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SEC Signals Shift Away From “Neither Admit Nor Deny” Approach to Settling Enforcement Actions

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The Securities and Exchange Commission (SEC) plans to return to a policy, requiring companies to admit wrongdoing to settle certain enforcement actions, according to the SEC Division of Enforcement Director Gurbir Grewal.

Grewal, speaking at the Practising Law Institute's October 13 *SEC Speaks*^[1] conference, said the agency will require “admissions in cases ‘where heightened accountability and acceptance of responsibility are in the public interest.’”^[2]

Grewal told attendees that “[w]hen it comes to accountability, few things rival the magnitude of wrongdoers admitting that they broke the law. Admissions, given their attention-getting nature, also serve as a clarion call to other market participants to stamp out and self-report the misconduct, to the extent it’s occurring in their firm.”^[3]

Grewal’s remarks signal a return to the policy instituted under former SEC Chair Mary Jo White in 2013. Before White’s tenure, the SEC’s “traditional neither admit nor deny approach” allowed a defendant “to be found guilty of criminal conduct and, at the same time, settle parallel SEC charges while neither admitting nor denying civil liability.”^[4]

In 2012, the SEC began requiring admissions of wrongdoing in cases “involving parallel criminal convictions” or non-prosecution or deferred prosecution agreements “that include[d] admissions or acknowledgments of criminal misconduct.”^[5] The following year, the SEC expanded the policy to encompass cases that did not necessarily include accompanying criminal prosecutions.^[6] Those included:

- Cases where a large number of investors have been harmed or the conduct was otherwise egregious.
- Cases where the conduct posed a significant risk to the market or investors.
- Cases where admissions would aid investors deciding whether to deal with a particular party in the future.
- Cases where reciting unambiguous facts would send an important message to the market about a particular case.^[7]

At the conclusion of White’s tenure, former SEC Chair Jay Clayton and the co-directors of the Division of

Enforcement reverted back to the “traditional” approach.^[8] The shift resulted in a decrease of admissions of guilt in SEC enforcement actions.^[9]

Requiring more defendants to admit wrongdoing to settle may have additional consequences for the SEC’s enforcement program. Crucially, those admissions can serve to strengthen claims made by plaintiffs in concurrent civil litigation.^[10] The policy could lead to an increase in litigation should defendants prefer to fight their actions in court rather than admit guilt as part of a settlement agreement.

If you have any questions relating to SEC enforcement actions, your company’s policies and procedures, whether certain transactions are permissible, or otherwise relating to the above alert, please do not hesitate to reach out to Troutman Pepper’s Securities Investigations and Enforcement team for guidance.

[1] See <https://www.pli.edu/programs/sec-speaks>.

[2] See <https://www.law360.com/securities/articles/1430619/sec-s-top-enforcer-says-admissions-are-back-on-the-menu>.

[3] See <https://www.wsj.com/articles/sec-to-seek-admissions-of-wrongdoing-in-some-enforcement-actions-11634139229>.

[4] See <https://www.sec.gov/news/public-statement/2012-spch010712rskhtm>.

[5] See *id.*

[6] See <https://www.sec.gov/news/speech/spch092613mjw>.

[7] See *id.*

[8] See https://wp.nyu.edu/compliance_enforcement/2021/01/19/admissions-of-guilt-to-the-sec-under-chair-jay-clayton/.

[9] See *id.*

[10] See <https://www.law.com/newyorklawjournal/2021/06/30/collateral-consequences-of-no-admit-no-deny-sec-settlements/>.

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