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SEC Seeks to Alleviate Chief Compliance Officers' Concerns Regarding Recent Enforcement Actions

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On November 4, 2015, Andrew Ceresney, Director of the Division of Enforcement of the Securities and Exchange Commission (SEC), presented the ***keynote address*** at the 2015 National Conference of the National Society of Compliance Professionals. In his speech, Mr. Ceresney addressed specific concerns expressed by Chief Compliance Officers (CCOs) regarding recent enforcement actions in the investment adviser space. Mr. Ceresney sought to assuage fears and to emphasize the SEC's role in support for the work of CCOs.

First, Mr. Ceresney discussed recent cases that emphasized the SEC's commitment to aid compliance personnel in receiving necessary support resources from their firms. Next, he discussed Rule 206(4)-7 of the Investment Advisers Act of 1940 (Advisers Act). Finally, Mr. Ceresney reiterated that in the rare instance that the SEC charges a CCO in an enforcement action, it is primarily limited to examples of clear misconduct, obstruction of regulators, or wearing multiple hats in a company.

During Mr. Ceresney's tenure at the SEC and in private practice, he has found "that the state of a firm's compliance function says a lot about the firm's likelihood of engaging in misconduct and facing sanctions." He provided several questions that firms should ask themselves which could predict the likelihood of an enforcement action:

- Are compliance personnel included in critical meetings?
- Are their views typically sought and followed?
- Do compliance officers report to the CEO and have significant visibility with the board?
- Is the compliance department viewed as an important partner in the business and not simply as a support function or a cost center?
- Is compliance given the personnel and resources necessary to fully cover the entity's needs?

Mr. Ceresney observed that "far too often, the answer to these questions is no," which can lead to lapses in the firm's compliance efforts, which then results in enforcement issues with the SEC. He reassured the audience that if CCOs and compliance personnel lack the necessary resources and information it is the firm's responsibility to provide adequate assistance. The SEC is "in your corner" to encourage businesses in providing that essential support for compliance departments to be effective.

Mr. Ceresney also opined on Rule 206(4)-7 and its purpose to empower and hold responsible CCOs. This led into his most important point regarding the rare instances in which the SEC brings charges against CCOs. He provided several cases to highlight the broad categories in which the SEC might seek recourse through enforcement action:

- Affirmative misconduct by the CCO unrelated to his compliance responsibilities.
- Obstruction or intentional misleading of the SEC.
- Wholesale failure of the CCO to carry out her responsibilities.

Over 8,000 enforcement actions have been brought by the SEC since 2003 and within that number only 1,300 involved investment advisers/investment companies. Of those 1,300, only five enforcement actions included charges under Rule 206(4)-7 against individuals with CCO-only titles affiliated with investment advisers, where there were not efforts to obstruct or mislead the SEC. Mr. Ceresney repeated that "these numbers make clear that the Commission only rarely charges CCOs for causing violations of Rule 206(4)-7. To quell any doubts, he reiterated that there has not been any recent trend toward more enforcement activity involving CCOs in their compliance function."

Mr. Ceresney closed by reminding the audience that they indeed have the SEC's full support. The SEC views CCOs and compliance personnel as "essential partners in ensuring compliance with the federal securities laws." If there are difficulties receiving necessary support within the firm, the SEC will assist the CCOs in rectifying the situation before it results in violations; however, the SEC will bring enforcement actions if necessary. Finally, Mr. Ceresney stated that the SEC considers carefully any action brought against a CCO and will only recommend that course of action "after a thorough analysis of the facts and circumstances and consideration of fairness and equity." Mr. Ceresney concluded that he does not want compliance personnel to be fearful of liability when acting based on good faith judgments, and only when "the facts demonstrate that the CCOs conduct crossed a clear line" will enforcement actions be considered.

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