

Public Statement

Statement Regarding Offers of Settlement



Chairman Jay Clayton

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When the Securities and Exchange Commission is considering filing (or has filed) an action alleging violations of the federal securities laws, it often is in the public interest to pursue a timely, reasonable and consensual resolution of the matter. The Commission has long recognized that an appropriately-crafted settlement can be preferable to pursuing a litigated resolution, particularly when the settlement is agreed early in the process and the Commission obtains relief that is commensurate with what it would reasonably expect to achieve in litigation. In plain language, the sooner harmed investors are compensated, the offending conduct is remediated, and appropriate penalties are imposed, the better.

I have been considering the factors that affect settlement negotiations and settlement agreements with an eye toward enhancing outcomes for investors and most effectively utilizing our resources.^[1] This statement discusses my views on some of those factors and specifically addresses the Commission's approach to settlement offers that are accompanied by contemporaneous requests for Commission waivers from automatic statutory disqualifications and other collateral consequences.

Factors that Drive Appropriate Settlements

It often is noted that the cost of litigation—or, more accurately, avoiding the cost of litigation—is a key driver of settlements. This is undoubtedly correct, as that cost—in terms of dollars as well as other less-tangible factors—can be significant for many defendants.^[2]

There are, however, other factors that can drive appropriate settlements. One important factor is the demonstrated willingness of the Commission to litigate zealously if a timely and reasonable offer of settlement is not made. When no such offer has been made, I believe we should promptly file an action and pursue all appropriate remedies. Our practice reflects this principle.^[3] In addition, we are bolstering, and expect to continue to bolster, our trial and trial-support resources.^[4]

Another factor that drives appropriate settlements is the importance of promptly remedying harm to investors. Investor protection is at the core of the Commission's mission and, from the Commission's perspective, an attractive settlement offer is one that provides appropriate remedial relief, including any return of money to injured investors, more quickly than would be expected in a litigated action.^[5] I encourage settling parties to craft their settlement offers with this perspective in mind and also to be flexible and creative to maximize the remedial effects of proposed settlements.

A fourth factor that drives appropriate settlements is a desire for certainty. In particular, the ongoing and potential consequences of a litigated action often motivate an entity to pursue a settlement that puts the matter behind it. The Commission's ability to provide such certainty can be another critical factor in reaching a settlement that is in

the best interest of investors. Put simply, the Commission's willingness to zealously pursue all appropriate remedies often is a strong stick and, at the same time, the ability of the Commission to provide a full and final resolution of a matter often is a significant carrot.

Pursuing a settlement agreement that provides certainty can be complex, including because the imposition of certain types of relief by the Commission and other authorities can have significant collateral consequences.^[6] For example, remedies such as the imposition of an injunction against future violations of the antifraud provisions of the federal securities laws, or the requirement that an entity undertake to retain an independent compliance consultant, may subject the entity to collateral disqualifications that, as a practical matter, can prohibit the entity from continuing to conduct certain businesses.^[7] The effects of these collateral consequences can vary widely depending on the scope of the businesses and operations of the entity and, in practice, range from immaterial to extremely significant. In certain cases, these collateral consequences are wholly appropriate, including to serve important investor protection considerations. In other cases, in whole or in part, they may not be, including because other measures may more appropriately address the conduct at issue and related investor protection considerations.^[8]

In many cases, the Commission has the authority to grant a waiver from these collateral consequences, either in full or subject to conditions. In these circumstances, parties seeking settlements often make contemporaneous settlement offers and waiver requests.

The Commission has followed a practice where a decision to grant, deny or condition the grant of a waiver is informed by a recommendation from one or both of the Divisions of Corporation Finance and Investment Management or determined by the staff pursuant to delegated authority.^[9] The analysis informing this recommendation or determination can be complex because, for example, the businesses and operations of the entity affected by the collateral disqualifications may or may not be related to the conduct at issue, and the collateral consequences can range from immaterial to extremely significant and may or may not have an impact on investor protection. The robust analysis performed by the Divisions of Corporation Finance and Investment Management has proven critical to the Commission's consideration of these issues.

Although settlement offers and waiver requests have generally been made contemporaneously, and resolution of both often is critical to achieving the necessary level of certainty, in recent years, the Commission has considered these matters almost exclusively on a segregated basis. Considering a settlement offer and a related waiver request as if they are two separate and unconnected events can add complexity, including because such a formulaic separation often is inconsistent with appropriate consideration of the substance and interconnected nature of the matters at issue and undermines factors that drive appropriate settlements. The complexity added by such a separation can substantially complicate and lengthen the negotiating process, which, among other consequences, may not lead to the best outcome for investors and can unnecessarily tap Commission resources.^[10]

Forms of Contemporaneous Settlement Offers and Waiver Requests

Recognizing that a segregated process for considering contemporaneous settlement offers and waiver requests may not produce the best outcome for investors in all circumstances, I believe it is appropriate to make it clear that a settling entity can request that the Commission consider an offer of settlement that simultaneously addresses both the underlying enforcement action and any related collateral disqualifications. To be more specific and to discuss the issue in context, an offer of settlement that includes a simultaneous waiver request negotiated with all relevant divisions (e.g., Enforcement, Corporation Finance, Investment Management) will be presented to, and considered by, the Commission as a single recommendation from the staff.^[11] This approach will honor substance over form and enable the Commission to consider the proposed settlement and waiver request contemporaneously, along with the relevant facts and conduct, and the analysis and advice of the relevant Commission divisions to assess whether the proposed resolution of the matter in its entirety best serves investors and the Commission's mission more generally.^[12]

The Commission is, of course, under no obligation to accept any settlement offer and may determine not to accept a simultaneous offer of settlement and waiver request on the basis of form alone.

