

## Public Statement

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# Statement of Commissioners Hester M. Peirce and Elad L. Roisman on Contingent Settlement Offers



**Commissioner Hester M. Peirce**



**Commissioner Elad L. Roisman**

**Feb. 12, 2021**

Investigating and bringing civil enforcement actions for violations of the federal securities laws is integral to achieving the Securities and Exchange Commission’s three-part mission of protecting investors, facilitating capital formation, and maintaining fair and orderly markets. Negotiated settlement of civil enforcement actions on just and fair terms often best serves this mission because it allows for prompt correction of unlawful conduct. For this reason, since July 2019, the Commission has considered and accepted contingent settlement offers, meaning offers that would resolve both the claimed violations of the federal securities laws and the collateral consequences that sometimes arise from the violations, most often by granting certain waivers.<sup>[1]</sup> As then-Chairman Clayton explained, treating the offer to settle claimed violations and the related waiver requesting relief from collateral consequences as “two separate and unconnected events” created a “formulaic separation [that] often is inconsistent with appropriate consideration of the substance and interconnected nature of the matters at issue and undermines factors that drive appropriate settlements.”<sup>[2]</sup> Yesterday, the policy of considering settlement offers holistically abruptly changed when Acting Chair Lee issued a statement saying that “the Division of Enforcement will no longer recommend to the Commission a settlement offer that is conditioned on granting a waiver.”<sup>[3]</sup>

We continue to support the policy of considering and accepting contingent settlement offers. Nothing in the policy altered the standards applicable either when the Division of Enforcement assessed the offer to settle the claimed violations or when the Division of Investment Management or Division of Corporation Finance assessed the appropriateness of granting requested waivers. The judgment of the Division of Investment Management and the Division of Corporation Finance remained fully independent of the Division of Enforcement, and the policy has not created structural conflicts or pressures between the settlement and waiver processes undertaken by the different operating divisions. In short, the policy worked well.

Openness to contingent settlement offers acknowledges the reality that an entity's willingness to reach a prompt settlement on just and fair terms often is influenced by its concerns regarding the potential collateral consequences of entering into the settlement. The decision to disallow contingent settlement offers denies this reality—but it cannot change it. Insisting that an entity that is willing to settle be left in the dark about whether its waiver application will be granted significantly alters the entity's settlement calculus because it undercuts the certainty and finality that settlement might otherwise provide.

For the reasons stated above, we disagree with Acting Chair Lee's attempt to rescind that policy by directing the Division of Enforcement to decline to recommend contingent settlement offers to the Commission for consideration. This change marks a return to an unwieldy process that treats as completely separate what is in fact interrelated. It re-introduces an artificial separation between the process by which an entity reaches a resolution on its violations of securities laws and the process by which it obtains clarity with respect to the collateral consequences of those violations. The result will be a longer period between the initiation and resolution of enforcement matters. We do not see how this outcome advances either the Commission's mission or serves the interests of investors.

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[1]For example, a settlement that includes an undertaking to hire an independent compliance consultant carries with it collateral consequences for which we often grant waivers.

[2]<https://www.sec.gov/news/public-statement/clayton-statement-regarding-offers-settlement>

[3]<https://www.sec.gov/news/public-statement/lee-statement-contingent-settlement-offers-021121>