing previously named staff. 17 C.F.R. § 200.30-4(a)(1) and (4).

Witness Immunity Order Requests:

To improve the effectiveness and efficiency of its investigations, the Commission has delegated authority to the Director to submit witness immunity order requests to the DOJ with respect to individuals who have provided or have the potential to provide substantial assistance

in the Commission's investigations and related enforcement actions. 17 C.F.R. § 200.30-4(a)(14).

Subpoena Enforcement Actions:

If a person or entity refuses to comply with a subpoena issued by the staff pursuant to a Formal Order, the Commission may file a subpoena enforcement action in district court, seeking an order compelling compliance. *See* Section 21(c) of the Exchange Act, Section 22(b) of the Securities Act, Section 209(c) of the Advisers Act, and Section 42(c) of the Investment Company Act. The Commission has delegated the authority to institute such an action to the Director. 17 C.F.R. § 200.30-4(10).

2.6. Closing an Investigation

2.6.1. Policies and Procedures

Basics:

Properly closing an investigation is an important part of managing investigations and making the best use of the Division's resources. The staff is encouraged to close an investigation as soon as it becomes apparent that there is no violation of applicable law or that circumstances indicate that no enforcement action will be recommended. Staff and their supervisors are encouraged to make this decision when appropriate so that resources can be redirected to other investigations. The appropriate Associate Director/Unit Chief is responsible for approving a closing recommendation.

Generally, factors that should be considered in deciding whether to close an investigation include:

- The seriousness of the conduct and potential violations of the federal securities laws;
- The staff resources available to pursue the investigation;
- The sufficiency and strength of the evidence;
- The extent of potential investor harm if an enforcement action is not commenced;
- The age of the conduct underlying the potential violations; and
- Whether the conduct is more appropriately addressed by another U.S. regulator or law enforcement authority, a foreign regulator, or through private litigation.

The presence or absence of U.S. investors should be a factor considered but should not, in itself, control whether to close an investigation.

Considerations:

Once a decision has been made to close an investigation, there are several steps that the staff must take. These include:

- Determine whether any current litigation hold notices apply to the case files.
- Prepare a closing recommendation. The closing recommendation is a short memorandum and serves as the basic historical record summarizing what the staff did in the investigation, any enforcement action brought, and the basis for closing the investigation.
- Prepare and send appropriate termination notices. *See* [Section 2.6.2](#).

An investigation that has resulted in an enforcement action cannot be closed until all enforcement actions in the case are complete. This requires (1) the Commission has approved dismissal of the action or (2) there is a final judgment or Commission order and all ordered monetary relief is accounted for. Accounting for monetary relief means:

- All disgorgement and civil penalties have been paid in full or the Commission has authorized the staff to terminate collection of any unpaid amounts;
- All funds collected have either been distributed to harmed investors or paid into the Treasury; and
- All money has been properly recorded.

Further, an investigation cannot be closed if any debts of a defendant or respondent are the subject of collection activity by the Commission or on the Commission's behalf (*e.g.*, by the Department of the Treasury's Financial Management Service or the DOJ), or if any funds are being held pending final distribution.

Once the investigation is closed, the files should be prepared for proper disposition. Electronic records obtained or generated during the investigation will also require proper disposition. In addition, the Commission's Freedom of Information Act ("FOIA") Office will need to be consulted. If the FOIA Office determines that documents (non-record materials) should be retained, the office will advise the staff. For example, the staff may be asked to include documents subject to a pending FOIA request in the files even though the documents would otherwise not have to be retained after the case is closed.

Further Information:

Staff should contact OCC with questions about closing an investigation.

2.6.2. Termination Notices

Basics:

The Division's general policy is to notify individuals and entities at the earliest appropriate time after the staff has determined not to recommend to the Commission an enforcement action against them. This notification takes the form of a termination letter. The staff should continuously review the status of open investigations and send a termination letter when appropriate. As noted below, notwithstanding the general policy, the staff may, with proper supervisory approval, delay the issuance of a termination letter or determine not to send a termination letter in limited circumstances.

The staff may send termination letters to individuals or entities before the investigation is closed and before a determination has been made as to every potential defendant or respondent.

Except as noted herein, assuming the staff has decided that no enforcement action will be recommended against that individual or entity, a termination letter should typically be sent to any individual or entity who:

- Is identified in the caption of the Formal Order, if a Formal Order was issued in the investigation;
- Submitted or was solicited to submit a Wells submission;
- Asks for such a notice; or
- To the staff's knowledge, reasonably believes that the staff was considering recommending an enforcement action against them.

The Director or appropriate Deputy Director, Unit Chief (or Deputy Unit Chief, if a Senior Officer), or Associate Director must approve any decision not to send a termination letter to persons or entities that fall into any of the above categories. The termination letter should be signed by staff at the Assistant Director level or above and reference the Commission's [Wells Release](#), which authorized termination notices. As noted in the Commission's Wells Release, the provision of a termination notice "must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation of that particular matter. All that such a communication means is that the staff has completed its investigation and that at that time no enforcement action has been recommended to the Commission."

Considerations:

Staff should also consider sending termination letters to companies that provided information concerning their securities in connection with insider trading investigations.

Staff are also encouraged to send a termination letter to any party who made significant productions in an investigation to enable that party to determine that the matter has been closed.

3. A Guide to Investigative Practices

3.1. Special Considerations

3.1.1. External Communications Between Senior Enforcement Officials and Persons Outside the SEC Who Are Involved in Investigations

Introduction:

The purpose of these best practices is to ensure that external communications between senior enforcement officials (at the Associate Director/Unit Chief level and above) and persons outside the SEC are handled with the appropriate care, sensitivity, and transparency. These best practices concern only external communications that: (1) are material; (2) relate to ongoing, active investigations; and (3) occur between senior enforcement officials and persons outside the SEC who are involved with investigations (other than persons at agencies or organizations with which the SEC cooperates).

Outside persons involved in investigations, such as defense attorneys, seeking to contact the staff of the Division, including senior officials (at the Associate Director/Unit Chief level and above), should in the first instance seek to schedule any such discussions through an appropriate staff attorney or Assistant Director assigned to the matter.

Senior officials in the Division who receive direct requests for discussions from outside parties should adhere to the below guidelines on best practices. These guidelines are in place to provide consistency to persons involved in investigations, and to continue to maintain the Division's impartiality and history of handling investigations with integrity both in appearance and in fact. Underlying these best practices is the recognition of the importance of the investigative team's responsibility to gather evidence, raise questions, and manage relationships with outside persons during an investigation. The best practices reflect the practical realities of the teamwork required by all staff involved in an investigation (from staff attorney to the most senior official), while providing the flexibility necessary to engage in communications in situations and under circumstances that may present unforeseen variables.

Best Practices:

These best practices should be applied to all situations in which senior officials engage in material communications with persons outside the SEC relating to ongoing, active investigations:

- Generally, senior officials should include other staff members on the investigative team when engaging in material external communications and should avoid initiating communications without the knowledge or participation of at least one of the other investigative team members. However, "participation" could include either having another staff member present during the communications or having a staff member involved in preparing the senior official for the communications. For example, if the investigative team believes that a communication could be more productive as a one-on-one communication between the senior official and the outside person, members of the team could participate by discussing the case with the senior official prior to the meeting,

or by assisting in preparing talking points for the senior official to use during the communication.

- Although senior officials should include other staff members on the investigative team when engaging in an external communication, there are circumstances in which none of the staff members are available to participate when an outside person initiates a communication. Under those circumstances, the senior official may need to balance several factors to determine whether to engage in the communication without the participation of other staff members, including:
 - Whether the senior official is familiar with the context and facts that are the subject of the communication;
 - Whether the investigative team is aware that the outside person planned to initiate a communication with the senior official;
 - Whether the outside person had previously discussed the matter with others on the investigative team (and how the team responded);
 - Whether the senior official was briefed by the investigative team regarding the communication; and
 - Whether the communication involves a matter of urgency, a routine issue, or a more complex situation in which the outside person is seeking an agreement or representation regarding a material aspect of the investigation.
- If a senior official engages in an external communication without the participation or presence of other staff members, then the senior official should communicate to the outside person that the senior official will inform the other members of the investigative team that the communication occurred and include all pertinent details for their information and consideration, and should consider:
 - Communicating to the outside person that the fact that the senior official engaged in the communication does not imply acquiescence or agreement; and
 - Communicating to the outside person that the senior official is not in a position to reach an agreement or make a representation without reviewing the circumstances with other investigative team members (however, the senior official need not avoid reaching an agreement or making representations if any of the staff prepared the senior official for the communication in anticipation that agreements or representations might be discussed).
- Within a reasonable amount of time, the senior official should document material external communications related to the investigation involving, but not limited to, potential settlements, strength of the evidence, and charging decisions. The senior official may take contemporaneous notes of the communication, send an email to any of the assigned staff, prepare a memo to the file, or orally report details to any of the assigned staff (who may then take notes or prepare a memo to the file).

- The senior official should at all times keep in mind the need to preserve the impartiality of the Division in conducting its fact-finding and information-gathering functions. Propriety, fairness, and objectivity in investigations are of the utmost importance, and the investigative team cannot carry out its responsibilities appropriately unless these principles are strictly maintained. The senior official should be particularly sensitive that an external communication may appear to be, or may be an attempt to supersede, the investigative team's judgment and experience.

Considerations:

- There may be circumstances in which a senior official and an outside person find it necessary to discuss the professionalism of assigned staff or allegations regarding questionable conduct by the assigned staff. It is important that the public is comfortable communicating about sensitive matters with staff, including senior officials. In such circumstances, even if the communication could be considered a material communication about the investigation itself, the senior official may choose not to inform any of the assigned staff about the communication. The senior official, however, should be sensitive to the possibility that allegations about questionable conduct may serve as a pretext to complain about minor events or annoyances during the investigative process, to gain an advantage in the investigation, or to undermine the progress of the investigation. Depending on the apparent motivation of the communication, the senior official should consider whether to inform the investigative team of the communication, following the best practices above.
- If any of the investigative team members learn that an outside person might contact a senior official, the staff member should alert the senior official as soon as possible and provide all pertinent details concerning the anticipated subject matter of the communication.
- In addition to the best practices above and the typical considerations that apply when a staff member communicates with someone outside the agency who is involved in an enforcement investigation, senior officials and other investigative team members should recognize the discretion and judgment inherent in balancing all the circumstances of a potential communication with outside persons, including:
 - The time, place, and context of the communication;
 - The availability and accessibility of any of the assigned investigative team to participate in the communication;
 - The expected or anticipated subject matter of the communication;
 - The priority, phase, and sensitivity of the investigation, including the status of the Wells process or any pending settlement discussions;
 - The complexity and circumstances of the suspected securities law violations at issue;

- The need to further the Commission’s interests in the investigation and to protect investors;
- The level of cooperation of witnesses and their counsel; and
- The existence of interest by the Department of Justice or other agencies with criminal prosecutorial authority.

Further Information:

For questions concerning the applicability of these best practices, staff should contact OCC.

3.1.2. Statutes of Limitations and Tolling Agreements

Basics:

- 28 U.S.C. § 2462 states that “[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.” This five-year statute of limitations is non-jurisdictional and may be tolled. *See SEC v. Fowler*, 6 F.4th 255, 262 (2d Cir. 2021). The statute of limitations is also an affirmative defense that is waived if it is not raised in timely fashion. *See Canady v. SEC*, 230 F.3d 362, 363 (D.C. Cir. 2000).
- Section 6501 of the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”) establishes a statute of limitations for other remedies. *See* § 21(d)(8) of the Exchange Act. For disgorgement generally, the limitations period is five years. That period is extended to ten years for securities law violations for which scienter must be established. In addition, the NDAA provides a limitations period of ten years for claims for “equitable remedies,” specifically including “for an injunction or for a bar, suspension, or cease and desist order.”
- If the staff, in the course of an investigation, believes that any of the relevant conduct arguably may be outside the applicable limitations period before the SEC would be able to file or institute an enforcement action, the staff may ask the potential defendant or respondent to sign a “tolling agreement.” By signing a tolling agreement, the potential defendant or respondent agrees not to assert a statute of limitations defense in the prospective enforcement action for a specified time period, which is excluded for statute of limitations purposes. If the staff believes that a tolling agreement is appropriate, staff should in the first instance obtain approval from the appropriate Associate Director/Unit Chief for up to 90 days. Any requests to extend tolling agreements beyond the initial 90 days require approval from the Director or appropriate Deputy Director. After approval, a tolling agreement must be signed by staff at the Assistant Director level or above. Staff should save all fully executed tolling agreements in the case file.

- When opening a MUI or investigation, staff must add the applicable statute of limitations date in the Hub. As the MUI or investigation proceeds, staff must update the statute of limitations, including with any tolling agreements, as appropriate. It is imperative that the Hub reflect an accurate statute of limitations date for each matter.

Considerations:

- Consider the statute of limitations issue early in the investigation. Tolling agreements should be obtained prior to the expiration of all applicable statutes of limitation. As a general matter, retroactive tolling agreements are disfavored.
- Take into account the amount of time needed for the recipient of a Wells notice to complete Wells submissions, for staff to prepare recommendations to the Commission, for relevant divisions and offices at the SEC to review recommendations, and for the Commission to consider the recommendation.
- Staff should be sensitive to investigative delays leading to statute of limitations problems as a result of requests for extensions of time from defense counsel, and, where abused, should refuse requests for more time.
- Staff should take care not to delay or slow the pace of an investigation based on the potential availability or existence of a tolling agreement. Consequently, staff themselves should limit requests for extensions. Swift investigations generally are most effective and enhance the public interest.

3.1.3. Continuing Investigations During Ongoing SEC Litigation

Basics:

The Division may continue to investigate and issue investigative subpoenas pursuant to a Formal Order while simultaneously litigating a related civil action if there is an independent, good-faith basis for the continued investigation. An independent, good-faith basis may include the possible involvement of additional persons or entities in the violations alleged in the complaint, or additional potential violations by one or more of the defendants in the litigation.

Considerations:

While the SEC has broad investigative authority, staff should exercise judgment when deciding whether to continue investigating while litigating a related case. The staff should consider the following:

- In assessing whether to issue subpoenas, the staff should consider all relevant facts and circumstances, including the degree of factual and legal overlap, the prior course of the litigation and investigation, and the likely views of counsel and the judge assigned to the case.

- If the staff obtains testimony or documents in the investigation that are properly discoverable in the litigation, the SEC must produce them in the litigation in accordance with the Federal Rules of Civil Procedure (“FRCP”).
- Although there is some case law to support the practice, staff should not use investigative subpoenas solely to conduct discovery with respect to claims alleged in the pending complaint. A court might conclude that the use of investigative subpoenas solely to conduct discovery is a misuse of the SEC’s investigative powers and circumvents the court’s authority and the limits on discovery in the FRCP.
- In addition, there are special considerations and restrictions on continuing an investigation following the institution of a proceeding brought in an administrative forum (“administrative proceeding” or “AP”). In the AP context, continuing investigations are subject to Rule 230(g) of the SEC’s Rules of Practice, which requires the Division to inform the hearing officer and each party promptly if the staff issues any new subpoenas under the same Formal Order or investigative file number. The rule also directs the hearing officer “to order such steps as [are] necessary and appropriate” to assure that the subpoenas are not issued “for the purpose of obtaining evidence relevant to the proceedings.” The hearing officer must ensure that any relevant documents obtained through the use of such subpoenas are made available for inspection and copying to each respondent “on a timely basis.” 17 C.F.R. § 201.230(g).

Further Information:

Before continuing an investigation while there is related pending litigation, or if the staff is going to recommend simultaneously that the Commission file a civil action and issue a Formal Order, the investigative staff should discuss the issue with the Chief or Deputy Chief Litigation Counsel within the Division’s Trial Unit and should revisit the issue whenever contemplating the service of investigative subpoenas that could be seen as relating to pending litigation.

Staff should consult with OCC and the Chief or Deputy Chief Litigation Counsel with any questions about continuing an investigation while there is related pending litigation.

3.1.4. Parallel Investigations and the State Actor Doctrine

Basics:

The State Actor Doctrine may be implicated when action by a private entity (*e.g.*, an SRO, a company, or a law firm) is fairly attributable to a government entity and the government entity influences the specific conduct of the private entity. The action may be fairly attributable if there is a sufficiently close nexus between the government entity and the challenged action of a private entity.

The State Actor Doctrine may apply to a wide variety of private actions in which government is in some way concerned. It has been analyzed under a two-prong test, and satisfying either prong can result in a finding of state action:

- Under the “joint action” prong, private entities may engage in state action when they are willful participants in joint action with state officials.
- Under the “government compulsion” prong, coercive influence or significant encouragement by the state can convert private conduct into state action.

