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What to Do When the SEC Hits You with a Wells Notice

By Danielle Walker November 8, 2017

Firms gearing up to fight a Securities and Exchange Commission (SEC) Wells notice – which carries news of a planned enforcement action by the agency – can start by avoiding a few major missteps when responding via a Wells submission, a senior enforcement official for the Commission shares.

At a recent conference, **Gerald Hodgkins**, associate director of the SEC's division of enforcement, shared key housekeeping tips for companies, including registered investment advisers, such as asset managers.

Keep it Concise

Firms should avoid flouting the Commission's 40-page limit for written responses to a Wells notice, known as Wells submissions. When making their case, companies should also consider consolidating their official responses to the SEC and avoid going on the attack in the process, Hodgkins said late last month on a panel at the Securities and Enforcement Forum in Washington D.C.

"You might not convince the Staff, for example, that they don't have a case... but the Wells process, an effective Wells [submission], is one that is balanced, has fair inferences, and allows the Staff to look with objectivity with the evidence that is in front of them," Hodgkins said at the event.

He noted that submissions can be rejected for exceeding the 40-page limit, adding that following page-limit guidelines "forces parties to be a little more careful and thoughtful about their priorities."

Firms can alternatively submit a videotape, not to exceed 12 minutes, as an official response to a Wells notice. The 40-page written limitations do not include exhibits, according to the SEC's enforcement manual.

In addition to urging respondents to consolidate their Wells submissions to the SEC, since parts of the first statement may no longer be applicable as the case develops, Hodgkins issued a warning about professional conduct in submissions.

"[I] don't think it's effective to attack the Staff's professionalism," he noted.

Be Careful What You Share

Attorneys in the securities space have long debated the pros and cons of the Wells submission, which allows individuals or entities to make a case as to why the agency should not bring an enforcement action or reduce

charges – but also poses its own potential risks as the submission could be used against a client at a later point, panelists at the conference shared.

"You could find yourself filing that Wells [submission]... and that Wells being used against you," **George Kostolampros**, a partner at **Venable**, said.

There have, however, been instances "where a Wells submission has caused the [SEC] staff to drop its case," he noted.

While another attorney said that he was "not so cynical as to believe that it's pointless," to file a Wells submission, he offered various instances where the process has proven useful for respondents, including when they've felt a defendant was unfairly included in a case, says **Andrew Ehrlick**, a partner at **Paul Weiss**. This can include specific units of a business.

"It may matter, particularly with investment advisers or asset managers, for a particular entity to be in or out..." he said.

"But if you're confident that the case is going to go forward, then there may be a lot of downside to committing yourself, before you see a complaint, particularly if the Staff hasn't been as clear in this particular case as to what the charges or the actual allegations might be," Ehrlick later added of Wells submissions.

Sit Down With the SEC

Firms can also request a "pre-Wells discussion" with SEC staff, according to **David Chase**, a securities lawyer and former senior counsel for the SEC's enforcement division, speaking in an interview with *FundFire*.

"With a registered investment adviser, they are licensed, so the stakes are higher in SEC cases," he said, explaining that advisers, such as asset managers, may opt in certain instances to disclose a Wells notice in their Form ADV.

Last December, **PIMCO** agreed to pay nearly \$20 million to settle SEC charges that it misled investors about the performance of its Total Return ETF and mispriced certain fund securities, as reported by *FundFire* sister publication *Ignites*. The year prior, PIMCO disclosed in a regulatory filing that it had received a Wells notice related to the exchange-traded fund, *Ignites* reported.

Chase later added, that generally speaking, his stance on written Wells submissions are: "If I can't talk the SEC out of it in a series of meetings, then putting it in writing isn't going to help." But, he adds, "There are cases where the Commission is fundamentally wrong and needs to know what they missed."

"If it's a case that needs to be settled, the Wells process is usually a good time to negotiate," he continues. "That's when the Staff has the best flexibility to cut a deal with my client. However, if I have an investment adviser that has an extremely defensible case, my gut instinct is to [argue] orally and have discussions with the SEC."

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