

Chairman Jay Clayton Announces Change in SEC Waiver Process

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Earlier this month, SEC Chairman Jay Clayton issued a statement announcing a change in the SEC's waiver application process that will streamline the SEC settlement process. The Commission will now consider settlement offers that address both the underlying enforcement actions and waiver of collateral automatic disqualifications as a single proposal. This new approach should result in a more efficient and transparent settlement negotiation process, removing much of the uncertainty regarding collateral consequences that currently accompanies the SEC settlement process.

Statement Regarding Offers of Settlement

In a public statement regarding offers of settlement and the waiver process, Chairman Clayton highlighted the factors that drive parties to settle with the SEC, including: (i) avoiding the cost of litigation; (ii) the Commission's willingness to litigate cases if a settlement offer is not made; (iii) the importance that the Commission places on promptly remedying harm to investors; and (iv) the parties' desire for certainty.

Chairman Clayton notes that a key way in which the Commission can provide certainty to settling parties is with respect to whether the automatic disqualifications that may be triggered by settlement will be waived. As we have previously [explained](#), the federal securities laws include broad disqualification provisions that are automatically triggered by a number of events, including SEC settlement. Yet settlement offers and requests for waiver of ensuing disqualifications have previously been considered separately by the Commission. According to Chairman Clayton – and consistent with our own experience – this process has resulted in complicated settlement negotiations, wasted resources, and imperfect outcomes.

Recognizing that the settlement negotiation and waiver request processes are intertwined, Chairman Clayton has implemented a new waiver application process that will “honor substance over form” and allow the Commission to consider settlement offers that “simultaneously address[] both the underlying enforcement action and any related collateral disqualifications.” Under this new approach, the Commission will consider settlement offers and waiver requests together as a single package, as long as those requests have been negotiated with all relevant SEC divisions, including the Divisions of Corporation Finance, Enforcement, and Investment Management. Chairman Clayton clarifies that the Commission will remain free to reject settlement offers or accept a settlement offer and reject the associated waiver request. In the latter scenario, the settling party will have five business days to notify the SEC Staff that it intends to accept the settlement offer without a waiver. If it fails to do so within the required period, the proposed settlement terms may be revoked by the Commission.

Background on the Waiver Process

As discussed in a previous [client alert](#), the SEC's waiver process has been the subject of both legislative scrutiny and controversy among the SEC Commissioners over the past several years. Much of this debate has focused on the purpose of waivers and whether automatic disqualifications should serve as

an enforcement mechanism. Some members of Congress expressed concern that large financial institutions received repeated waivers in connection with enforcement actions coming out of the 2008 financial crisis.¹ Certain SEC Commissioners – notably, former Commissioner Kara Stein – also believed that entities should not receive multiple waivers after more than one violation. For example, former Commissioner Stein dissented from a 2015 order allowing Deutsche Bank AG to maintain its Well-Known Seasoned Issuer status following criminal conviction of its subsidiary for LIBOR rigging, expressing concern that “waiver requests will continue to roll in, as issuers are now emboldened by an unofficial Commission policy to overlook widespread and serious criminal conduct – and ensure that the largest companies retain their array of advantages in our capital markets.”² In the same vein, other Commissioners have supported conditional waivers that would require entities to abide by certain terms.³

Other members of the Commission, however, have viewed waivers not as tools for punishment and deterrence but as forward-looking determinations of a party’s ability to “engage responsibly and lawfully in the activity at issue.”⁴ Certain Commissioners have also addressed the relationship between settlement offers and waiver requests highlighted by Chairman Clayton’s statement. For example, former Commissioner Daniel Gallagher thought that settlements should “bring finality” and “involve a meeting of the minds on all aspects of the resolution,” including waivers, particularly if disqualifications are considered to be sanctions.⁵

Prior to Chairman Clayton’s July 3 statement, parties seeking waivers from automatic disqualifications would discuss their requests with the SEC Staff and would usually learn whether the Staff intended to recommend that the waiver request be granted before submitting it to the Commission. However, the Commission would not consider a waiver request until the relevant settlement order was entered and automatic disqualification had been triggered. Accordingly, settling parties had no certainty with respect to whether they would be disqualified as a result of settlement. In contrast, parties settling with the SEC will now be able to submit a single proposal for settlement of an enforcement action and a waiver request to the Commission. The Commission will then give the proposal a single vote and settling parties will have flexibility to determine whether to continue forward with settlement even if their waiver request is denied.

Practical Considerations

The SEC’s new approach to waiver requests, which appears to be a direct response to a bill introduced by House Financial Services Committee Chair Maxine Waters that would significantly change the waiver process, will likely bring about a more efficient and transparent process for parties settling with the SEC. Eliminating the fiction that the collateral consequences of settlement are not an integral part of the

¹ Letter from U.S. Senator Elizabeth Warren to Chair Mary Jo White, SEC (June 2, 2015), *available at* https://www.warren.senate.gov/files/documents/2015-6-2_Warren_letter_to_SEC.pdf.

² Kara M. Stein, Comm’r, SEC, Dissenting Statement in the Matter of Deutsche Bank AG, Regarding WKSJ (Dec. 18, 2015), <https://www.sec.gov/news/statement/dissenting-statement-deutsche-bank-ag-wksi.html>.

³ See, e.g., *id.*; Luis A. Aguilar, SEC, Public Statement: Enhancing the Commission’s Waiver Process (Aug. 27, 2015), <https://www.sec.gov/news/statement/aguilard-enhancing-commissions-waiverprocess.html>.

⁴ Mary Jo White, Chair, SEC, Remarks at the Corporate Counsel Institute, Georgetown University: Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws (Mar. 12, 2015), <https://www.sec.gov/news/speech/031215-spch-cm-jw.html>. See also Daniel M. Gallagher, Comm’r, SEC, Remarks at the 37th Annual Conference on Securities Regulation and Business Law: Why is the SEC Wavering on Waivers? (Feb. 13, 2015), <https://www.sec.gov/news/speech/021315-spc-cdmg.html>.

⁵ Daniel M. Gallagher, Comm’r, SEC, Remarks at the 37th Annual Conference on Securities Regulation and Business Law, *supra* note 4.

calculus when considering an offer of settlement, the SEC's new process will allow settling parties to both clearly understand the ramifications of settlement and, where a waiver is not granted, plan for the business impact of disqualification. Further, many of the same factors that are considered by the Commission in connection with offers of settlement are also relevant when considering waiver requests, including the duration of the conduct at issue, level of employees involved, and the state of mind of those employees.⁶ Simultaneous submission of offers of settlement and waiver requests should therefore streamline the Commission's review and allow for more efficient use of its resources.

Although we view this new approach as a positive development, certain challenges encountered during the waiver process will likely persist. For example, there remains a lack of transparency with respect to how the Commission will analyze and apply relevant factors when considering a waiver request, which can make it difficult for parties applying for waivers to determine their likelihood of success. In addition, criminal indictments and convictions involving certain securities law violations also trigger automatic disqualifications. Thus, parties entering settlements with the Department of Justice that trigger automatic disqualification will continue to face uncertainty with respect to whether such settlements will result in disqualification, and will need to coordinate separately with the SEC regarding their waiver requests. This requires multi-agency negotiation and coordination – typically in advance of entry of a settlement order – to determine whether disqualification is likely and a waiver request can be considered by the Commission on the same day that a triggering settlement is entered, significantly slowing the settlement process.

⁶ Mary Jo White, Chair, SEC, Remarks at the Corporate Counsel Institute, *supra* note 4.

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