Guidelines:

When staff is aware that a private entity is investigating conduct that is the same as or related to the conduct involved in the staff’s investigation, staff should keep the following guidelines in mind:

- In fact and appearance, the SEC and the private entity’s investigations should be conducted in parallel and should not be conducted jointly. Staff should make investigative decisions independent of any parallel investigation that is being conducted by a private entity.
- The staff should not take any investigative step principally for the benefit of the private entity’s investigation.
- The staff should not direct the private entity to conduct an investigation or mandate the manner in which the private entity conducts an investigation or the investigative steps taken by the private entity. The private entity always retains discretion as to how to conduct an investigation, but should keep in mind that the staff finds indicia of the investigation’s independence, thoroughness, and effectiveness to be helpful indicators when deciding whether to credit an internal investigation’s findings.
- In SEC investigations in which a witness has asserted or indicated an intention to assert the Fifth Amendment in testimony, the staff should not suggest any line of questioning to the private entity conducting a parallel investigation or provide to the private entity any document or other evidence for use in questioning a witness, other than pursuant to an approved access request.

Further Information:

Staff should consult with OCC concerning any questions relating to the State Actor Doctrine.

3.2. Documents and Other Materials

3.2.1. Privileges and Privacy Acts

In connection with any request for document production, staff must comply with the Privacy Act of 1974 (“Privacy Act”), the Right to Financial Privacy Act of 1978 (“RFPA”), the Electronic Communications Privacy Act of 1986 (“ECPA”), and the rules regarding the assertion of privileges and protections. *See* [Section 4](#). In addition, staff must comply with policies on contacting witness’s counsel (*see* [Section 3.3.7.1](#)), parallel investigations (*see* [Section 3.1.4](#)), and ongoing litigation (*see* [Section 3.1.3](#)).

3.2.1.1. Supplemental Information Forms (SEC Forms 1661 and 1662)

When requesting documents or information from regulated persons and entities other than pursuant to a subpoena, the staff must provide a copy of the SEC’s “Supplemental Information for Entities Directed to Supply Information to the Commission Other Than Pursuant to Commission Subpoena” (“[SEC Form 1661](#)”).

When requesting documents or information from regulated persons or entities pursuant to a subpoena or from any other witness either voluntarily or pursuant to a subpoena, the staff must provide the witness with a copy of [SEC Form 1662](#).

These forms provide information on the following topics:

- Potential consequences for providing false statements and documents and for failure to supply information;
- Wells submissions and how they may be used;
- Requests for confidential treatment pursuant to the Freedom of Information Act; and
- The Commission’s authority to solicit information and how the Commission may use information provided to it.

Additionally, the [SEC Form 1662](#) provides testimony-related information, including about witness rights and responsibilities.

3.2.2. Document Preservation Letters

Basics:

A duty to preserve documents generally arises when litigation is reasonably anticipated or foreseeable, as well as when litigation is pending. A document preservation letter informs the recipient of the need to preserve certain documents and other materials pursuant to this duty so that evidence is not destroyed, either inadvertently or intentionally. The staff should consider sending a document preservation letter as early as is appropriate in an investigation, keeping in mind that such letters can later be supplemented with additional categories of documents that should be preserved.

In a standard document preservation letter, the staff should make clear that the notice applies to all forms of documents and communications, including those in electronic form, that are potentially relevant to an investigation. Document preservation notices should explicitly request the preservation of all relevant communications sent or received on any and all messaging platforms and messaging applications, including those communications sent or received on personal devices, such as smartphones or tablets. The preservation notice should request that the recipient of the notice, or the recipient’s counsel, respond to the notice, in writing, acknowledging receipt of the letter.

Considerations:

A preservation letter will inform the recipient of the existence of an investigation. The staff may therefore determine not to send a preservation letter in an investigation, for example, in an ongoing fraud where assets may be dissipated.

3.2.3. Voluntary Document Requests

During a MUI or investigation, the staff may request the voluntary production of documents. The staff also may request the voluntary creation of documents, such as chronologies of events. In a MUI or investigation, the staff can also request that witnesses agree to voluntary interviews and testimony.

When the staff begins a MUI, voluntary document requests can be a principal means of gathering documents, data, and other information. Often the fruits of these requests will help the staff assess the merits of a potential investigation at its earliest stages, before the staff opens an investigation or seeks the issuance of a Formal Order.

Considerations:

- A voluntary document request should be accompanied by a copy of [SEC Form 1662](#).
- Many issuers, individuals, harmed investors, and other parties are willing to provide significant materials to the staff voluntarily, without a subpoena. Regulated entities are required to produce certain records without a subpoena. *See* [Section 3.2.4](#).
- Staff can consider, on a case-by-case basis, whether and how a voluntary document request as opposed to a subpoena may affect a witness's diligence in searching for documents and the witness's responsiveness.
- The staff should include a copy of the [SEC Data Delivery Standards](#) with every document request.

3.2.4. Document Requests to Regulated Entities

Basics:

- The staff may request information from regulated entities, such as registered investment advisers and broker-dealers. Pursuant to Sections 17(a) and (b) of the Exchange Act and Section 204 of the Advisers Act and the rules thereunder, among other statutes and rules, regulated entities *must* provide certain information to the staff even without a subpoena.
- Records from regulated entities are often essential cornerstones of an investigation. Because regulated entities must produce certain records without a subpoena, the staff can often obtain documents, such as brokerage account statements or account opening documents, which might otherwise require a subpoena to obtain from an individual.

Considerations:

- A document request to a regulated entity should be accompanied by a copy of the [SEC Form 1661](#).
- For reasons of efficiency and strategy, the staff should consider what types of records to obtain from a regulated entity. For example, in addition to customer account statements, a broker-dealer will have documents such as order tickets, order confirmations, trading blotters and transfer records.
- Some regulated entities have specific policies regarding whether (and, if so, when) to notify a client or customer that the staff has requested documents related to that customer's or client's account. Even if there is no formal policy in place, the customer or client might be provided some informal notice. Depending on the conduct, potential for investor harm, or other circumstances, the staff should consider requesting that the entity not disclose the request for documents, at least for a certain limited period of time.
- The staff should include a copy of the [SEC Data Delivery Standards](#) with every document request to a regulated entity.

Further Information:

- See [Sections 2.1.2.1](#) and [4.7](#) for information relating to BSA materials.
- For additional information on documents that may be requested from broker-dealers, and what information such documents can provide, the staff should contact the Market Surveillance Group in OMI.

3.2.5. Subpoenas for Documents

Basics:

The Commission, or the staff it designates as officers in a Formal Order, may issue subpoenas for documents or witness testimony, pursuant to Section 19(c) of the Securities Act, Section 21(b) of the Exchange Act, Section 209(b) of the Advisers Act, and Section 42(b) of the Investment Company Act. The Commission or its designated officers may require the production of any records deemed relevant or material to the inquiry and may require their production from any place in the United States.

To issue a subpoena for documents, a staff member must be named as an officer for purposes of an investigation in the Commission's Formal Order. See [Section 2.2.3](#). Once the Commission has issued a Formal Order, the staff named as officers in the order may issue subpoenas.

Considerations:

- A subpoena for documents should be accompanied by a copy of [SEC Form 1662](#).

- A subpoena for documents should include an attachment to the subpoena listing the documents requested (generally by category or type of document) and any additional requirements for compliance with the subpoena.
- The staff should include a copy of the [SEC Data Delivery Standards](#) with every subpoena.

Further Information:

- Subpoenas to financial institutions such as banks and credit card issuers are subject to the RFPA, *see* [Section 4.5](#).
- For procedures on granting a request for a copy of the Formal Order, *see* [Section 2.2.3.3](#).
- For more information about [SEC Form 1661](#) and [SEC Form 1662](#), *see* [Section 3.2.1.1](#).

3.2.6. Subpoenas and Document Requests to the News Media

In April 2006, the SEC issued a policy statement concerning SEC subpoenas to members of the news media. *See* [Policy Statement Concerning Subpoenas to Members of the News Media](#), Exchange Act Release No. 34-53638 (April 12, 2006) (“News Media Subpoena Policy Statement”), codified at 17 C.F.R. § 202.10. The staff should refer to and must comply with News Media Subpoena Policy Statement.

3.2.7. Subpoenas and Document Requests to Attorneys

A subpoena or voluntary request to an attorney or law firm can raise complex issues. Before issuing a subpoena or voluntary request to an attorney or law firm for an attorney’s documents or testimony, staff should first consult with OCC and the Commission’s Professional Responsibility Counsel.

3.2.7.1. Service of Subpoenas

Under Rule 8 of the SEC’s Rules Relating to Investigations (17 C.F.R. § 203.8), service of subpoenas issued in formal investigative proceedings shall be effected in the manner prescribed by Rule 232(c) of the SEC’s Rules of Practice (17 C.F.R. § 201.232(c)). Rule 232(c), in turn, states that service shall be made pursuant to the provisions of Rule 150(b) through (d) of the SEC’s Rules of Practice (17 C.F.R. §§ 201.150(b) through (d)).

Rule 150, in relevant part, provides that service of investigative subpoenas may be effected:

(b) Upon a person represented by counsel. Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to [Rule 102], service shall be made pursuant to paragraph (c) of this section upon counsel,

unless service upon the person represented is ordered by the Commission or the hearing officer.

(c) *How made.* Service shall be made electronically in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website. Persons serving each other shall have provided the Commission and the parties with notice of an email address.

Moreover, Rule 150(d) provides:

[I]f service is of an investigative subpoena pursuant to 17 CFR § 203.8, service may be made by delivering a copy of the filing.

3.2.7.2. Forthwith Subpoenas in Investigations

Basics:

Forthwith subpoenas, which call for the immediate production of information, are one of many tools staff can use to compel the production of evidence during an investigation. However, they should only be used in exigent circumstances. For example, a forthwith subpoena may be appropriate where records are sought from a witness or custodian who: (i) we have specific reason to believe may destroy or falsify records, (ii) is a flight risk, or (iii) has been uncooperative or obstructive during the investigation.

A forthwith subpoena, as with other investigative subpoenas, is not self-enforcing. Absent a court order, staff cannot compel a witness or custodian to comply with a forthwith subpoena. Staff should expect courts to scrutinize closely subpoenas that demand immediate production. See [Section 2.5.4](#).

Further Information:

If the staff believes there may be a need to issue a forthwith subpoena due to exigent circumstances, the staff should consult with the Division's Chief and Deputy Chief Litigation Counsel immediately.

3.2.7.3. Responding to Subpoenas

Considerations:

- A subpoenaed entity or individual is required to produce all subpoenaed items that are in its possession, custody, or control. This includes items that are not in the subpoenaed entity's or individual's immediate possession, but that the subpoenaed entity or individual has the effective ability to obtain.

- If copies of a document differ in any way, they are to be treated as separate documents, and the subpoenaed entity or individual must produce each copy. For example, if the subpoenaed entity or individual has two copies of the same letter, but only one of them is marked with handwritten notes, the subpoenaed entity or individual must produce both the clean copy and the copy with notes.
- The term “document” in the context of a production responsive to a subpoena generally includes, but is not limited to, any written, printed, or typed matter including, but not limited to, all drafts and copies bearing notations or marks not found in the original, letters and correspondence, interoffice communications, slips, tickets, records, worksheets, financial records, accounting documents, bookkeeping documents, memoranda, reports, manuals, telephone logs, facsimiles, messages of any type, telephone messages, text messages, voice mails, tape recordings, video recordings, notices, instructions, minutes, summaries, notes of meetings, file folder markings and any other organizational indicia, purchase orders, information recorded by photographic process, including microfilm and microfiche, computer printouts, spreadsheets, and other electronically stored information, including but not limited to writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations that are stored in any medium from which information can be retrieved, obtained, manipulated, or translated. The term “document” also includes all electronic communications, such as email, text messages, messages sent via messaging applications (such as WhatsApp, iMessage, or Signal), messages sent on communication platforms (such as Teams, Slack, Discord, or Telegram), and messages sent or received on personal devices such as smartphones or tablets.

3.2.8. Blue Sheets and Consolidated Audit Trail Data

Basics:

Blue Sheets: Blue Sheeting is a process by which the SEC requests and obtains trading data from the broker-dealer community. Member firms are required to provide trading information pursuant to Section 17(a) of the Exchange Act and Rule 17a-25 thereunder. *See* 17 C.F.R. § 240.17a-25.

Although the process is now handled electronically through the SEC’s Blue Sheet application, the name derives from the fact that blue paper was once used to make such requests.

Blue Sheet data provide information identifying the account holder for whom specific trades were executed and indicate whether the transaction was a buy or a sell and long or short, among other data elements. The data also identifies proprietary and customer trades executed on all domestic or foreign markets, all “in-house cross” transactions, transactions cleared for introducing brokers, and prime broker transactions.

Consolidated Audit Trail: The Consolidated Audit Trail (“CAT”) is a database that contains the full lifecycle of customer orders to buy or sell equity and options securities across all U.S. market venues. CAT data is anonymized and customer information is maintained in a separate database. The data collected does not include social security numbers or birth dates. The

CAT was developed pursuant to Rule 613 under Regulation NMS (Regulation of the National Market System). *See* 17 C.F.R. § 242.613.

Application:

It may be appropriate to obtain and review Blue Sheet data, or query CAT data, in a variety of investigations, but such data is typically obtained in matters involving possible insider trading or market manipulation violations.

Further Information:

For additional information on Blue Sheeting, staff should consult with the Blue Sheets Operations Group in OMI.

For information about Consolidated Audit Trail data, staff should contact the Division's Office of Investigative and Market Analytics.

3.2.9. Form of Document Production to the SEC

Basics:

The staff should include a copy of the [SEC Data Delivery Standards](#) with every subpoena and document request. The [SEC Data Delivery Standards](#) describe the general and technical requirements for electronic and paper productions to the SEC. Adherence to these standards will ensure consistency across all cases within the Division. Staff should consult with the Division's IT staff in the Litigation Support Branch if they or a producing party have any questions or concerns regarding the [SEC Data Delivery Standards](#).

All requested or subpoenaed documents should be produced directly to the Division's Centralized Processing Unit ("CPU").

To ensure proper processing by CPU, an entity or individual producing materials should enclose a cover letter with each document production containing the following information:

- Case number, case name, and requesting SEC staff member name;
- A copy of the document request or subpoena;
- All Bates numbering ranges included in the production (*see* [Section 3.2.9.3.](#));
- A brief description of items produced, including the Bates ranges and custodians for each item and the paragraph(s) in the subpoena attachment to which each item responds; and
- For each document withheld from production on the grounds of any privilege or protection, a detailed privilege log (*see* [Section 3.2.9.4.](#));
- If any documents responsive to the document request or subpoena no longer exist because they have been lost, discarded, or otherwise destroyed, the producing entity or

individual should identify the documents and the date on which they were lost, discarded, or destroyed;

- A brief description of what steps were taken to identify and produce documents responsive to the document request or subpoena, including who searched for documents, who reviewed documents for responsiveness to the document request or subpoena, what sources were searched, and where the original documents are maintained and by whom; and
- A statement as to whether the producing entity or individual believes it has met its obligations under the document request or subpoena by searching carefully and thoroughly and producing all required documents or materials.

Considerations:

In producing copies of original documents, the entity or individual should be aware that:

- The SEC cannot reimburse the entity or individual for costs, except in the case of RFPA subpoenas or certain productions under the ECPA.
- The entity or individual must maintain the originals of all documents responsive to the subpoena or voluntary document request in a safe place in the event production of the original documents is required at a later date.
- If it appears that the copy of an original document may not represent the original document in its entirety, whether by means of post-it(s), notation flag(s), removable markings, erroneous copying, or for any other reason, the staff should request the original document so that the staff can verify that the copy represents the original document in its entirety, including all of the markings contained within it.

Further Information:

- Staff should refer any questions about the form of production to the Division's IT staff in the Litigation Support Branch.
- For more information on privilege logs, *see* [Section 3.2.9.4](#).
- For information on certifications of completeness of production, *see* [Section 3.2.9.6](#).

3.2.9.1. Electronic Production of Documents

Basics:

For an electronic production, the entity or individual must produce documents in accordance with the [SEC Data Delivery Standards](#) and must maintain the originals of all responsive documents, including all metadata, in their native software format in the event production of the original documents in native format is required at a later date.

Considerations:

Most accounting firms create and maintain their workpapers electronically. The [SEC Data Delivery Standards](#) include instructions for producing workpapers, including in native format via laptop computer, web-based viewing platform, or otherwise to allow for viewing in the same format and organization as the audit team. Firms may raise concerns about producing electronic workpapers and other audit documents, citing to intellectual property rights in what they view as proprietary programs. The staff does not necessarily agree with such concerns, but, as an accommodation, may consider alternative approaches such as web-based production and production on a dedicated laptop computer. These requests may be evaluated on a case-by-case basis to determine whether an alternative approach is appropriate in the investigation.

