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White Collar Crime Policy: The SEC's New Cooperation Policy

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The Securities and Exchange Commission (SEC) has announced a series of important policy changes as it scrambles to reform itself after the public outcry that followed its having missed the Madoff fraud. The SEC's new policy on cooperation is a key part of that effort. As Robert S. Khuzami, the Director of the SEC's Division of Enforcement, recently put it, the policy has "the potential to be a game-changer for the Enforcement Division."[1]

The policy is modeled on the approach that has long been in use at U.S. Attorneys' Offices across the country. With some exceptions, the Division of Enforcement staff is to be substituted into the role of the U.S. Attorney's Office, negotiating cooperation, non-prosecution and deferred prosecution agreements. The five-member Commission itself is to play more or less the role of the sentencing judge, determining the case outcome by deciding whether reduced charges and penalties are appropriate in recognition of the cooperation.

The policy also draws on the SEC's longer-established approach to company cooperation. That approach, first announced in the SEC's 2001 *Seaboard* Report, set forth the circumstances in which a cooperative company can avoid being charged or can mitigate its punishment.[2] The new policy charts a course for cooperation by individuals and pertains to cooperation by companies. Thus, in addition to signaling a new effort to gain the cooperation of individuals, the policy represents an effort to codify what was in essence common law gleaned from Seaboard and the cases that followed involving cooperation by companies.

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