

(1) There should be reasonable grounds to believe that the information sought is essential to successful completion of the investigation. The subpoena should not be used to obtain peripheral or nonessential information.

(2) The staff should have exhausted all reasonable alternative means of obtaining the information from non-media sources. Whether all reasonable efforts have been made to obtain the information from alternative sources will depend on the particular circumstances of the investigation, including whether there is an immediate need to preserve assets or protect investors from an ongoing fraud.

(f) If there are reasonable grounds to believe the information sought is essential to the investigation, all reasonable alternative means of obtaining it have been exhausted, and all efforts at negotiation have failed, then the staff investigating the matter shall seek authorization for the subpoena from the Director of the Division of Enforcement. No subpoena shall be issued unless the Director, in consultation with the General Counsel, has authorized its issuance.

(g) In the event the Director of the Division of Enforcement, after consultation with the General Counsel, authorizes the issuance of a subpoena, notice shall immediately be provided to the Chairman of the Commission.

(h) Counsel (or the member of the news media, if not represented by counsel) shall be given reasonable and timely notice of the determination of the Director of the Division of Enforcement to authorize the subpoena and the Director's intention to issue it.

(i) Subpoenas should be negotiated with counsel for the member of the news media to narrowly tailor the request for only essential information. In negotiations with counsel, the staff should attempt to accommodate the interests of the Commission in the information with the interests of the media.

(j) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give

reasonable and timely notice of their demand for documents.

(k) In the absence of special circumstances, subpoenas to members of the news media should be limited to the verification of published information and to surrounding circumstances relating to the accuracy of published information.

(l) Because the intent of this policy statement is to protect freedom of the press, news gathering functions, and news media sources, this policy statement does not apply to demands for purely commercial or financial information unrelated to the news gathering function.

(m) Failure to follow this policy may constitute grounds for appropriate disciplinary action. The principles set forth in this statement are not intended to create or recognize any legally enforceable rights in any person.

[71 FR 20340, Apr. 20, 2006]

**§ 202.12 Policy statement concerning cooperation by individuals in its investigations and related enforcement actions.**

Cooperation by individuals and entities in the Commission's investigations and related enforcement actions can contribute significantly to the success of the agency's mission. Cooperation can enhance the Commission's ability to detect violations of the federal securities laws, increase the effectiveness and efficiency of the Commission's investigations, and provide important evidence for the Commission's enforcement actions. There is a wide spectrum of tools available to the Commission and its staff for facilitating and rewarding cooperation by individuals, ranging from taking no enforcement action to pursuing reduced charges and sanctions in connection with enforcement actions. As with any cooperation program, there exists some tension between the objectives of holding individuals fully accountable for their misconduct and providing incentives for individuals to cooperate with law enforcement authorities. This policy statement sets forth the analytical framework employed by the Commission and its staff for resolving this tension in a manner that ensures that potential cooperation arrangements

maximize the Commission's law enforcement interests. Although the evaluation of cooperation requires a case-by-case analysis of the specific circumstances presented, as described in greater detail below, the Commission's general approach is to determine whether, how much, and in what manner to credit cooperation by individuals by evaluating four considerations: the assistance provided by the cooperating individual in the Commission's investigation or related enforcement actions ("Investigation"); the importance of the underlying matter in which the individual cooperated; the societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct; and the appropriateness of cooperation credit based upon the profile of the cooperating individual. In the end, the goal of the Commission's analysis is to protect the investing public by determining whether the public interest in facilitating and rewarding an individual's cooperation in order to advance the Commission's law enforcement interests justifies the credit awarded to the individual for his or her cooperation.

(a) *Assistance provided by the individual.* The Commission assesses the assistance provided by the cooperating individual in the 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.<sup>1</sup>

(c) *Interest in holding the individual accountable.* The Commission assesses

<sup>1</sup>Cooperation in Investigations that involve priority matters or serious, ongoing, or widespread violations will be viewed most favorably.

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) 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 injured 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.

NOTE TO § 202.12: Before the Commission evaluates an individual's cooperation, it analyzes the unique facts and circumstances of the case. The above principles are not listed in order of importance nor are they intended to be all-inclusive or to require a specific determination in any particular case. Furthermore, depending upon the facts and circumstances of each case, some of the principles may not be applicable or may deserve greater weight than others. Finally, neither this statement, nor the principles set forth herein creates or recognizes any legally enforceable rights for any person.

[75 FR 3123, Jan. 19, 2010]

### Subpart A—Public Company Accounting Oversight Board (Regulation P)

#### § 202.140 Interim Commission review of PCAOB inspection reports.

(a) *Definitions.*

(1) *Board* or *PCAOB* means the Public Company Accounting Oversight Board.

(2) *Registered public accounting firm* or *Firm* shall have the meaning set forth in 15 U.S.C. 7201(a)(12).

(3) *Associated person* means a person associated with the registered public accounting firm as defined in 15 U.S.C. 7201(a)(9).

(b) *Reviewable matters.* A registered public accounting firm may request interim Commission review of an assessment or determination by the PCAOB contained in an inspection report prepared under 15 U.S.C. 7214 and relating to that firm, if the firm:

(1) Has provided the PCAOB with a response, pursuant to the rules of the PCAOB, to the substance of particular