Further Information:

- Staff should refer any questions about the form of electronic production to the Division's IT staff in the Litigation Support Branch.
- For more information about when and how to request electronic workpapers, staff should contact the Division's Office of the Chief Accountant.

3.2.9.2. Accepting Production in Paper Format

Basics:

In circumstances in which documents are not electronically maintained, the staff may allow an entity or individual to produce documents in paper format. If this occurs, the entity or individual should scan the paper documents and produce them in an electronic format consistent with the [SEC Data Delivery Standards](#) and adhere to the following guidelines:

- The copies must be identical to the originals, including even faint marks or print.
- The producing entity or individual should put an identifying notation on each page of each document copy to indicate that it was produced by the entity or individual, and number the pages of all the documents submitted. (For example, if Jane Doe sends documents to the staff, she may number the pages JD-1, JD-2, JD-3, etc., in a blank corner of the documents.) However, the entity or individual should make sure the notation and number do not conceal any writing or marking on the document.
- If producing a copy of an original document that contains post-it(s), notation flag(s), or other removable markings or attachments that may conceal all or a portion of the markings contained in the original document, copies of the original document both with and without the relevant post-it(s), notation flag(s), or removable markings or attachments should be produced.

In limited circumstances, such as when interacting with a potentially harmed investor who lacks access to scanning capabilities and/or witnesses unrepresented by counsel, the staff may allow the entity or individual to produce original documents in paper format. In such cases, the staff will scan the original documents and return the originals as soon as practicable. If the

subpoenaed entity or individual sends the staff original documents, it should not add any identifying notations to the original documents. In such cases, the staff should also prepare a chain of custody log that is prepared, dated, and signed by someone other than the investigating attorney in case the authenticity of the scanned documents is later challenged.

Further Information:

- Staff should refer any questions about the production of paper documents to the Division's IT staff in the Litigation Support Branch.

3.2.9.3. Bates Stamping

Introduction:

Bates stamping (also known as Bates numbering) refers to the use of unique identifiers on documents as they are scanned or processed.

Bates stamping is commonly used to label and identify documents for production. Marking each document with a unique identifier is a useful tool both at the investigative stage and in litigation and provides an efficient and clear way to identify documents on the record in testimony and depositions.

Basics:

- The [SEC Data Delivery Standards](#) contain instructions on use of Bates numbers.
- Original documents should not be altered for any reason, including with Bates stamps. Original documents should be scanned, and only the copies (not the originals) should be Bates stamped. *See* [Section 3.2.9.2](#).
- Although there is no standard method for numbering documents, the best practice is to place an identifying notation on each page of each document (1) to indicate the source of the production and (2) to number the pages of all the documents submitted. For multiple productions from the same source, the best practice is to continue the numbering from the previous production.
- The Bates stamp should not conceal any writing or marking on the document.

3.2.9.4. Privilege Logs

Basics:

With respect to each document that has been withheld from production, or produced with redactions, on the grounds of any privilege or protection, the producing entity or individual should provide the staff with a detailed privilege log at the same time as the responsive documents. For each document withheld on the basis of a claim of attorney-client privilege, the privilege log should include the identity of the attorney and client involved. For each document

withheld on the basis of the attorney work product doctrine, the privilege log should identify the litigation in anticipation of which the document was prepared.

Considerations:

Staff should keep in mind the following considerations when requesting and reviewing privilege logs:

- After each production is received, the staff should ask for written confirmation that all requested materials have been produced and that any document withheld or produced with redactions based upon an assertion of any privilege has been noted in the privilege log.
- The staff should carefully review the privilege log to determine whether the privilege has been properly asserted. In addition, the staff should compare redacted documents against the privilege log to determine whether a privilege has been properly asserted for each redacted portion.
- The staff should obtain additional information where entries in the privilege log are incomplete or do not otherwise provide sufficient information to determine whether the privilege has been properly asserted.
- See [Section 4.1.1](#) for considerations if privilege is asserted over a document during testimony.
- For questions about whether a privilege was properly asserted, staff should consult OCC and the Chief or Deputy Chief Litigation Counsel.

3.2.9.5. Business Record Certifications

Basics:

- At the time an entity produces business records (*e.g.*, telephone records, bank account statements, brokerage account records), the staff should simultaneously obtain from a custodian of records or other qualified person a declaration certifying that the documents are records of regularly conducted business activities.
- A certification should eliminate the need to have a custodian of records testify at deposition or civil trial because the records can be authenticated by the certification under Rules 902(11) and 902(12) of the Federal Rules of Evidence. A certification may also avoid the need for testimony by the custodian in an administrative proceeding.

3.2.9.6. Confirming Completeness of Production

Introduction:

When recommending that the Commission accept a settlement offer from an entity or individual, it is important to obtain an executed Certification as to Completeness of Document

Production (“certification”) from the settling party. In the certification, the settling party acknowledges that the Commission has relied upon, among other things, the completeness of the settling party’s production.

Basics:

- A settling individual must declare under penalty of perjury that the individual has made a diligent search of all files in the individual’s possession, custody, or control that are reasonably likely to contain responsive documents and that those documents have either been produced or identified in a privilege log.
- In the case of an entity, the certification should contain similar language, but require a representative to declare that the representative has made a diligent inquiry of all persons who reasonably had possession of responsive documents, and that those documents have been produced or identified in a privilege log.
- The certification requirement applies to SEC subpoenas, document requests, and requests for voluntary production of documents.

Considerations:

- Because of the significance of this certification, the staff should inform individuals and entities of this requirement early in the investigation and should reiterate the obligation when staff is made aware of changes in counsel and when commencing settlement negotiations.
- As a best practice, during the course of the investigation, staff should confirm in writing any agreed-upon modifications to document subpoenas, document requests, or requests for voluntary production of documents.

3.2.10. Investigative and Litigation Files

Various federal laws, the Commission’s internal rules and policies, and the Division’s procedures require proper maintenance of investigative and litigation files.

Following the Division’s procedures for maintaining investigative and litigation files helps ensure that any loss of or damage to the Division’s offices, files, or equipment will cause minimal disruption to the work of the Division. Consistency in document management practices helps facilitate information sharing and limit loss of information associated with staff turnover. Maintaining investigative and litigation files in a systematic way increases the likelihood of success in litigation.

Basics:

- For all MUIs, investigations, and litigations, the staff should implement a system for handling all documents and work product typically created or received in the course of an investigation or litigation. This system will include the opening of a matter-specific sub-directory in the appropriate shared location and also, as appropriate, the opening of

matter-specific databases in the Division's document review platform, testimony transcript review platform, and other applicable platforms.

- Typically, document productions will be logged by CPU and routed for loading into the Division's document review platform, where the staff will be able to review the documents. Similarly, testimony transcripts will be processed by the Division's IT staff and loaded into the Division's transcript review platform, where the staff will be able to review transcripts.

Considerations:

- Documents produced to the staff or otherwise obtained from third parties should be segregated from staff work product and other privileged materials.
- In the event documents require additional protections (*e.g.*, if they come from a foreign government and are not supposed to be transmitted pursuant to an access request or if they would directly or indirectly identify the whistleblower status of someone), they should be kept separate and well-marked.
- Information from whistleblowers that could reasonably be expected to identify the whistleblower must be kept confidential. Staff should consult with OWB if there are questions regarding the handling of whistleblower information.
- All BSA information is sensitive; in particular, SARs, and related information that would reveal the existence of a SAR, must be protected from inadvertent disclosure. SARs and SAR material must be segregated, labeled as "sensitive," and stored securely. Steps must be taken to avoid inadvertent dissemination of these documents or inadvertent disclosure of the existence of these documents. See [Section 2.1.2.1](#) and [Section 4.7](#).
- Staff should keep in mind that original files may ultimately be used at trial or during a similar litigation proceeding and should not alter any original documents or other materials. In the limited circumstances in which the staff allows an entity or individual to produce original documents in paper format, the staff generally should scan the original documents and return the originals as soon as practicable. There might be circumstances in which we must maintain possession of an "original" document if, for example, authenticity of the document or signatures on it are disputed, and we need to keep the original for forensic testing and for use at trial. The staff should not add any identifying notations to the original documents. The staff should also create and maintain a chain of custody log for each original, including from whom and when it was received, and for its return, the date it was returned and all tracking information. When possible, this log should be prepared, dated, and signed by someone other than the investigating attorney in case the authenticity of the scanned documents is later challenged.

Further Information:

- Staff should refer any questions about receiving, using, storing, and disposing of electronic files to the Division's IT staff in the Litigation Support Branch.

- Investigative staff should consult with staff in the Division’s Trial Unit regarding any concerns regarding the future use of documents in litigation.
- Staff should contact the BSA Review Group for specific information and guidance about how to handle BSA materials properly. *See also* [Section 2.1.2.1](#), and [Section 4.7](#).

3.2.10.1. Document Control

Basics:

In implementing good document management and control during an investigation or litigation, the staff should have a structured and consistent system for labeling, storing, and keeping track of documents.

To that end, the staff should follow the procedures below, adjusted as appropriate for the particular circumstances:

- The staff should maintain an index of all document requests and subpoenas issued during an investigation. The index should be saved in the matter-specific subfolder in the appropriate shared location.
- The staff should index all documents and other materials received during an investigation or litigation after receipt, including documents and other materials received from document productions, testimony transcripts, etc. The index should be saved in the matter-specific subfolder in the appropriate shared location. The index should typically include the following:
 - A description of the documents produced or obtained, including Bates numbers;
 - Identity of the producing party or source;
 - Location of the documents;
 - The document request or subpoena that sought the documents, if any; and
 - Whether the response to the request or subpoena is complete.
- The staff should index any paper documents or other materials sent to off-site storage.

Considerations:

Staff should update the document index with each new production in a timely manner.

3.2.10.2. Complying with Rule 26(a) of the Federal Rules of Civil Procedure

Basics:

FRCP Rule 26(a)(1) requires the SEC to make certain disclosures at the onset of litigation. Additionally, the SEC is required to conduct a reasonable search of documents within its possession, custody, or control to respond to discovery requests pursuant to FRCP Rule 34. Failure to produce documents during discovery can result in sanctions, including an order precluding the SEC from using those documents as evidence.

Creating and maintaining an accurate contact list and document index will help the investigative staff effectively manage a complex investigation and greatly assist the SEC's trial attorneys when compiling initial disclosures pursuant to FRCP Rule 26(a)(1) and in responding to subsequent discovery requests.

- *Contact list* – The contact list should include the name, address, and telephone number of all individuals and entities likely to have discoverable information and, where applicable, their counsel.
- *Document index* – The document list should include all documents, electronically stored information, and tangible things that the staff obtains during the investigation and provide at least the following:
 - A description of the documents by category;
 - Location of the documents;
 - Identity of the party that produced the documents;
 - Identification of the request or subpoena and correspondence relating to the documents; and
 - Bates numbers, if possible.

Further Information:

For questions about contact lists and document indexes, staff should consult with the Trial Unit.

3.2.10.3. Preserving Evidence in Anticipation of Litigation

Basics:

A duty to preserve electronically stored information (“ESI”) and paper records generally arises when litigation is reasonably anticipated or foreseeable, as well as when litigation is pending. Failure to preserve ESI and paper records can result in court sanctions. When there is a duty to preserve, staff should make reasonable and good faith efforts to preserve ESI and paper records relevant to an investigation or litigation. The Hub automatically sends litigation hold

notices to staff assigned to a matter and to other individuals working for the SEC who are not assigned to the matter, but who may have relevant information directing them to preserve relevant ESI and paper records.

ESI is a broad term that includes, among other things, word processing files, spreadsheets, databases, email, and voicemail.

3.2.10.4. Off-Site Storage

Legacy paper records and physical evidence must be organized in boxes for transfer to the Division's off-site storage provider as follows:

- The boxes should include a detailed description of all contents to facilitate storage and retrieval.
- The staff should maintain tracking logs to include the date and location when boxes are sent to, or received from, off-site storage, and when boxes are destroyed or sent to the SEC's Office of Records Management Services.

3.2.10.5. Preserving Internet Evidence

Basics:

Evidentiary issues may arise concerning authentication and preservation of internet documents, particularly pertaining to pages from the internet. Website owners may, at any time and within seconds, alter, edit or even remove contents of a website. Thus, upon discovering relevant evidence on a website, the staff immediately should seek to preserve that website evidence to capture information as it existed at the time the staff discovered the information.

Website preservation must be completed by the Division's IT staff in the Litigation Support Branch, to help ensure a forensically-preserved copy of the relevant information.

Further Information:

The staff should direct any questions about preserving internet evidence to the Division's IT staff.

3.2.10.6. Preserving Audio Recordings

The staff should be able to trace the receipt and custody of audio recording data from the time they are received through their use at trial and demonstrate that the audio recordings were securely stored once they came into the staff's possession. The goal is to ensure the admissibility of the recording by establishing its authenticity and the requisite preservation of its condition.

To maintain authenticity, the staff should follow these procedures:

- When obtained, audio recordings should be affixed with a Bates or control number.

- Testimony of the recording’s custodian should establish the producing party’s procedures for making and maintaining audio recordings, the procedures used to produce the audio recordings to the SEC, and the location of the originals (if copies were produced). The custodian should also be asked to identify the date and time of the recordings, and the speakers and the source of the recording, such as the telephone numbers associated with the recording. This information is often available in digital recordings by retrieving data files created at the time the recording was made that capture this information.
- If copies of recordings are produced, the staff should ensure the custodian testifies on the record that the custodian understands the obligation to maintain the originals in a place and manner sufficient to preserve their authenticity.
- The staff should have transcripts prepared of all audio recordings with evidentiary value. The transcript should identify the source of the recording (*e.g.*, meeting, presentation, news video), each speaker, the speaker’s location, and the dates and times the original recording was made. The transcript should also identify the name of the person who prepared it, the date the transcript was prepared, and any information sufficient to describe the specific medium (*e.g.*, disc, tape) transcribed.

3.2.10.7. Preserving Electronic Media

Basics:

Laptops, personal devices, such as smartphones or tablets, and data storage devices, such as computer hard drives, CDs, DVDs, backup tapes, or USB flash drives, may contain information that may be useful during an investigation. In instances where staff anticipates any such devices might be submitted or requested, staff should first consult with the Division’s Information Technology Forensic Lab (“ITFL”) within the Office of Technical Services (“OTS”).

- Staff should create an appropriate service request for ITFL support. Qualified digital ITFL forensic analysts will create and analyze forensic images of the device(s). The analysts will extract relevant data and artifacts, and those will be submitted for inclusion into the SEC’s electronic file management and review systems.
 - The ITFL will securely store and safeguard the original device(s) and subsequently-derived forensic images according to its evidence handling procedures. These procedures will establish the authenticity of the hardware and prevent against any alteration or destruction of information.
 - Whenever possible, the submitted, original device will be returned to the owner/custodian following the creation of a verified forensic image.
- Staff will provide the ITFL details and context regarding the matter, and the role of that particular device, so that appropriate, relevant data can be extracted for staff review. Such data and files will be provided by the ITFL back to staff using the same storage and review systems as are used for other file productions.

ITFL analysts may also provide, as appropriate, reports concerning their analysis related to artifacts and other aspects which might not be contained or accessible by the review of the contents of individual files. For example, this may include a timeline analysis of events recorded within various logs throughout a device or analysis to search for deleted content. Through the testimony of the hardware's owner or custodian, the staff should seek to establish the authenticity of the original hardware, including information regarding the procedures utilized for storing and maintaining data on the hardware.

Considerations:

Forensic imaging is a copying process that produces an exact digital replica of the original data on the hardware and preserves the structure and integrity of the data. The staff should confer with the Division's IT staff to ensure proper imaging of data. To be deemed reliable, the imaging of electronic media information must meet industry standards for quality and reliability, must ensure that no data is altered during the imaging process, and must be tamper proof. The Division's IT staff has established specific procedures and guidelines for imaging data. The staff should also ensure that, prior to its delivery to the SEC, the producing party has stored the original in a safe location, including by confirming details of such storage through the testimony of a custodian or owner of the hardware.

Further Information:

Staff should refer any questions about preserving electronic media evidence to ITFL staff.

3.3. Witness Interviews and Testimony

3.3.1. Privacy Acts

In connection with any witness interviews or testimony, staff must comply with the Privacy Act, *see* [Section 4.4.](#), the RFPA, *see* [Section 4.5.](#), and the ECPA, *see* [Section 4.6.](#)

3.3.2. No Targets of Investigations

Unlike the grand jury process in which targets of an investigation are often identified, the SEC investigative process does not have targets. Thus, the SEC is not required to provide any type of target notification when it issues subpoenas to third parties or witnesses for testimony or documents in its nonpublic investigations of possible violations of the federal securities laws. The Supreme Court, in *SEC v. O'Brien*, 467 U.S. 735, 750 (1984), noted that "the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission." Citing the SEC's broad investigatory responsibility under the federal securities laws, the Court found no statutory, due process, or other standard regarding judicial enforcement of such subpoenas to support the proposition that such a notice is required.

