



Gurbir Grewal. Photo: David Handschuh/ALM

## **'Tough Talk' From SEC's New Enforcer Making Settlements Harder to Obtain, South Florida Lawyer Says**

Requiring defendants to admit wrongdoing in order to enter into a settlement is bound to prompt more defendants to try cases, according to Fort Lauderdale attorney David Chase.

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Attorneys defending individuals and companies in U.S. Securities and Exchange Commission enforcement actions say they are working longer and harder thanks to the stricter approach to enforcement under Gurbir Grewal.

Grewal took the helm at the SEC's enforcement division in July after three years as New Jersey's attorney general. He also had stints as the Bergen County prosecutor and as chief of the Economic Crimes Unit at the U.S. Attorney's Office in New Jersey.

Since joining the SEC, Grewal has made it clear that the public should expect a departure from past practice. He has sought bigger monetary penalties from offenders, and says he will require admissions of guilt as a condition of certain settlements.

In addition, Grewal has said he will seek to permanently remove some defendants from the securities industry, rather than let them return to the same field after a violation.

## **Will Tough Talk Die Down?**



David Chase. Courtesy photo

David Chase, a Fort Lauderdale attorney and former staff counsel in the SEC enforcement division, said he has already seen evidence of Grewal's higher penalties in his client's cases.

"The higher the civil penalty being sought, the more draconian the sanctions being sought, the higher the chance that settlement will not occur and the parties are going to have to litigate the case," Chase said. "It adds another dimension to an

already complicated process. It makes it more difficult to try to achieve settlement, that I know for sure," he said.

Chase questions whether "tough talk" by Grewal will "die down" and the enforcement division will revert to business as usual.

"Right now in this environment there is no doubt it is a more difficult process because the SEC has raised the stakes for settlement. I've seen it before in other administrations. At some point they may realize that nothing's getting settled and there's a need for the SEC to settle cases," said Chase, who now represents clients in SEC cases.

But requiring defendants to admit wrongdoing in order to enter into a settlement is bound to prompt more defendants to try cases, according to Chase. Such admissions have impact on related private litigation, criminal and regulatory consequences, he said, calling the policy "a mistake."



“Settlements are really important to the functioning of the SEC. It can’t try every case. It just can’t, and they need to have a mechanism to be able to settle out cases, where they effectuate their goal of deterrence but allow individuals or entities

to say, ‘Look, we resolved this. We’re not admitting anything, we’re not denying it. We’re resolving it as a practical matter because of the time, expense and risk of litigation.’ If that’s taken away, that will fundamentally, in my opinion, change the way SEC investigations are handled and resolved,” Chase said.

### **‘Taking Cases to the Mat’**

Christopher Porrino of Lowenstein Sandler/courtesy photo

Christopher Porrino, who was Grewal’s predecessor as New Jersey’s attorney general, calls him “a close friend and colleague.”

Porrino, now with Lowenstein Sandler in Roseland, New Jersey, said that Grewal has yet to carry out his pledge to make defendants admit wrongdoing and leave the securities field, but added, “I know Gurbir well enough to know if he says that’s what he’s going to do, that is what he will do.”

Grewal’s stricter approach is likely to mean more defendants will decide to try more cases, rather than settle, Porrino said.

“If admission of wrongdoing is going to mean the demise of a company, or it means a person is going to be unable to earn a living, then that person is going to have nothing to lose by fighting. You’ll see some entities and individuals taking cases to the mat because of that. But I believe, knowing



Gurbir as well as I know him, this is not going to be an across-the-board requirement. It's going to be in those cases that warrant it," Porrino said.

Porrino added that he was confident Grewal could bring about change at the SEC because he had a track record of leadership.

To effectively run the SEC's enforcement arm "means motivating the people who work within the organization, and I think Gurbir will be able to motivate the offices and staff under his management to bring more cases, to bring better cases, to bring more complex cases and to break ground in ways that the ground hasn't been broken before under prior enforcement directors," Porrino said.

Sean McKessy, a partner at Phillips & Cohen.

Sean McKessy, a former SEC staff attorney who also established and ran the agency's whistleblower program, welcomed Grewal's new approach to enforcement. McKessy, who now represents SEC whistleblowers with Phillips & Cohen in Washington, D.C., concedes that the higher penalties will translate to more money for his clients and his firm.

But McKessy said higher penalties would cause defendant companies to view violations of securities law as something that could threaten their ongoing survival, rather than merely pay up as a cost of doing business. He hailed Grewal for coming to the job as "an approach and a thought process that says 'I'm here now, let's question some of the premises that we operate under.' I think it's interesting and refreshing that he's come out of the gate swinging."

Litigating as opposed to settling is an acceptable trade-off, according to McKessy. “All the benefits of a pro-enforcement, high-penalty environment offsets any concerns that some cases may take longer and go to litigation instead of settle,” he said.

Whether Grewal can bring about change at the SEC enforcement division is a “legitimate” concern, according to McKessy. Veterans of the agency tend to have a “natural skepticism” of outsiders who come in and promise to shake things up.

“It’s really hard to shake things up at a large entity that has done things a certain way,” McKessy said. “That said, I have to believe Gurbir didn’t have to take this job and was very thoughtful about the fact that he had these challenges to face.”