I have consulted with the Office of the General Counsel and the Division of Enforcement regarding the mechanics of the Commission's consideration of a simultaneous offer of settlement and waiver request. Based on these discussions, I generally expect that, in a matter where a simultaneous settlement offer and waiver request are made and the settlement offer is accepted but the waiver request is not approved in whole or in part, the prospective defendant would need to promptly notify the staff (typically within a matter of five business days) of its agreement to move forward with that portion of the settlement offer that the Commission accepted. In the event a prospective defendant does not promptly notify the staff that it agrees to move forward with that portion of the settlement offer that was accepted (or the defendant otherwise withdraws its offer of settlement), the negotiated settlement terms that would have resolved the underlying enforcement action may no longer be available and a litigated proceeding may follow.

[1] Since arriving at the Commission in May 2017, I have consulted with the directors of the Divisions of Enforcement, Corporation Finance and Investment Management, as well as various others, including my fellow Commissioners, on how to improve the effectiveness and efficiency of our consideration of settlement offers, waiver requests and related matters.

[2] Appropriate settlements, particularly those settlements that occur without undue delay, provide savings to the Commission as well. Among other things, they allow the Commission to allocate resources that would be used in support of any given litigation to other matters.

[3] For example, the SEC prevailed on scienter based fraud charges in *SEC v. Johnston*, 368 F. Supp. 3d 247 (D. Mass. 2019); *SEC v. Present*, No. 14-cv-14692 (D. Mass. Mar. 20, 2018); *SEC v. Revolutions Med. Corp.*, No. 12-cv-03298 (N.D. Ga. Mar. 16, 2018); and *SEC v Fowler*, No. 17-cv-00139 (S.D.N.Y. June 21, 2019). Moreover, in any given year, the SEC brings and wins numerous cases based on affirmative summary judgment motions.

[4] We recently lifted our hiring freeze, enabling us to fill positions vacated as a result of retirements and other departures, and, in addition, expect to add over 100 positions in 2019 across the Commission, with an emphasis on the Division of Trading and Markets, the Office of Compliance Inspections and Examinations and the Division of Enforcement.

[5] See, e.g., SEC Press Release 2019-28, SEC Share Class Initiative Returning More Than \$125 Million to Investors (Mar. 11, 2019), available at <https://www.sec.gov/news/press-release/2019-28>.

[6] See, e.g., 15 U.S.C. § 77z-2(b)(1)(A); 15 U.S.C. § 78u-5(b)(1)(A); 15 U.S.C. § 80a-9(a); 17 C.F.R. § 227.100 et seq.; 17 C.F.R. §§ 230.262, 230.405, 230.504(b)(3), 230.506(d), & 230.602(b)-(e); 17 C.F.R. § 275.206(4)-3(a)(1)(ii)(C).

[7] Such collateral consequences may include: loss of well-known seasoned issuer (WKSI) status for the purposes of securities offerings; loss of statutory safe harbors under the Securities Act of 1933 (Securities Act), and the Securities Exchange Act of 1934 (Exchange Act), for forward-looking statements, which were added by the Private Securities Litigation Reform Act of 1995 (PSLRA); loss of private offering exemptions provided by Regulations A, D and Crowdfunding under the Securities Act; loss of the exemption from registration under the Securities Act for securities issued by certain small business investment companies and business development companies provided by Regulation E; and the prohibition on a registered investment adviser from receiving cash fees for solicitation under Rule 206(4)-3 of the Investment Advisers Act of 1940 (Advisers Act).

[8] See, e.g., *Revised Statement on Well-Known Seasoned Issuers* (April 24, 2014), available at <http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm>; *Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D* (March 13, 2015), available at <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml>.

[9] The Division of Corporation Finance and the Division of Investment Management exercise their expertise to make recommendations to the Commission with regard to requests for waivers from disqualification and also act within the scope of their delegated authority. See, e.g., 17 C.F.R. § 200.30-1(b)-(d); 17 C.F.R. § 200.30-1(a); 17 CFR 200.30-5(a).

[10] By way of example, in a case where a settlement that is in the best interest of investors would require an entity to undertake to retain an independent compliance consultant, and the agreement to retain that consultant would be the event that triggers a collateral disqualification, an entity may, absent the ability to submit a simultaneous settlement offer and waiver request, refuse to propose such a term of settlement. In circumstances where other authorities are considering actions involving the same or related conduct, complexity can increase and the ability for the authorities to provide collective certainty can be a significant driver of appropriate settlements.

[11] The Commission should continue to review and consider the policy divisions' staff analysis. I expect that the analysis performed by the policy divisions regarding the appropriateness of a waiver of an automatic disqualification will continue to be rigorous and fair, and, in the context of determining whether the applicant has met the applicable standard for the waiver, will continue to result in what is best for the protection of investors, the markets and the public, as well as the promotion of market integrity. For a more detailed discussion of the staff's process in considering enforcement actions and waiver requests, see Brief for Harvey L. Pitt *amicus curiae* at 9-15, *U.S. Sec. & Exch. Comm'n v. Citigroup Global Markets, Inc.* 752 F.3d 285 (2d Cir. 2014); Chair Mary Jo White, *Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws* (Mar. 12, 2015), available at <https://www.sec.gov/news/speech/031215-spch-cmjw.html>.

[12] The Commission permitted these types of simultaneous settlement offers and waiver requests in the past (often they were framed as an offer of settlement contingent upon the receipt of a specified waiver). The Directors of the Divisions of Enforcement, Corporation Finance and Investment Management, as well as other senior members of the Enforcement Division, believe that returning to the practice of permitting simultaneous offers of settlement and waiver requests will benefit investors and the Commission's mission more generally.