Although some parties involved in investigations eventually may be named as defendants or respondents in a subsequent action, the SEC does not have targets of its MUIs or investigations.

3.3.3. Voluntary Interviews

3.3.3.1. Privacy Act Warnings and Forms 1661 and 1662

Basics:

- The Privacy Act, 5 U.S.C. § 552a, requires, among other things, certain disclosures to individuals from whom the SEC's staff solicits information.
- When the staff contacts a person to request a voluntary interview, before asking any substantive questions, the staff should provide an oral summary of at least the required Privacy Act information described below.
- The Privacy Act requires that the staff provide the following information:
 - That the principal purpose in requesting information from the witness is to determine whether there have been violations of the statutes and rules that the SEC enforces.
 - That the information provided by members of the public is routinely used by the SEC and other authorities, to conduct investigative, enforcement, licensing, and disciplinary proceedings, and to fulfill other statutory responsibilities.
 - That the federal securities laws authorize the SEC to conduct investigations and to request information from the witness, but that the witness is not required to respond.
 - That there are no direct sanctions and no direct effects upon the witness for refusing to provide information to the staff.

Considerations:

The staff must send a copy of [SEC Form 1661](#) or [SEC Form 1662](#), as appropriate, along with a cover letter to the witness at the outset of the interview if practicable, or if not, promptly after the interview has taken place. If the staff contacts the witness and the witness asks to delay the interview to a later date, the staff may send Form 1661 or 1662 in advance of the interview.

3.3.3.2. Documenting the Interview

Basics:

While conducting a voluntary interview, the staff may take written notes of the interview. With the witness's consent, and supervisory approval, the staff also may make an audio recording of the interview.

Considerations:

A minimum of two staff members are encouraged to be present to conduct a witness interview. Advantages to having a minimum of two staff members present to conduct a witness interview include having more than one person who can ask questions and later have

recollections and impressions of the interview. Moreover, one of the staff members may subsequently need to serve as a witness at trial. Staff also should consider having only one staff member take notes during the interview. If the staff intends to make an audio recording of the interview, Division policy requires the staff to obtain the witness's consent and supervisory approval before initiating the recording.

3.3.4. Voluntary On-the-Record Testimony

Basics:

The staff may request voluntary transcribed (“on the record”) testimony from witnesses. The staff cannot require and administer oaths or affirmations without a Formal Order. Nevertheless, the staff can conduct voluntary testimony with a court reporter present who produces a verbatim transcript. Voluntary testimony may be recorded by audio, audiovisual, and/or stenographic means. Staff should identify the potential method or methods of recording to be used in writing to the witness prior to the occurrence of the voluntary testimony.

If a witness is voluntarily willing to testify under oath, the staff, after obtaining the witness's consent, will have the court reporter or notary place the witness under oath. If the witness is placed under oath, false testimony may be subject to punishment under federal perjury laws. In addition, 18 U.S.C. § 1001, which prohibits false statements to government officials, applies even if a witness is not under oath.

While conducting voluntary on-the-record testimony, the witness may have counsel present. Also, at the beginning of the testimony, the staff should consider asking the witness questions on the record to reflect that the witness understands: (1) that the witness is present and is testifying voluntarily; (2) that the witness may decline to answer any question that is asked, and (3) that the witness may leave at any time.

Considerations:

Staff should otherwise conduct the voluntary on-the-record testimony as it would any other testimony, including providing the witness with a copy of [SEC Form 1662](#) prior to testimony.

3.3.5. Testimony Under Subpoena

3.3.5.1. Authority

The SEC may require a person to provide documents and testimony under oath upon the issuance of a subpoena. Prior to issuing any subpoenas in a matter, the staff must obtain a Formal Order. *See* [Section 2.2.3](#).

In authorizing the issuance of a Formal Order, the Commission delegates fact-finding and investigative authority to the staff. Various statutes provide for the designation of officers of the Commission who can administer oaths, subpoena witness, take testimony, and compel production of documents. *See* Section 19(c) of the Securities Act, Section 21(b) of the Exchange Act, Section 209(b) of the Advisers Act, and Section 42(b) of the Investment Company Act.

These statutory provisions do not limit the designation of Commission officers to attorneys. Non-attorneys, such as staff accountants, analysts, and investigators, also may be designated as officers and empowered to take testimony and issue subpoenas.

See [Section 2.2.3.3](#) for information on requests for a copy of the Formal Order when a subpoena has been issued.

3.3.5.2. Using a Background Questionnaire

Basics:

The background questionnaire is a document that the staff uses to obtain important background information from a witness. The questionnaire solicits a variety of personal information from the witness, including, among other things, the witness's contact information, date and place of birth, the names and account numbers for all bank, securities, and brokerage accounts, a list of all educational institutions attended and degrees received, and an employment history. The information solicited in the background questionnaire is routinely asked for in testimony.

Some questions in the form background questionnaire may not be relevant to some witnesses in some investigations. For that reason, staff should review the background questionnaire and determine whether modification of the questionnaire is necessary before sending it to a witness.

Considerations:

- The witness is not required as a matter of law to comply with the staff's request to complete the written background questionnaire. Disclosure of the information is entirely voluntary on the witness's part. There are no direct sanctions and thus no direct effects for failing to provide all or any part of the requested information, although it should be explained that this information will then be asked for in testimony.
- If the witness chooses to provide a background questionnaire, the witness should be examined about the document. For example, the witness should be asked to authenticate the document by requiring the witness to testify about its preparation, the source of information contained in the document, and the accuracy of the information provided.
- Information provided pursuant to a background questionnaire is subject to the SEC's routine uses as listed in [SEC Form 1662](#). The witness also is liable, under 18 U.S.C. § 1001, if the witness knowingly makes any false statements in the background questionnaire.
- Background questionnaires, as exhibits to testimony transcripts, may become public if they are produced during discovery in a subsequent litigation. To safeguard sensitive personal information, and in particular, sensitive personal identifying information ("PII") such as a witness's Social Security number, the staff should consider whether it is necessary to obtain the sensitive PII and, if it is, omitting it from the background

questionnaire and instead requesting that it be submitted outside of testimony, *e.g.*, in a letter or orally.

3.3.5.3. Witness Right to Counsel

Basics:

- Any person compelled to appear, or who appears by request or permission of the SEC, to provide testimony may be accompanied, represented and advised by counsel, provided, however, that all witnesses shall be sequestered, and unless permitted in the discretion of the officer conducting the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness. *See* Rule 7(b) of the SEC’s Rules Relating to Investigations, 17 C.F.R. § 203.7(b). Any person appearing with a witness in a formal investigative proceeding may be asked by the officer conducting the examination to confirm on-the-record that such person is representing the witness as counsel.
- This means that a testifying witness may have an attorney present during any formal investigative proceeding, and the attorney may (1) advise the witness before, during and after the testimony; (2) question the witness briefly at the conclusion of the testimony to clarify any of the answers the witness gave during testimony; and (3) make summary notes during the witness’s testimony solely for the witness’s use. *See* Rule 7(c) of the SEC’s Rules Relating to Investigations, 17 C.F.R. § 203.7(c). If the witness is accompanied by counsel, the witness and counsel may consult privately.
- If a witness’s counsel is also a potential witness in the investigation, this should be addressed in advance of the testimony, including conferring with OCC and OGC. Under Rule 7(b)’s requirement that “witnesses shall be sequestered,” the staff may determine that it is appropriate to not permit that particular counsel to attend, and to insist that the witness have different counsel in connection with the testimony. Such determinations should ordinarily be made by the staff in consultation with the appropriate personnel in OGC.
- “Counsel” is defined as any attorney representing a party or any other person representing a party pursuant to Rule 102(b) of the SEC’s Rules of Practice, 17 C.F.R. § 201.102(b). *See* Rule 101(a) of the SEC’s Rules of Practice, 17 C.F.R. § 201.101(a).
- Rule 102(b) of the SEC’s Rules of Practice states that in any proceeding a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State (as defined in Section 3(a)(16) of the Exchange Act, 15 U.S.C. § 78c(a)(16)); a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association; and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state. Rule 102(a) also provides that in any proceeding an individual may appear on his or her own behalf.

Considerations:

- If a witness is not accompanied by counsel, the witness may advise the staff taking the testimony at any point during the testimony that the witness desires to be accompanied, represented and advised by counsel. Testimony will be adjourned to afford the witness an opportunity to arrange for counsel.
- The witness may be represented by counsel who also represents other persons involved in the investigation. For more information on multiple representations, and a statement that staff should read from Form 1662 during a testimony in which counsel represents multiple parties, *see* [Section 4.1.1.1](#).

3.3.5.4. Going off the Record

Testimony may be recorded by audio, audiovisual, and/or stenographic means. Staff should identify in the subpoena or subpoena cover letter the potential method(s) for recording the testimony. With reasonable prior notice to the witness, staff may designate another method or methods for recording the testimony in addition to that specified in the subpoena or subpoena cover letter.

The staff taking the testimony controls the record. If a witness desires to go off the record, the witness must indicate this to the staff taking the testimony, who will then determine whether to grant the witness's request. The reporter will not go off the record at the direction of the witness, or counsel for the witness. *See* [SEC Form 1662](#) and Rules 6 and 7 of the SEC's Rules Relating to Investigations, 17 C.F.R. §§ 203.6 and 203.7.

3.3.5.5. Transcript Availability

Basics:

Rule 6 of the SEC's Rules Relating to Investigations, 17 C.F.R. § 203.6, provides that:

Transcripts, if any, of formal investigative proceedings shall be recorded solely by the official reporter, or by any other person or means designated by the officer conducting the investigation. A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however,* That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness's own testimony.

Persons requested to supply information voluntarily are also accorded the rights provided by Rule 6. If a witness wishes to purchase a copy of the transcript of their testimony, the staff will provide the witness with a copy of the appropriate form. Rule 6 does not permit a witness to obtain or review documentary evidence provided by anyone other than the witness.

Further Information:

Staff should consult with the supervising Assistant Director for the procedures to be followed to make a recommendation that the staff deny a witness's request for a transcript copy.

3.3.6. Engaging with Investors

The staff frequently engages with investors who are often at the heart of investigations and enforcement actions. In addition to collecting evidence from investors, as appropriate, the staff will educate investors about the SEC's role and what investors can and cannot expect as part of an investigation or action. Every member of the Division shares a responsibility to be professional when communicating with investors.

In conversations with investors, staff should provide relevant resources, including, but not limited to directing them to the SEC's investor.gov website. Staff should also explain that investors have a right to contact their own counsel.

3.3.7. Special Cases

3.3.7.1. Contacting Employees of Represented Issuers and Other Entities

All U.S. jurisdictions have adopted a rule of professional conduct governing a lawyer's communications with represented organizations, and staff should follow the applicable jurisdiction's version of the rule when communicating with officers, employees and other constituents of represented organizations. This rule in the majority of jurisdictions is similar to American Bar Association Model Rule of Professional Conduct 4.2 ("Model Rule 4.2"), which states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment [7] to Model Rule 4.2 explains the rule's applicability to organizations that are represented in the matter:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former

constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* Rule 4.4.

In some jurisdictions, the text of and/or comments to Model Rule 4.2 differ significantly from the Model Rule and, in a few jurisdictions, case law may impose restrictions that are not obvious from the rule's text. If staff have questions about application of Model Rule 4.2 to a particular situation, they should contact OCC or the Commission's Professional Responsibility Counsel.

3.3.7.2. Contacting Witnesses Residing Overseas

Basics:

The staff is encouraged to consult with the SEC's Office of International Affairs ("OIA") as soon as the staff suspects any foreign connection to an investigation. Because countries have varying requirements for contacting witnesses, staff should contact OIA before attempting to contact a prospective witness residing overseas. OIA can provide advice on the requirements for contacting witnesses in foreign jurisdictions, the existence of any information sharing mechanism in the country in which the witness resides, the uses to which information can be put, and practical considerations, such as likely response time for the assistance needed from authorities from a particular foreign jurisdiction. OIA also can prepare requests for assistance to foreign authorities and review drafts for compliance with the requirements of any information sharing mechanism that exists or foreign law and practice. Depending on the needs of a particular matter, OIA may initiate contacts with the foreign counterpart, sometimes in advance of sending a formal request for assistance.

Considerations:

As a general matter, the Division is able to obtain testimony and documents from witnesses residing overseas through a variety of mechanisms. These mechanisms include: information sharing arrangements with foreign counterparts, such as memoranda of understanding, mutual legal assistance treaties, the Hague Evidence Convention, letters rogatory, and ad hoc arrangements, in addition to, in certain jurisdictions, voluntary cooperation. OIA can advise the staff as to which of these mechanisms is available in a particular foreign jurisdiction.

- Memoranda of Understanding ("MOUs") are arrangements between regulators regarding information sharing and cooperation in securities matters. The SEC is a signatory to the International Organization of Securities Commissions ("IOSCO") Multilateral MOU ("MMOU") and the Enhanced MMOU ("EMMOU"). They are the primary information sharing arrangements the SEC uses to request enforcement assistance from foreign securities regulators. The MMOU signatories commit to obtain and provide bank, brokerage, and beneficial ownership records to other MMOU signatories, while the EMMOU expands the scope of cross-border enforcement assistance to include audit work

papers, compelled testimony, asset freeze guidance, and certain internet service providers' telephone records.

- Mutual Legal Assistance Treaties (“MLATs”) generally are designed for the exchange of information in criminal matters and are administered by the DOJ. Although MLATs are primarily arrangements to facilitate cross-border criminal investigations and prosecutions, the SEC may be able to use this mechanism in certain circumstances. Some jurisdictions permit the SEC to obtain information, including sworn testimony, through MLATs. U.S. criminal interest in the matter may be a prerequisite to the ability of the SEC to obtain information through an MLAT. DOJ has signed a number of MLATs with foreign criminal authorities. MLATs may be an effective mechanism to obtain assistance when an MOU with a particular country either does not exist or does not permit the type of information sought from a prospective witness residing overseas.
- The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters facilitates cooperation in cross-border evidence gathering in civil or commercial matters between contracting parties. The Hague Evidence Convention provides for obtaining evidence abroad on a voluntary and compulsory basis through a variety of mechanisms.
- Letters Rogatory are formal requests from a court in one country to the appropriate judicial authority in another country. Generally, letters rogatory are used in litigation to compel testimony or other evidence, or to serve process on a person located abroad, when no other means is available. The execution of a request for judicial assistance by the foreign court is based on comity between nations, absent a specific treaty such as the Hague Evidence Convention. Because letters rogatory generally can only be used to gather evidence in litigation, letters rogatory may have limited utility where a matter is in the investigative stage.
- Ad Hoc Arrangements: Even if no formal information sharing mechanism exists with respect to a particular jurisdiction, the SEC nevertheless may be able to secure assistance in contacting a witness overseas by working on an *ad hoc* basis with foreign authorities.
- Voluntary Cooperation: Depending on the jurisdiction, it may be possible to request information directly from persons located abroad on a voluntary basis. However, in some foreign jurisdictions, such efforts may violate local statutes and laws. In still other jurisdictions, advance notice to the local regulator and relevant authorities may be required. Division staff should consult OIA even when the staff seeks voluntary cooperation from a witness. When seeking voluntary cooperation, the staff should stress the voluntary nature of the inquiry.

Further Information:

For more information on contacting witnesses residing overseas, staff should contact OIA.

3.3.8. Proffers and Proffer Agreements

Proffers of information and evidence by witnesses, including potential cooperating witnesses, are an important method by which the staff can assess the potential value of such information and evidence. A proffer is generally required to evaluate whether to recommend that a cooperation agreement be entered into by the Division. Offering to proffer is often a method for individuals and entities to initiate a discussion concerning the potential benefits of cooperation in connection with an investigation or proceeding. Proffers are generally made directly by a witness, but at times are preceded by a proffer by an attorney for the witness.

A proffer agreement is a written agreement generally 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 staff at or above the level of Assistant Director. The staff uses a standard proffer agreement. Modifications to the standard agreement should not be made without first consulting with OCC.

Considerations:

- In most cases, the staff should require a potential cooperating individual to make a detailed proffer before the use of the cooperation tools discussed in [Section 6.2](#).
- To avoid potential misunderstandings, with few exceptions, proffer sessions with witnesses should be conducted pursuant to written proffer agreements. Written agreements are not necessary for proffers of information given by counsel on behalf of a witness.
- If the staff conducts a joint proffer session with criminal authorities, the staff should address any potential substantive or procedural issues with an appropriate supervisor at the level of Assistant Director or above, as well as the Assistant United States Attorney or state prosecutor on the matter, before the proffer begins. In particular, the staff and criminal authorities should discuss who will take notes on the proffer. In cases where the staff participates in a proffer session with the criminal authorities, and the cooperating individual has not asked for a proffer agreement with the Commission, the staff should remind the individual that the proffer agreement with the criminal authorities does not apply to the Commission. See [Section 5.2](#).

4. Privileges and Protections

4.1. Assertion of Privileges

4.1.1. Attorney-Client Privilege

Basics:

- The attorney-client privilege protects from disclosure confidential communications between attorney and client made when the client is seeking legal advice. The purpose of the privilege is to encourage free and candid communication between attorney and client.
- Elements necessary to establish the attorney-client privilege include:
 - A communication;
 - Made in confidence;
 - Between an attorney and a client;
 - For the purpose of seeking or obtaining primarily legal advice.

Considerations:

- Information that typically does not involve a confidential communication and therefore is not privileged includes:
 - Identity of the client;
 - Existence of the attorney-client relationship;
 - General reason why the attorney was retained;
 - Fee arrangement between attorney and client; and
 - Billing statements, unless they include narrative descriptions that satisfy the elements of a privilege.
- Courts have held that the mere presence of an attorney at a meeting does not render communications at the meeting privileged.
- Crime-fraud exception to attorney-client privilege: Most courts require the party wishing to invoke the crime-fraud exception to demonstrate that there is a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and the communications in question were in furtherance of the crime or fraud. This burden is normally not met by showing that the communications in question might provide evidence of a crime or fraud, but rather by showing that the communication itself was in furtherance of the crime or fraud and was intended to facilitate or conceal the crime or

fraud.

- Corporations asserting the attorney-client privilege: The attorney-client privilege can be asserted by a corporation to protect communications between corporate employees and in-house or outside counsel. Courts have held that to assert the attorney-client privilege, a corporation must show that the communication came from a person who was employed with the corporation at the time of the communication, the employee was seeking legal advice from an attorney, and the communication was made within the scope of the employee's duties.
- If a privilege is asserted over a document during testimony, the staff should stay on the record. The staff should exercise care when inquiring into potentially privileged matters by making clear on the record that they are not intending to obtain the disclosure of confidential communications between attorney and client. However, the staff should indicate on the record that they intend to establish whether the predicate facts for the assertion of the privilege are present.
- Questions to consider asking to test the assertion of the attorney-client privilege include:
 - Who prepared the document?
 - Who sent the document?
 - To whom was the document sent?
 - What was the date of the communication?
 - What was the date on the document? What date was the document prepared, sent, or received?
 - Who are the attorney and client involved?
 - What was the nature of the document (*i.e.*, memorandum, letter, etc., and generic subject matter)?
 - Who are the parties indicated on the document through carbon copy notations or otherwise who were to receive the document, and all parties that in fact received or saw the document?
 - Who was present during the communication?
 - Who conveyed the communication?
 - Who are the parties to whom the substance of the communication was conveyed?
 - Did the attorney respond?
 - Would all of the communication, if disclosed to the staff, reveal or tend to reveal a

communication from a client (made with the intention of confidentiality) to the client's attorney, in connection with the client seeking legal services or legal advice, at a time when the attorney was retained by that client?

- Would any segregable part of that communication not reveal or tend not to reveal such a confidential communication?
 - Did a retention agreement between the attorney and client exist and if so, what is the date of such agreement?
 - During what period of time did the attorney-client relationship exist?
 - Was a legal fee charged the client by the attorney in connection with the matter involving the communication, and if so, how much, and how, when and by whom was it paid? If no fee was charged, was one discussed?
 - What was the general nature of legal services rendered, and during what time period were they rendered?
 - Did the communication primarily involve a business dealing between the attorney and client?
 - Did the communication involve the client seeking business advice?
 - Was the communication a grant of authority or instruction for the attorney to act upon?
- See [Section 4.3](#). for considerations regarding potential waiver of the attorney-client privilege and evaluation of an advice-of-counsel defense in an investigation.

4.1.1.1. Multiple Representations

Basics:

It is not unusual for counsel to represent more than one party (employees of the same company, for example). Representing more than one party in an investigation does not necessarily present a conflict of interest, although it may heighten the potential for a conflict of interest.

Considerations:

When an attorney represents multiple parties, staff in testimony should inform the party of the following statement in [SEC Form 1662](#):

You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's interests. If you are represented by counsel who also represents other persons involved in the

investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours.

Further Information:

For additional information on representation of more than one party in testimony, *see* [Section 3.3.5.3.](#)

4.1.2. Attorney Work Product Doctrine

Basics:

- A party or the representing attorney may refuse to provide information on the basis that the information requested is protected by the attorney work product doctrine. If the documents or information requested were prepared in anticipation of litigation or for trial, or directly related to preparation for trial, then the work product doctrine generally applies and the party seeking discovery has the burden of proving substantial need and undue hardship. For material to be prepared in “anticipation of litigation,” the prospect of litigation must be identifiable, although litigation need not have already commenced.
- Elements of the doctrine as set forth in FRCP 26(b)(3) are the following:
 - Documents and tangible things;
 - Prepared in anticipation of litigation or for trial; and
 - By or for another party, or by or for that party’s representative, including attorney, consultant, surety, indemnitor, insurer, or agent.
- Work product may be discovered, however, if “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” FRCP Rule 26(b)(3)(A)(ii).

Considerations:

- *See* [Section 4.3](#) for considerations regarding waiver of the attorney work product protection.

4.1.3. The Fifth Amendment Privilege Against Self-Incrimination

Basics:

- Witnesses testifying before the SEC may assert their Fifth Amendment privilege against self-incrimination.

- If a grant of immunity or the expiration of the time limits for criminal prosecution prescribed by the statute of limitations eliminates the danger of self-incrimination, the witness may not invoke the privilege.

Considerations:

- Staff typically will require testimony by or a declaration from the witness to assert the witness's Fifth Amendment privilege. Staff typically will not accept a letter from counsel as an alternative to testimony or a declaration.
 - Reasons for requiring a witness to appear in testimony to assert the Fifth Amendment privilege include, but are not limited to, obtaining a clear and specific privilege assertion on the record, allowing the staff to probe the scope of the privilege assertion, and allowing the staff to determine whether there are grounds to challenge the assertion.
 - A witness must object on the basis of the Fifth Amendment privilege to each question.
 - In some circumstances, allowing assertion of the privilege by declaration may be more appropriate when, for example, time is of the essence.
- The Fifth Amendment privilege against self-incrimination protects individuals and sole proprietorships, but does not protect a collective entity, such as a corporation, or documents or other information held by an individual in a representative capacity for a collective entity.
- Under the required records doctrine, the Fifth Amendment privilege against self-incrimination does not apply to records required to be kept by an individual under government regulation, such as tax returns.
- During litigation, the SEC can assert that an adverse inference should be drawn against a defendant on any issue on which a defendant refused to testify based on an assertion of the Fifth Amendment privilege.
- If a witness testifying before the SEC asserts a Fifth Amendment privilege against self-incrimination, the staff should state on the record that the staff member has no authority to confer immunity, that the staff member has no intention of doing so, and that any questions asked from that point on in the testimony will be with the understanding that the witness may decline to answer on the basis that the response may tend to incriminate the witness. Without compulsion to testify, there can be no claim that immunity was granted. *United States v. Orsinger*, 428 F.2d 1105, 1114 (D.C. Cir. 1970) (witness who refused to testify under Commission subpoena, and who was not compelled to testify, acquired no immunity from criminal prosecution). *See also United States v. Abrams*, 357 F.2d 539, 549 (2d Cir. 1966).

4.2. Inadvertent Production of Privileged or Non-Responsive Documents

Basics:

Most U.S. jurisdictions have adopted a rule similar to American Bar Association Model Rule of Professional Conduct 4.4(b), which provides that a lawyer who receives a document relating to the representation of the lawyer's client, and knows or reasonably should know that the document was inadvertently sent, must promptly notify the sender. In some jurisdictions, the text of the rule and/or case law interpreting it impose additional obligations on lawyers who receive inadvertently produced documents.

Staff should not assume that inadvertent production of a privileged document waives privilege. Under Rule 502(b) of the Federal Rules of Evidence, a disclosure to a federal agency of information covered by the attorney-client privilege or work product protection does not operate as a waiver in a federal (or state) proceeding if:

- (1) The disclosure was inadvertent;
- (2) The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) The holder promptly took reasonable steps to rectify the error.

When a potentially inadvertent production is first identified, either by staff or by the producing party, before determining how to proceed, staff should consult with the appropriate supervisor(s) at the Assistant Director level and above and the Commission's Professional Responsibility Counsel and, if appropriate, the Associate Director, Unit Chief, Chief Counsel, and/or Chief Litigation Counsel and Deputy Chief Litigation Counsel. Generally, if an inadvertent production is discovered by staff, staff should promptly notify the producing party, through the producing party's counsel, of staff's receipt of inadvertently produced documents.

Considerations:

- If an inadvertently produced document is privileged and the producing party is not the privilege holder, staff should consult with the appropriate supervisor(s) at the Assistant Director level and above and the Commission's Professional Responsibility Counsel regarding whether additional steps should be taken.
- Whether the staff is required to return, delete, or sequester an inadvertently produced document or has a legally sound basis for using it is, in part, a function of applicable state rules of professional conduct, as well as, in many circumstances, the applicable law of privilege, Federal Rules of Evidence, and FRCP 26(b)(5)(B). Under some states' rules of professional conduct, the staff's obligations may depend on whether the staff was aware of the inadvertent production before reviewing the document.
- If it is determined that an inadvertently produced document should be deleted or returned to the producing party, staff should require that the party first provide a written representation stating that the producing party will retain a copy of the document in the

form it was produced to staff until the conclusion of the matter and acknowledging that versions of the document may continue to exist on SEC backups. If the producing party claims that the document is privileged or attorney work product, staff should require the party to promptly submit a privilege log for the document.

4.2.1. Purposeful Production Without Privilege Review

Basics:

In some instances, a party may seek to produce documents to the staff before reviewing them for privilege, while also seeking to preserve any claims of privilege on the materials. If it will benefit the investigation, staff can choose to accept such a production by entering into a written agreement (the Model Agreement for Purposeful Production without Privilege Review) with the producing party. Under the agreement, responsibility for identifying any privileged materials resides solely with the party, and acceptance of the production is not an agreement to shift such responsibility to the staff. Further, under the terms of such agreement, the party must agree, among other things, not to assert that the Commission's investigation or litigation has been tainted by the staff's receipt, review, examination, or use of any material later determined to be privileged.

Considerations:

- The Division typically uses a Model Agreement for Purposeful Production without Privilege Review. Staff should consult with OCC concerning any request to modify the model agreement.
- In determining whether to enter into such an agreement and accept such a production, staff should consider whether doing so will advance the investigation or litigation by expediting production.

Further Information:

Staff should refer any questions about this issue to their appropriate supervisor(s) at the Assistant Director level and above and to OCC.

4.3. Waiver of Attorney-Client Privilege or Attorney Work Product Protection

Basics:

The staff must respect legitimate assertions of the attorney-client privilege and attorney work product protection. As a matter of public policy, the SEC wants to encourage individuals, corporate officers, and employees to consult counsel about the requirements and potential violations of the federal securities laws. Likewise, non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine.

A key objective in the staff's investigations is to obtain relevant information, and parties are, in fact, required to provide all relevant, non-privileged information and documents in

response to SEC subpoenas. **The staff should not ask a party to waive the attorney-client privilege or attorney work product protection without prior approval of the Director or appropriate Deputy Director.** A proposed request for a privilege waiver should be reviewed initially with the Assistant Director supervising the matter, and that review will involve more senior members of management as appropriate before being presented to the Director or Deputy Director.

Both entities and individuals may provide significant cooperation in investigations by *voluntarily* disclosing relevant information. Voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation, and a party's decision to assert a legitimate claim of privilege will not negatively affect that party's claim to credit for cooperation. However, as discussed below, if a party seeks cooperation credit for timely disclosure of relevant facts, the party must disclose all such facts within the party's knowledge.

Corporations often gather facts through internal investigations regarding the conduct at issue in the staff's investigation. In corporate internal investigations, employees and other witnesses associated with a corporation are often interviewed by attorneys. Certain notes and memoranda generated from attorney interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product protection. To receive cooperation credit for providing factual information obtained from the interviews, the corporation need not necessarily produce, and the staff may not request without approval, protected notes or memoranda generated by the attorneys' interviews. However, the corporation must produce any requested relevant factual information acquired through those interviews—such factual information is not protected from production by the attorney-client privilege or attorney work product protection.

A party may choose to voluntarily disclose privileged communications or documents. In this regard, the SEC does not view a party's waiver of privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the staff. *See [Seaboard Report](#)*. In the event a party voluntarily waives the attorney-client privilege or attorney work product protection, the staff cannot assure the party that, as a legal matter, the information provided to the staff during the course of the staff's investigation will not be subject to disclosure pursuant to subpoena, other legal process, or the routine uses set forth in the [SEC Forms 1661](#) and [1662](#).

Considerations:

- The SEC encourages and rewards cooperation by parties in connection with the staff's investigations. One important measure of cooperation is whether the party has timely disclosed facts relevant to the investigation. Other measures of cooperation include, for example, voluntary production of relevant factual information the staff did not directly request and otherwise might not have uncovered, requesting that corporate employees cooperate with the staff, and making all reasonable efforts to secure such cooperation. The SEC's policies with respect to cooperation are set forth in the [Seaboard Report](#), and in the "Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions," Securities Exchange Act Release No. 61340 (Jan. 13, 2010) (17 C.F.R. § 202.12) ("[2010 Cooperation Policy Statement](#)"), which outline other

factors that may be considered in assessing whether to award credit for cooperation. *See* [Section 6](#).

- **A party's decision to assert a legitimate claim of attorney-client privilege or attorney work product protection will not negatively affect that party's claim to credit for cooperation.** The appropriate inquiry in this regard is whether, notwithstanding a legitimate claim of attorney-client privilege or attorney work product protection, the party has disclosed all relevant underlying facts within its knowledge.
- By timely disclosing the relevant underlying facts, a party may demonstrate cooperation for which the staff may give credit, while simultaneously asserting privilege. The timely disclosure of relevant facts is considered along with all other cooperative efforts and circumstances in determining whether and the extent to which the party should be awarded credit for cooperation.
- In order for the staff to credit an advice-of-counsel defense in an investigation, the party asserting the defense must provide information sufficient to enable the staff to evaluate the validity of the defense, even if this requires disclosure of privileged information. To assert a valid advice-of-counsel defense, courts have held that defendants must establish that they (1) made complete disclosure to counsel; (2) requested counsel's advice as to the legality of the contemplated action; (3) received advice that such action was legal; and (4) relied in good faith on that advice. Staff at the Assistant Director level or above should attempt to explore the possibility of an advice-of-counsel defense with a party's counsel at an early stage in the investigation.

Further Information:

- For more information on the attorney-client privilege and attorney work product doctrine, and related exceptions, *see* [Sections 4.1.1](#). (Attorney-Client Privilege) and [4.1.2](#). (Attorney Work Product Doctrine).
- For information on the inadvertent production of privileged materials, *see* [Section 4.2](#). of the Manual.
- For information on the production of privileged materials pursuant to a confidentiality agreement, *see* [Section 4.3.1](#).
- For more information on the factors considered by the Commission when crediting cooperation, staff should consult the [Seaboard Report](#) and [Section 6.1.2](#). (with respect to corporations) and [Section 6.1.1](#). (with respect to individuals).

4.3.1. Confidentiality Agreements

Basics:

A confidentiality agreement is an agreement between the staff of the Division and, typically, a party who, in an investigation, agrees to produce materials that it considers to be

privileged (such as reports of internal investigations, interview memoranda, and investigative working papers). For its part, the staff agrees not to assert that the producing party has waived as to any third party any privileges or attorney work product protection as a result of the producing party's production of the materials to staff, and staff agrees not to assert that production of the materials resulted in a subject matter waiver. The staff also agrees to maintain the confidentiality of the materials, except to the extent that the staff determines that disclosure is required by law, or that disclosure would be in furtherance of the SEC's discharge of its duties and responsibilities. The basis for the agreement is the interest of the staff in determining whether violations of the federal securities laws have occurred, and the producing party's interest in providing staff with important information for consideration as part of the staff's investigation of potential violations of the federal securities laws.

Considerations:

- The Division typically uses a Model Confidentiality Agreement. The staff should not agree to modifications to the Model Confidentiality Agreement without first consulting with OCC and the Chief or Deputy Chief Litigation Counsel. The agreement must be signed by a supervisor at the Assistant Director level or above.
- While obtaining materials that are otherwise potentially subject to privilege or the protections of the attorney work product doctrine can be of substantial assistance in conducting an investigation, the staff should exercise judgment when deciding whether to enter into a confidentiality agreement with a company under investigation.

Considerations include the following:

- Some courts have held that companies that produce otherwise privileged materials to the SEC or the DOJ, even pursuant to a confidentiality agreement, waived privilege in doing so.
- Some companies have pertinent operations in one or more foreign jurisdictions, which may have data privacy and other laws that will restrict the staff's ability to obtain evidence. The company itself may have access to the persons in such jurisdictions (especially if they are still employees) and to other sources of evidence (such as documents and emails). In such instances, the company may be able to convey important information to the staff by producing interview memoranda and through reports of findings derived from otherwise restricted sources.

4.4. Compliance with the Privacy Act of 1974

Basics:

- The Privacy Act (5 U.S.C. § 552a) establishes requirements for the solicitation and maintenance by federal agencies of personal information regarding members of the public.
- When obtaining information from the public, the statute generally requires the staff to provide notice with respect to the authority for the solicitation and whether disclosure is

voluntary or mandatory, the principal purposes for seeking the information, the effect of refusing to provide the information, and the “routine uses” of the information. The statute generally prohibits any disclosure of personal information unless the disclosure is within one of the statute’s exemptions (including the exemption for “routine uses”).

Considerations:

The Privacy Act notice requirement referred to above is generally met by providing a copy of [SEC Form 1661](#) or [SEC Form 1662](#) to the person or entity from which information is sought. The forms contain the list of uses that may be made of personal information. Generally, disclosures in aid of the staff’s investigations will be covered by one or more of the routine uses.

Further Information:

- For questions relating to the Privacy Act, staff should contact OCC.
- For further information on [SEC Forms 1661](#) and [1662](#), see [Section 3.2.1.1](#).
- For further information on how to meet the Privacy Act requirements when conducting voluntary interviews, see [Section 3.3.3](#).

4.5. Compliance with the Right to Financial Privacy Act of 1978

Basics:

- The RFPA (12 U.S.C. § 3401 *et seq.*) provides individuals with a privacy interest in their banking records held by a financial institution. Section 21(h) of the Exchange Act contains additional RFPA procedures available only to the SEC.
- The RFPA applies when staff seeks the financial records of a “customer” (*i.e.*, an individual or partnership of five or fewer individuals) from a “financial institution” (*e.g.*, a bank, mortgage lending company or trust company, but not regulated entities, such as broker-dealers or investment advisers). Generally, the staff may only obtain customer records from a financial institution pursuant to subpoena after providing the customer with notice of the subpoena and an opportunity to challenge production in court. Notice must also be provided when the staff discloses information obtained pursuant to the RFPA to another federal agency (absent an exemption, such as for disclosure to the DOJ).

Considerations:

- Staff must comply with the RFPA restrictions whenever seeking banking records, including banking records of corporate entities.
- In certain situations, including where notice to the customer may impede an investigation or result in the movement of funds out of U.S. jurisdiction, staff may consider seeking a court order under Section 21(h) of the Exchange Act to delay notice; the staff may also consider filing an emergency action to obtain an asset freeze order to protect investor funds. The Commission has delegated authority to the Director of Enforcement to file

applications in Federal court to seek an order pursuant to Section 21(h)(2). *See* 17 C.F.R. § 200.30-4(a)(19).

- Staff must also comply with the RFPA restrictions whenever disclosing information obtained from a financial institution to another federal agency.

Further Information:

For further information about the RFPA and its requirements, staff should contact OCC.

4.6. Compliance with the Electronic Communications Privacy Act of 1986

Basics:

- The ECPA (18 U.S.C. § 2510 *et seq.*) expanded the wiretap laws to protect the contents of electronic communications (*e.g.*, email) and other subscriber or customer records held by third-party electronic communications service providers.
- The staff can obtain the content of communications either directly from the sender or intended recipient, or from a service provider with subscriber or customer consent.
- The ECPA also authorizes federal agencies to obtain telephone records and email records (other than content) by subpoena. This information includes the name, address, local and long distance telephone connection records, or records of session times and durations; length of service (including start date) and types of service utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and the means and source of payment for such service (including any credit card or bank account number). No subscriber or customer notice is required when obtaining such records.

Considerations:

- Staff must comply with the ECPA restrictions whenever seeking information or records from persons or entities who provide computerized communication services to the public. These service providers include online information services, national and local entities that permit customers to gain access to the internet, and any other person or entity that permits customers to communicate via email, online chat rooms, or instant messaging. Access to information and records from any of these entities may be subject to the ECPA.
- The ECPA applies only to records held by third-party service providers, and hence does not apply to email held by the sender or addressee, or held on the servers of a company that provides internal email services for its own employees.
- As a result of changes in the language of Section 2703 of the ECPA, and in telephone billing practices, service providers have increasingly submitted requests for reimbursement for production of transactional records regarding telephone and electronic communication services. Reasonable invoices submitted after compliance with SEC subpoenas will be considered.

Further Information:

For further information on whether the ECPA may apply and the procedures to follow when it does, staff should consult OCC.

4.7. Handling Bank Secrecy Act Material

BSA information can provide valuable leads in investigations. However, BSA information often contains sensitive data or personally identifiable information. In addition, SARs are protected by the BSA and related regulations that prohibit improper disclosures. *See* 31 U.S.C. § 5318(g)(2)(A). The purpose of a SAR is to report known or suspected violations of law or suspicious activity observed by financial institutions. Information obtained from SARs provides an additional resource for identifying entities and individuals that may be engaged in conduct that constitutes potential violations of the federal securities laws or poses an increased risk of harm to the investing public.

Staff may only share SARs and SAR information with other SEC staff in the Divisions of Enforcement or Examinations when required in the context of an investigation. However:

- All SAR materials must be segregated, marked to indicate that they contain sensitive SAR information, and properly secured.
- In investigations and litigation, SEC production of SARs or documents identified by the filer as supporting the filing of a SAR is generally prohibited.
- Staff may share SARs and SAR information with certain other government agencies only under very limited circumstances and after implementing appropriate safeguards.
- SAR materials cannot be shown to witnesses or marked as exhibits in testimony.
- Staff may not disclose SAR information or its existence to persons outside the SEC who may be assisting in a matter, such as an independent compliance consultant or receiver.

Searching the FinCEN Database:

Designated staff members must periodically search the FinCEN Database to stay informed about SARs related to their MUIs and investigations. They should search the system as often as necessary during an investigation and before making significant decisions, such as opening a MUI or investigation, or adding a related party. Before closing a matter, staff members should use their best judgment to determine if a search of the FinCEN Database is warranted, considering whether a related SAR might impact the decision to close the matter.

Further Information:

- Staff should contact the Division's BSA Review Group for specific information and guidance about how to properly handle SARs and other materials filed pursuant to the BSA. *See* [Sections 2.1.2.1](#), and [3.2.10](#).

5. Working with Other Agencies and Organizations

5.1. Disclosure of Information and Access Requests

Basics:

Section 24(b) of the Exchange Act (15 U.S.C. § 78x(b)) makes it unlawful to disclose non-public information outside the Commission without Commission approval. All information obtained or generated by SEC staff during investigations or examinations should be presumed confidential and nonpublic unless disclosure has been specifically authorized. The SEC may grant access to nonpublic information to domestic and foreign governmental authorities, SROs, and other persons specified in Section 24(c) of the Exchange Act (15 U.S.C. § 78(c)) and Rule 24c-1 thereunder (17 C.F.R. § 240.24c-1). The Commission has delegated authority to the Director to grant access requests, pursuant to Rule 24c-1, to the SEC's nonpublic enforcement and regulatory files. 17 C.F.R. § 200.30-4(a)(7). Disclosures of such information to members of the general public will normally be made only pursuant to FOIA or as necessary for staff to conduct its investigations.

Rule 2: The Discussion Rule:

Cooperation and coordination with other law enforcement agencies often require the staff to engage in discussions of nonpublic information prior to the grant of a formal access request. Rule 2 of the SEC's Rules Relating to Investigations (also referred to as the "Discussion Rule") was adopted to permit discussions with those persons who may obtain access to nonpublic information through the SEC's access program. Discussions under Rule 2 must be authorized by staff at the Assistant Director level or above. Rule 2 extends only to the conduct of discussions and not to the furnishing of nonpublic documents. *See* Rule 2 of the SEC's Rules Relating to Investigations, 17 C.F.R. § 203.2.

Access Requests:

Section 24(c) of the Exchange Act and Rule 24c-1 authorize the SEC to grant access to nonpublic information in enforcement files in certain circumstances, as described below. The Commission has delegated authority to the Director to grant access requests pursuant to Rule 24c-1 to the SEC's nonpublic enforcement and regulatory files. 17 C.F.R. § 200.30-4(a)(7). Note, however, that work product and other privileged information is rarely disclosed, even when another governmental authority is granted access to the other materials in nonpublic files, and should not be disclosed without specific supervisory approval. In addition, information obtained by the SEC from other agencies should be safeguarded, and the staff should comply with all conditions placed on the information by the agency that provided access.

Rule 24c-1 authorizes disclosure to the following classes of requestors (*see* [Section 5.6](#) for the full text of the Rule):

- Federal, state, local and foreign governmental authorities;
- Self-regulatory and similar organizations;

- Foreign financial regulatory authorities;
- Securities Investor Protection Corporation and its trustees;
- Trustees in bankruptcy;
- Trustees, receivers, masters, special counsels, or other court-appointed persons charged with performing functions arising from securities litigation;
- Professional licensing or oversight authorities that are government-sponsored (*e.g.*, bar associations that are part of a state’s court system); and
- Duly authorized agents, employees, or representatives of the above persons.

Access Request Procedures:

All access requests should be in writing and signed by an official who is in a sufficiently senior or supervisory position to make and enforce required representations. Requestors are generally expected to use the Division’s template access letters and direct the letter to the assigned Assistant Director.

The access request should be entered into the Hub. The authority to grant access has been sub-delegated to supervisors at or above the Associate Director/Unit Chief level or above. When an access request has been approved, the staff should prepare an access grant letter for signature by assigned supervisory staff at the Assistant Director level or above. Staff should retain the original access request and grant letters in the case file.

Disclosure of Whistleblower Identifying Information:

There are strict limitations on the Commission’s authority to disclose information that could reasonably be expected to reveal the identity of a whistleblower (“whistleblower identifying information”). Section 21F(h)(2)(A) of the Exchange Act provides that whistleblower identifying information may not be disclosed unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or other entities as provided in Section 21F(h)(2)(C). Accordingly, there can be situations in which whistleblower identifying information might be disclosed in litigated cases. Disclosure of a person’s status as a whistleblower may be required in order to comply with discovery and other obligations in connection with civil or criminal litigation. Such obligations arise under the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and constitutional obligations to disclose information about evidence and witnesses.

Further, while the Exchange Act limits disclosure to other government agencies, either orally (pursuant to the Discussion Rule) or in response to an access request, the Exchange Act expressly provides the Commission with the authority to disclose whistleblower identifying information to certain regulatory and law enforcement authorities when “necessary to accomplish the purposes of [the Exchange Act] and to protect investors.” Exchange Act § 21F(h)(2)(D). Making such a disclosure requires Commission authorization, which can be granted by the Director exercising delegated authority. 17 C.F.R. § 200.30-4(a)(16). Disclosure

to an agency not enumerated in Section 21F(h)(2) of the Exchange Act, whether orally or in response to an access request, cannot be approved using delegated authority. If staff propose to disclose whistleblower identifying information to an agency not enumerated in Section 21F(h)(2) of the Exchange Act, they should contact OWB.

Further Information:

For further information regarding access requests, staff should consult with OCC. For further information regarding disclosure of whistleblower identifying information to another regulatory or law enforcement authority, staff should consult with OWB.

5.2. Cooperation with Criminal Authorities

The SEC is an independent federal agency charged by Congress with upholding the federal securities laws. The SEC has authority to bring civil, but not criminal, actions to enforce those laws. This authority is not compromised when federal or state criminal authorities conduct a criminal investigation and/or make a determination to bring criminal charges concurrent with the SEC's investigation and/or civil action. Nonetheless, there are certain unique considerations that arise when cooperating with criminal authorities.

5.2.1. Parallel Investigations

Basics:

Parallel civil and criminal proceedings are not uncommon.³ 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, consistent with the considerations below, the Division's investigations with parallel criminal investigations when appropriate. There are, however, a number of considerations the staff should be mindful of when conducting a parallel investigation and when determining whether to seek authorization to bring an enforcement action that involves a parallel criminal investigation. Because each matter presents a unique set of circumstances, assigned staff will consult with supervisors and, as appropriate, with OCC, whenever they are involved in parallel proceedings.

³ The Supreme Court recognized in *United States v. Kordel*, 397 U.S. 1, 11 (1970) that parallel civil and criminal proceedings are appropriate and constitutional. As the Court of Appeals for the D.C. Circuit put it in the leading case of *SEC v. Dresser*, 628 F.2d 1368, 1377 (D.C. Cir. 1980), “[e]ffective enforcement of the securities laws requires that the SEC and [the Department of] Justice be able to investigate possible violations simultaneously.” Other courts have issued opinions to the same effect. *See, e.g., SEC v. First Fin. Grp. of Tex.*, 659 F.2d 660, 666–67 (5th Cir. 1981) (“The simultaneous prosecution of civil and criminal actions is generally unobjectionable.”); *United States v. Stringer*, 535 F.3d 929, 933 (9th Cir. 2008) (“There is nothing improper about the government undertaking simultaneous criminal and civil investigations. . .”). Moreover, the federal securities laws themselves expressly provide that the SEC can share information gathered in its investigation with other government agencies and provide information to the Department of Justice for a determination whether to institute criminal proceedings. *See* Section 20(b), Securities Act; Section 21(d), Exchange Act; 17 C.F.R. § 240.24c-1 (access to nonpublic information).

Considerations:

While every situation is different, staff typically should keep the following considerations in mind when conducting a parallel investigation and when determining whether to seek authorization to bring an enforcement action that involves a parallel criminal investigation:

- It is important that the civil investigation has its own independent civil investigative purpose and not be initiated to obtain evidence for a criminal prosecution. This does not prevent staff from taking an action if the action will provide a benefit to both the SEC's matter and the parallel criminal matter. It does mean, however, that staff should not take an SEC civil investigative action for which the *sole* aim is to benefit the criminal matter.
- The staff should make its own independent decisions about all investigative steps, including what documents to request, what investigative testimony to take, what questions to ask during testimony, the location of testimony and similar matters, whether to issue Wells notices, and the timing and venue of any filings.
- If asked by counsel or any individual whether there is a parallel criminal investigation, staff should direct counsel or the individual to the section of [SEC Form 1662](#) dealing with "Routine Uses of Information," which states that:

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

Staff should also invite any person who raises such issues to contact criminal authorities in order to pursue the question of whether there is a parallel criminal investigation. Should counsel or the individual ask which criminal authorities should be contacted, staff should decline to answer unless authorized by the relevant criminal authorities.

- An appropriate supervisor must be involved in all significant discussions and written communications with criminal authorities.
- Generally, sharing information with criminal prosecutors is permissible, even though the sharing of information is intended to, and does in fact, assist criminal prosecutors; *see* [Section 5.1](#). for more information regarding the Discussion Rule and access requests. In addition, in certain circumstances it is appropriate for criminal authorities to ask SEC staff to refrain from taking actions that would harm a criminal investigation, and likewise it can be appropriate for SEC staff to ask criminal authorities not to take action that would harm an SEC investigation. Each matter is unique, and assigned staff should discuss these and other considerations with their supervisors.

Further Information:

For more information on joint proffer sessions, *see* [Section 3.3.8](#).

5.2.2. Grand Jury Matters

Basics:

The SEC is generally not privy to grand jury matters. Grand jury matters are subject to the confidentiality restrictions set forth in Federal Rule of Criminal Procedure 6(e) and analogous state rules of criminal procedure. Rule 6(e) provides for secrecy of all “matter[s] occurring before the grand jury,” subject to certain exceptions.

Considerations:

- Subject to the limitations in Federal Rule of Criminal Procedure 6(e) and similar state rules, the staff may receive information from the criminal authorities about the status of the criminal investigation and the future investigative plans of the criminal authorities.
- Before receiving information from the criminal authorities in an investigation, staff should inquire whether any of the information provided comes directly or indirectly from grand jury proceedings, including subpoenas.
- If staff comes into possession of grand jury materials, they should immediately inform their supervisor and take appropriate steps.

5.3. Cooperation with the Food and Drug Administration

Basics:

Staff may seek information from the Food and Drug Administration (“FDA”) in investigations arising from referrals by the FDA, or in which the FDA may have relevant information. For example, a company’s public statements about the status for FDA approval of its product may cause the staff to seek information from the FDA about its review of the product. Staff should also consult with their supervisors about the scope of the request and the appropriate addressee. The designated Enforcement FDA liaison should be informed of requests.

Before making any request to the FDA, staff should review the statutes and regulations that govern the FDA’s ability to disclose information to SEC staff. In particular, the Federal Food, Drug and Cosmetic Act prohibits the FDA from disclosing trade secrets, even to other federal agencies such as the SEC. *See* 21 U.S.C. § 331(j). Although the FDA may share other nonpublic records with other federal agencies, it must first receive a written agreement from such agency that the information will not be further disclosed without written permission from the FDA. *See* 21 C.F.R. § 20.85. And the Commissioner of Food and Drugs or an official designated by the Commissioner must authorize any investigative testimony by FDA employees. *See* 21 C.F.R. § 20.1(c).

Considerations:

- Documents relating to FDA consideration of applications for new drugs or biologics can be extremely voluminous—sometimes millions of pages—so staff should consider the extent to which they are relevant to its investigation before making broad requests for all documents relating to a product.
- When preparing to litigate a case in which nonpublic FDA documents or testimony transcripts will be part of the SEC’s initial disclosures, staff should keep in mind that before the FDA consents to further disclosure, it will conduct a review of each page for confidential commercial information or any privilege. Because this review can take a very long time, staff should allow ample time for that review before filing a case or in the litigation discovery schedule.
- If staff expects to charge a defendant who is not the owner of the information (for example, a current or former employee of the company), staff should seek consent from the company for the disclosure as early as practical, because the FDA will not agree to further disclosure of confidential commercial information without the consent of the owner of the information.

Further Information:

- Staff should refer any questions about FDA matters to the designated Division liaison or OCC.

5.4. Cooperation with the Public Company Accounting Oversight Board

The SEC and PCAOB generally have concurrent jurisdiction over PCAOB registered auditors for issuers and broker-dealers, but there may be instances in which it may be preferable for one organization to be principally responsible for investigating an auditor’s conduct.

Some of the factors the staff may wish to evaluate when coordinating investigations with the PCAOB include differences between possible charges and remedies, the nature of the conduct, and the standards involved.

5.5. Coordination and Consultation with Banking Agencies

Basics:

Under Section 241 of Subtitle D of Title II of the Gramm-Leach-Bliley Act, the SEC “shall consult and coordinate comments with the appropriate Federal banking agency before taking any action or rendering any opinion with respect to the manner in which any insured depository institution or depository institution holding company reports loan loss reserves in its financial statement, including the amount of any such loan loss reserve.” Therefore, staff should contact the relevant banking agency prior to contacting a bank about a loan loss allowance matter:

- For national banks, federal savings associations, and federal branches and agencies of foreign banks, contact the Office of the Comptroller of the Currency.
- For bank holding companies, savings and loan holding companies, or commercial lending companies, contact the Federal Reserve.
- For state savings associations, contact the Federal Deposit Insurance Corporation.

5.6. Referrals from the Division to Other Authorities

Introduction:

Subject to the considerations discussed below, staff may refer a matter to federal or state criminal authorities, SROs, the PCAOB, or other federal or state agencies. The decision to make a referral should be made by staff at the Associate Director/Unit Chief level or above.

The staff may also determine that it is appropriate to refer a matter or information concerning potential professional misconduct to state bar associations or other state professional associations or licensing boards. The Commission has delegated to OGC authority to make such referrals, *see* 17 C.F.R. § 200.30-14(n), and the staff must consult with OGC, which will determine whether a referral is appropriate.

Authority:

A number of SEC rules govern the Commission's exercise of its statutory authority to make referrals, which authority the Commission has delegated to staff.

- **Rule 5(b) of the SEC's Informal and Other Procedures, 17 C.F.R. § 202.5(b):**

After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution. The Commission may also, on some occasions, refer the matter to, or grant requests for access to its files made by, domestic and foreign governmental authorities or foreign securities authorities, [SROs] such as stock exchanges or the [Financial Industry Regulatory Authority], and other persons or entities.

- **Rule 2 of the SEC's Rules Relating to Investigations, 17 C.F.R. § 203.2:**

Information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public, but the Commission approves the practice whereby officials of the Divisions of Enforcement, Corporation Finance, [Trading and Markets] and Investment Management and [OIA] at the level of Assistant Director or higher . . . may engage in

and may authorize members of the Commission's staff to engage in discussions with persons identified in Section 240.24c-1(b) of this chapter concerning information obtained in individual investigations or examinations, including formal investigations conducted pursuant to Commission order.

- **Rule 24c-1(b) of the Exchange Act, 17 C.F.R. § 240.24c-1(b):**

The Commission may, in its discretion and upon a showing that such information is needed, provide nonpublic information in its possession to any of the following persons if the person receiving such nonpublic information provides such assurances of confidentiality as the Commission deems appropriate:

- (1) A federal, state, local or foreign government or any political subdivision, authority, agency or instrumentality of such government;
- (2) A [SRO] as defined in Section 3(a)(26) of the [Exchange] Act, or any similar organization empowered with self-regulatory responsibilities under the federal securities laws (as defined in Section 3(a)(47) of the [Exchange] Act), the Commodity Exchange Act (7 U.S.C. § 1, *et seq.*), or any substantially equivalent foreign statute or regulation;
- (3) A foreign financial regulatory authority as defined in Section 3(a)(51) of the [Exchange] Act;
- (4) The Securities Investor Protection Corporation or any trustee or counsel for a trustee appointed pursuant to Section 5(b) of the Securities Investor Protection Act of 1970;
- (5) A trustee in bankruptcy;
- (6) A trustee, receiver, master, special counsel or other person that is appointed by a court of competent jurisdiction or as a result of an agreement between the parties in connection with litigation or an administrative proceeding involving allegations of violations of the securities laws (as defined in Section 3(a)(47) of the [Exchange] Act) or the Commission's Rules of Practice, 17 C.F.R. Part 201, or otherwise, where such trustee, receiver, master, special counsel or other person is specifically designated to perform particular functions with respect to, or as a result of, the litigation or proceeding or in connection with the administration and enforcement by the Commission of the federal securities laws or the Commission's Rules of Practice;
- (7) A bar association, state accountancy board or other federal, state, local or foreign licensing or oversight authority, or a professional association or self-regulatory authority to the extent that it performs similar functions; or
- (8) A duly authorized agent, employee or representative of any of the above persons.

5.6.1. Referrals to Criminal Authorities

MUIs or investigations may reveal conduct that warrants referral to criminal law enforcement authorities at the federal or state level, particularly where the conduct is egregious, involves recidivism, or where the involvement of criminal authorities may provide additional meaningful protection to investors. Pursuant to Executive Order 14294, in June 2025, the Commission issued a policy statement on agency referrals to the Department of Justice for potential criminal enforcement. *See* [Criminal Referral Policy Statement](#). The policy statement identified factors staff should consider in determining whether to refer potential violations to the DOJ. In accordance with general Division policy and consistent with this policy statement, subject to appropriate exceptions and to the extent consistent with law, in considering whether to refer potential violations to criminal law enforcement authorities at either the federal or the state level, staff should consider, among other factors:

- (1) The harm or risk of harm, pecuniary or otherwise, caused by the potential offense, including whether the putative defendant's conduct harmed or risked harming many victims;
- (2) The potential gain to the putative defendant that could result from the offense;
- (3) Whether the putative defendant held specialized knowledge, expertise, or was licensed in an industry related to the rule or regulation at issue;
- (4) Whether the putative defendant knew the conduct would cause harm or that it violated the law;
- (5) Whether the putative defendant is a recidivist or has otherwise engaged in a pattern of misconduct; and
- (6) Whether the involvement of the DOJ or the criminal authority to which staff is considering making a referral will provide additional meaningful protection to investors.

Typically, staff refers potentially violative conduct to federal or state criminal authorities without reference to a specific statutory violation. While the referred conduct could implicate strict liability offenses under civil statutes, the staff generally does not make referrals based on conduct that would appear solely to implicate strict liability offenses under civil statutes. Ultimately, it is up to the criminal authority whether it decides to investigate referrals from the Division.

As part of making a criminal referral, staff also must determine to which criminal authority or office to make the referral. When doing so, it is important to consider the geographic nexus of the conduct, past experience with the criminal law enforcement office, experience with the court in that jurisdiction, and volume of case referrals to a particular office.

The decision to make a criminal referral should be made by staff at the Associate Director or Unit Chief level or above. If there is a standard, non-urgent matter, staff should notify the Director of the intention to make a criminal referral. The Director will generally

respond to the referral request within 48 hours. Staff should not make a criminal referral in standard, non-urgent matters until they hear back from the Director. For expedited matters, the Associate Director/Unit Chief should notify the Director and/or appropriate Deputy Director directly. If possible, they should be notified before the referral is made; however, the Associate Director/Unit Chief has discretion, in such circumstances, to notify the Director and/or appropriate Deputy Director after the referral is made.

Once given approval to make a referral, assigned staff, along with the appropriate supervisor(s), may notify the appropriate criminal authorities.

- Rule 2 of the Commission’s Rules Relating to Investigations permits members of the staff at the Assistant Director level or higher, and with the appropriate approval, to engage in discussions concerning non-public investigative files with those persons listed in Exchange Act Rule 24c-1(b), including criminal authorities (*see* [Section 5.6](#) for the full text of this Rule).
- Staff then may invite the criminal authorities to make an access request (*see* [Section 5.1](#) regarding access requests). Once the access request has been approved, staff may share documents from the investigative file. Staff may not forward documents to the criminal authorities prior to the approval of the access request.
- After a referral to criminal authorities is made, staff is encouraged to maintain periodic communication with the criminal authorities concerning the status of any criminal investigation and/or criminal action, where appropriate. *See* [Section 5.2](#) for information relating to parallel investigations, the grand jury secrecy rule, and other concerns when cooperating with criminal authorities.

5.6.2. Referrals to Self-Regulatory Organizations

Basics:

In the course of conducting an inquiry or investigation, the staff may determine that it would be appropriate to refer the matter, or certain conduct, to one or more SROs. In particular, if a MUI or investigation concerns matters over which an SRO has enforcement authority (*e.g.*, financial industry standards, rules, and requirements related to securities trading and brokerage), staff should evaluate whether to contact the SRO about the matter and assess whether it would be appropriate for the SRO to consider investigating the matter in lieu of, or in parallel to, an investigation by the Division. Because SROs may impose disciplinary or remedial sanctions against their members or associated individuals, staff generally should make an effort to apprise the SRO about conduct that may violate the rules of the SRO. Internally, staff generally should consult as needed with OMI and/or the Division of Trading and Markets in evaluating potential referrals to SROs.

If there is a matter or conduct that appears to warrant a referral to an SRO, staff generally should follow the procedures below:

- Assigned staff will consult initially with the assigned Assistant Director, as well as OMI and/or the Division of Trading and Markets, as appropriate.
- Assigned staff must obtain approval at the Associate Director/Unit Chief level or above to refer the matter or conduct.
- Once given approval, assigned staff, along with the assigned Assistant Director, may notify the appropriate liaison at the SRO to discuss the matter or conduct, and a possible referral.
- Staff then may invite the SRO to make an access request. Once the access request has been approved, staff may share documents from the investigative file. Staff may not forward documents to the SRO prior to the approval of the access request. See [Section 5.1](#).
- After a referral to an SRO is made, staff should maintain periodic communication with the SRO concerning the status of the SRO inquiry or investigation.

Considerations:

- Staff should evaluate whether a referral is warranted in the early stages of a MUI or investigation. As the investigation progresses, the staff should periodically review the record to determine whether a new or additional referral may be appropriate.
- Staff should make efforts to continue communicating with SRO staff throughout the SRO's inquiry or investigation to determine whether SEC staff and SRO staff are investigating the same conduct, and so that SEC staff is aware of any determination by the SRO not to pursue an investigation or certain avenues of investigation.

Further information:

- Staff should contact the assigned Assistant Director, OMI, and/or the Division of Trading and Markets with any questions about making a referral to an SRO.
- For guidance regarding receiving referrals *from* an SRO, see [Section 2.1.2.5](#).

5.6.3. Referrals to the Public Company Accounting Oversight Board

Basics:

In certain instances, staff may refer matters regarding auditor misconduct to the PCAOB, which is authorized under Section 105 of the Sarbanes-Oxley Act of 2002, to conduct investigations and impose disciplinary or remedial sanctions against registered public accounting firms and their associated persons. If there is a matter that may be appropriate for referral, assigned staff generally should follow the procedures below:

- Assigned staff should consult initially with the assigned Assistant Director.

- Assigned staff should then get approval at or above the Associate Director/Unit Chief level to refer the matter.
- Assigned staff then should discuss the matter with the Division’s Chief Accountant, and secure that official’s approval for making the referral.
- Assigned staff then should, along with the assigned Assistant Director, or through the Division’s Office of the Chief Accountant, contact the PCAOB’s head of enforcement, or another designated PCAOB official, and discuss the matter.
- Staff then can invite the PCAOB to make an access request. *See* [Section 5.1](#). Once the access request has been approved, staff can share documents from the investigative file. Staff may not forward documents to the PCAOB prior to the approval of the access request.

Considerations:

Staff should keep in mind the following considerations when making a referral to the PCAOB:

- Staff should evaluate whether a referral is warranted in the early stages of a MUI or investigation. As the investigation progresses, the staff should periodically review the record to determine whether a new or additional referral may be appropriate.
- Staff should continue communication with PCAOB staff throughout the PCAOB’s investigation to determine whether SEC staff and PCAOB staff are investigating the same conduct and so that SEC staff is alerted to any determination by the PCAOB not to pursue its investigation or certain avenues of investigation.

Further Information:

- Staff should refer any questions about making a referral to the PCAOB to the Division’s Chief Accountant.
- For guidance regarding receiving tips from the PCAOB, *see* [Section 2.1.2.2](#).

5.6.4. Referrals to State Agencies

Basics:

Congress created a dual securities regulatory system in which both federal and state agencies serve specific, valuable functions in protecting investors. In the course of conducting an inquiry or investigation, the staff may determine that it would be appropriate to refer the matter, or certain conduct, to state regulators. It may be appropriate for the state agency to investigate the matter in lieu of, or in parallel to, an investigation by the Division.

If there is a matter or conduct that appears to warrant a referral to a state agency, staff generally should follow the procedures below:

- Assigned staff should consult with the assigned Assistant Director and obtain approval at or above the Associate Director/Unit Chief level to refer the matter or conduct.
- Once approval has been obtained, assigned staff along with the assigned Assistant Director may contact the state agency, discuss with it the relevant findings of the inquiry or investigation to date, and explain why the staff is referring the matter.
- Staff may then invite the state agency to make an access request. *See* [Section 5.1](#). Once the access request has been approved, staff may share documents from the investigative file. Staff may not forward documents to the state agency prior to the approval of the access request.

Considerations:

Assigned staff should discuss with the assigned Assistant Director whether it may be appropriate to refer a matter or certain conduct to the state. For example, a state may have a particular interest in a matter or type of matter, the harmed investors or parties may be concentrated in a particular geographic location, the conduct may be limited, though significant, or there may be no federal jurisdiction. In the early stages of a MUI or investigation, staff should evaluate whether a referral is warranted. As the investigation progresses, the staff is encouraged to periodically review the record to determine whether a new or additional referral may be appropriate. Staff should continue communicating with the state agency after a referral has been made.

Further Information:

- For guidance regarding receiving tips from the state agencies. *See* [Section 2.1.2.3](#).

6. Cooperation

Introduction:

Meaningful cooperation allows the SEC to streamline its investigations, conserve its resources, and more effectively protect the investing public. The staff should carefully consider the use of different tools to encourage and facilitate cooperation by individuals and companies to advance its investigations and related enforcement actions.

6.1. Analytical Frameworks

6.1.1. Framework for Evaluating Cooperation by Individuals

In January 2010, the Commission issued a policy statement articulating a framework for evaluating cooperation by individuals in the Commission's investigations and actions. *See* [2010 Cooperation Policy Statement](#). This policy statement can be found at 17 C.F.R. § 202.12. The policy statement identified four general considerations to use in assessing cooperation:

(a) Assistance provided by the individual. The Commission assesses the assistance provided by the cooperating individual in the Commission's investigation or related enforcement actions ("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;

(iii) 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.⁴
- (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 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 Cooperation in Investigations that involve priority matters or serious, ongoing, or widespread violations will be viewed most favorably.

- (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 harmed 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.

The policy statement also noted that these principles are not listed in order of importance; they are not intended to be all-inclusive; and that facts and circumstances of a particular case may render some of the principles inapplicable or worthy of lesser or greater weight.

6.1.2. Framework for Evaluating Cooperation and Related Efforts 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. See [Seaboard Report](#). In this report, the Commission articulated an analytical framework for evaluating cooperation and related efforts 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 generally identifies four broad measures of a company's cooperation:

- Self-policing prior to the discovery of the misconduct, including establishing and implementing 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. Self-reporting credit is appropriate when a company reports misconduct before the staff learns of misconduct from other sources and prior to imminent threat of disclosure or government investigation. Self-reporting credit will rarely be appropriate for conduct that has already received media attention or is subject to investigation by another regulator.
- 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. Examples of effective remediation include:
 - Taking appropriate action with respect to employees involved in misconduct;
 - Strengthening internal controls;
 - Clawing back compensation from responsible executives;
 - Making prompt corrective disclosures;
 - Hiring new financial and accounting staff to address accounting and disclosure issues;
 - Improving training for relevant personnel; and
 - Retaining independent compliance consultants to advise on other remedial measures.
- Cooperation with law enforcement authorities, including providing the Commission staff with all factual information relevant to the underlying violations and the company's remedial efforts. When evaluating cooperation, the staff should consider ways in which the company provided assistance beyond what was required by law. Staff will not recommend credit based merely on compliance with subpoenas for documents or testimony. Exemplary cooperation can include:
 - Summarizing factual findings from internal investigations;
 - Summarizing interviews of witnesses located abroad;
 - Identifying key documents and witnesses;
 - Translating foreign-language documents;
 - Providing detailed explanations and summaries of factual issues;

- Providing financial analyses conducted by external experts;
- Facilitating voluntary interviews of witnesses; and/or
- Any other measures that meaningfully advance the Commission's investigation.

The staff should also consider the timeliness of cooperation. Assistance early in an investigation will often more meaningfully advance an investigation than the same assistance later in the investigation. While cooperation often requires ongoing coordination and communication between counsel and the staff, the staff will not take any steps to affirmatively direct a company's internal investigation efforts.

Considerations:

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 or entering into a deferred prosecution agreement or, in limited and appropriate circumstances, a non-prosecution agreement, to pursuing reduced charges and/or penalties in connection with enforcement actions, including a zero-penalty settlement. For greater detail regarding the analytical framework used by the Commission to evaluate cooperation by companies, including whether and to what extent to impose civil penalties or other sanctions on companies, the staff should review the [Seaboard Report](#) in tandem with the factors delineated in the Statement of the Securities and Exchange Commission Concerning Financial Penalties, Release No. 2006-4 (Jan. 4, 2006). See [Sections 6.2.3.](#) and [6.2.4.](#) for information on deferred prosecution agreements and non-prosecution agreements, respectively.

When recommending cooperation credit, staff should consider describing in the applicable resolution documents the nature of the self-policing, self-reporting, remediation, or cooperation that resulted in the credit. See [Section 6.3.](#)

6.2. Cooperation Tools

There is a wide spectrum of tools available to the staff for facilitating and rewarding cooperation in 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.

As a preliminary matter, staff should consider the use of proffers of information as a means to obtain cooperation. See [Section 3.3.8.](#) for information concerning proffers and the use of proffer agreements.

For assistance in drafting the agreements discussed in this section, staff should consult OCC.

6.2.1. The Cooperation Committee

The cooperation program is overseen and administered by the Division's Cooperation Committee. The Cooperation Committee ensures that decisions regarding cooperation are made in an appropriate and consistent manner and recommends improvements to the cooperation program when needed. Staff should seek Cooperation Committee approval for all cooperation agreements, deferred prosecution agreements, non-prosecution agreements, and immunity requests. For questions about the Cooperation Committee or the cooperation program, staff may consult the cooperation program coordinator. The Cooperation Committee's decisions are subject to approval, rejection, or modification by the Director or, if the Director recuses or otherwise declines to participate, the appropriate Deputy Director.

6.2.2. Cooperation Agreements

Basics:

A cooperation agreement is a written agreement between the Division and a potential cooperating individual 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 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 has provided or is likely to provide substantial assistance to the Commission; (2) the individual 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 satisfies the applicable obligations under the agreement. If the agreement is violated, the staff may recommend an enforcement action to the Commission against the individual without any limitation.

Procedures:

- Prior to seeking authority to enter into a cooperation agreement, the staff should collect sufficient information regarding the individual's ability to provide substantial assistance to the Commission's investigations or related enforcement actions. Staff is encouraged to use a proffer agreement to collect this information.
- The Director and Senior Officers designated by the Director have the authority to enter into cooperation agreements on behalf of the Division.
- Staff should seek approval from the Cooperation Committee before entering into a cooperation agreement.
- The staff should draft an internal memorandum documenting the basis for entering into any cooperation agreement, retaining a copy of this memorandum as well as a copy of the corresponding cooperation agreement.

Considerations:

- Cooperation agreements are primarily intended to be used with individuals. In general, staff should use the factors in the [Seaboard Report](#) to assess cooperation by public companies or other entities regulated by the Commission, rather than seeking to employ cooperation agreements. See [Section 6.1.2](#).
- The staff should advise potential cooperators 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.
- The Division uses a standard form of cooperation agreement to be adapted to the specific circumstances of the investigation or related enforcement action(s).
- Cooperation agreements should generally include the following terms:
 - The cooperating individual agrees to cooperate truthfully and fully, as directed by the 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 FRCP Rule 45;
 - The cooperator agrees to enter a tolling agreement if requested by the staff;
 - The cooperator agrees not to violate the securities laws;
 - The cooperator acknowledges that the agreement does not constitute a final disposition of any potential enforcement action;
 - Subject to full, truthful, and continuing cooperation, the Division will bring the assistance provided by the cooperator to the attention of the Commission and, if requested by the cooperator, other regulatory and law enforcement authorities; and
 - The cooperator 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.

Related Tool:

- Cooperation Letters—Upon the written request of cooperating individuals and companies, supervisors at or above the level of Associate Director/Unit Chief 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 staff should be retained with the case file.

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 forgo 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) in most cases, 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:

- Deferred prosecution agreements must be approved by the Commission.
- Staff should seek approval from the Cooperation Committee before recommending a deferred prosecution agreement to the Commission.
- Staff should draft an internal memorandum documenting the basis for entering into any deferred prosecution agreement, retaining a copy of this memorandum as well as a copy of the corresponding deferred prosecution agreement.
- Unless the Commission directs otherwise, deferred prosecution agreements will be made available on the Commission's website.

Considerations:

- To determine whether to recommend that the Commission enter into a deferred prosecution agreement, the staff should use the standard cooperation analysis. *See [Section 6.1.](#)*
- An admission or an agreement not to contest the relevant facts underlying the alleged offenses generally is appropriate.
- 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 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 FRCP Rule 45;
- 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, prejudgment interest, 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 against the cooperator 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 the individual or company if the individual or company violates the terms of the agreement; and
 - Additional prohibitions and undertakings designed to protect investors and the markets.
- 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.

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 exceptional 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 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:

- Non-prosecution agreements must be approved by the Commission.
- Staff should seek approval from the Cooperation Committee before recommending a non-prosecution agreement to the Commission.
- Staff should draft an internal memorandum documenting the basis for entering into any non-prosecution agreement, retaining a copy of this memorandum as well as a copy of the corresponding non-prosecution agreement in the case file.
- Unless the Commission directs otherwise, non-prosecution agreements will be made available on the Commission's website.

Considerations:

- In virtually all cases, for individuals who have previously violated the federal securities laws, non-prosecution agreements will not be appropriate, and other resolutions should be considered.
- An admission or an agreement not to contest the relevant facts underlying the alleged offenses generally is appropriate.
- 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 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 FRCP Rule 45;
 - The cooperating individual or company shall make any agreed-upon disgorgement or penalty payments;
 - Additional undertakings designed to protect investors and the markets;
 - 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; and
 - The cooperating individual or company agrees that the Commission may use statements, information, and materials provided pursuant to the agreement against the individual or company if the individual or company violates the terms of the agreement.

6.2.5. Other Benefits of Cooperation

Basics:

Obtaining civil penalties serves the critical purpose of holding wrongdoers accountable and deterring misconduct by participants in the financial markets. Nonetheless, in addition to, or instead of, employing the benefits and tools described above, the Commission may exercise its discretion to impose a reduced penalty or no penalty.

The Division may recommend that the Commission forgo seeking civil penalties, or seek reduced civil penalties, against an entity in consideration of any self-policing, self-reporting, remediation, and cooperation by the entity. *See* [Seaboard Report](#) and [Section 6.1.2](#).

Similarly, when considering whether to recommend that the Commission seek reduced penalties against an individual who cooperated with the Division's investigation, the Division considers the assistance provided by the individual; the importance of the underlying matter; the societal interest in ensuring that the individual is held accountable for his or her misconduct; and the personal and professional profile of the individual. *See* [2010 Cooperation Policy Statement](#) and [Section 6.1.1](#).

Further Information:

For additional information regarding how the Commission evaluates cooperation. *See* [Section 6.1.1](#). (Framework for Evaluating Cooperation by Individuals) and [Section 6.1.2](#). (Framework for Evaluating Cooperation by Companies).

6.2.6. 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 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 (an "immunity order") permits the Commission, pursuant to 18 U.S.C §§ 6001–6004, and if its request is approved by the U.S. Attorney General, to seek a court order compelling the individual to give testimony or provide other information that may be necessary to the public interest. 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 DOJ, the staff should receive a proffer of the individual's expected testimony or have significant and reliable evidence regarding the individual's ability to provide substantial assistance to the Commission's investigation or related enforcement actions.
- The Commission has delegated authority to the Director to submit witness immunity order requests to the United States Attorney General. 17 C.F.R. § 200.30-4(a)(14). This authority was sub-delegated to Senior Officers in the Division.
 - Staff should seek approval from the Cooperation Committee before submitting the witness immunity order request.
 - Prior to requesting authorization to seek an immunity order or letter from the Director or a designated Senior Officer, unless exigent circumstances exist, the staff should contact the Cooperation Committee to obtain a copy of the DOJ witness immunity request form.
- 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 DOJ 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 or directly by the staff (with the approval of the Cooperation Committee) to the appropriate DOJ office 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 United States Attorney General, a motion and proposed immunity order may be filed with the court *ex parte*. Alternatively, after receiving approval from the DOJ, the Commission may issue an order requiring the individual to give testimony or provide other information which the individual has refused to give or provide on the basis of the individual's privilege against self-incrimination. 18 U.S.C. § 6004.
- A copy of the draft DOJ witness immunity request form submitted to the Director or a designated Senior Officer and a copy of the immunity order or letter should be maintained with the case file.

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. §§ 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 the Fifth Amendment.
- When attempting to determine whether to recommend that an immunity order or letter be sought, the staff should conduct the analysis outlined at [Section 6.1](#).
- 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 DOJ should expressly state the purpose of the application.

Further Information:

For additional information regarding cooperation with the criminal authorities, *see* [Section 5.2](#).

6.2.7. Oral Assurances

Basics:

- Where the available evidence indicates that a cooperating individual or company has not violated the federal securities laws such as to warrant an enforcement action, the staff 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.

Procedures:

- The decision to deliver an oral assurance must be made with the approval of a supervisor at or above the level of Associate Director/Unit Chief.
- Oral assurances are only authorized when the investigative record is adequately developed. Accordingly, prior to providing an oral assurance, the staff should receive proffers from the potential cooperating individuals and companies or have sufficient information regarding the potential cooperators' conduct.

- 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 to the Commission 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 in the case file a brief memorandum to file summarizing the assurance provided.

6.2.8. Termination Notices

- When an investigation has been completed as to a potential cooperator and the Division has determined, for any reason, not to recommend to the Commission an enforcement action against the potential cooperator, the staff may, and in some cases is required to, send a letter informing the potential cooperator of the determination. 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.
- For additional information about termination notices, *see* [Section 2.6.2.](#)

6.2.9. 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, recommend forgoing enforcement actions against a cooperating individual or company. In doing so, the staff should consider the settlement terms of other similar cases to identify precedent involving similar alleged misconduct and apply the factors outlined in [Section 6.1.](#)

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 settlement offers or consents, unless such disclosure would not advance the goals of the cooperation program or would adversely affect related ongoing investigations or proceedings. Modifications to this standard language should not be made without first consulting with OCC.

6.3. Publicizing the Benefits of Cooperation

Basics:

The staff should provide sufficient information to the public about the nature of the cooperation program, its significant benefits, and the steps individuals and companies can take to receive cooperation credit.

Procedures:

Where cooperation credit is being recommended to the Commission in settlements, the staff should include standard language relating to cooperation in settlement offers, consents, or

other dispositions, and in related litigation and/or press releases, unless such disclosure would not advance the goals of the cooperation program or would adversely affect related ongoing investigations or proceedings.

Where cooperation credit is recommended, staff should consider including a summary of the specific cooperation and remedial steps in the order or charging documents if such a disclosure would advance the goals of the cooperation program. These disclosures can advance the goals of the cooperation program by providing examples for other parties considering whether or how best to cooperate in investigations and enforcement actions, and by informing the public of the considerations underlying the Commission's enforcement decisions. Staff should consult OCC for guidance on appropriately describing cooperation.

Considerations:

- In most matters, the Commission's enforcement program is enhanced by publicizing the benefits associated with cooperating in an investigation or related enforcement action. Nevertheless, the staff retains discretion in recommending to the Commission 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 investigations generally is confidential and non-public, the staff should ensure that its public statements and releases do not inadvertently disclose non-public information.
- The staff should take care to protect the identity of any cooperating individual and company whose identity is not being disclosed elsewhere, such as in an order, consent, or Deferred Prosecution Agreement, unless the individual or entity has consented to disclosure by the Commission.

7. Index of Defined Terms

| Term | Definition |
|-----------------------------------|---|
| 2010 Cooperation Policy Statement | Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, Securities Exchange Act Release No. 61340 (Jan. 13, 2010), 17 C.F.R. § 202.12 |
| Advisers Act | Investment Advisers Act of 1940 |
| AP | Proceeding Brought in an Administrative Forum |
| BSA | Bank Secrecy Act |
| CAT | Consolidated Audit Trail |
| Chairman | Chairman of the U.S. Securities and Exchange Commission |
| Commission | U.S. Securities and Exchange Commission |
| CPU | Division of Enforcement's Centralized Processing Unit |
| Director | Director of the SEC's Division of Enforcement |
| Discussion Rule | Rule 2 of the SEC's Rules Relating to Investigations |
| Division | SEC's Division of Enforcement |
| Dodd-Frank Act | Dodd-Frank Wall Street Reform and Consumer Protection Act |
| DOJ | U.S. Department of Justice |
| ECPA | Electronic Communications Privacy Act of 1986 |
| ESI | Electronically Stored Information |
| Ethics Office | SEC's Office of Ethics Counsel |
| Exchange Act | Securities Exchange Act of 1934 |
| FRCP | Federal Rules of Civil Procedure |
| FDA | Food and Drug Administration |
| FinCEN | Department of Treasury's Financial Crimes Enforcement Network |
| FOIA | Freedom of Information Act |
| Formal Order | Formal Order of Investigation |
| Investment Company Act | Investment Company Act of 1940 |
| IOSCO | International Organization of Securities Commissions |
| IOSCO EMMOU | IOSCO Enhanced Memorandum of Understanding |
| IOSCO MMOU | IOSCO Multilateral Memoranda of Understanding |

| Term | Definition |
|--------------------------------------|--|
| ITFL | Division of Enforcement's Information Technology Forensic Lab, within its Office of Technical Services |
| Manual | Enforcement Manual |
| MLATs | Mutual Legal Assistance Treaties |
| Model Rule 4.2 | American Bar Association Model Rule of Professional Conduct 4.2 |
| MOUs | Memoranda of Understanding |
| MUI | Matter Under Inquiry |
| News Media Subpoena Policy Statement | Policy Statement Concerning Subpoenas to Members of the News Media, Exchange Act Release No. 34-53638 (April 12, 2006) |
| NDAA | National Defense Authorization Act for Fiscal Year 2021 |
| OCC | Division of Enforcement's Office of Chief Counsel |
| OGC | SEC's Office of the General Counsel |
| OGE | Office of Government Ethics |
| OIA | SEC's Office of International Affairs |
| OIEA | SEC's Office of Investor Education and Advocacy |
| OMI | Division of Enforcement's Office of Market Intelligence |
| OS | SEC's Office of the Secretary |
| OTS | Division of Enforcement's Office of Technical Services |
| OWB | Division of Enforcement's Office of the Whistleblower |
| PCAOB | Public Company Accounting Oversight Board |
| Privacy Act | Privacy Act of 1974 |
| RFPA | Right to Financial Privacy Act of 1978 |
| SARs | Suspicious Activity Reports |
| Seaboard Report | 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, Securities Exchange Act Rel. No. 44969 (Oct. 23, 2001) |
| SEC | U.S. Securities and Exchange Commission |
| SEC Form 1661 | Supplemental Information for Entities Directed to Supply Information to the Commission Other Than Pursuant to Commission Subpoena |

| Term | Definition |
|----------------|--|
| SEC Form 1662 | SEC's Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena |
| Securities Act | Securities Act of 1933 |
| SROs | Self-Regulatory Organizations |
| Sunshine Act | Government in the Sunshine Act |
| TCR System | Tips, Complaints, and Referral system |
| Wells Release | Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations, Securities Act Release No. 5310 (Sept. 27, 1972) |