Articles + Publications | May 13, 2026

SEC's 'No?Deny' Settlement Policy Heads for a Crossroads at OMB and the Supreme Court

WRITTEN BY

Jay A. Dubow | Ghillaine A. Reid

On May 8, the U.S. Securities and Exchange Commission (SEC) quietly sent a final rule titled "Rescission of Policy Regarding Denials in Settlements of Enforcement Actions" to the Office of Management and Budget (OMB) for review under Executive Order 12866. Although the text of the rule has not yet been released, the title strongly suggests that the SEC is preparing to roll back or significantly revise its decades?old "no?deny" settlement policy. That development arrives just as a major challenge to the policy is pending before the U.S. Supreme Court.

Background

Since 1972, SEC Rule 202.5(e) has provided that the agency will not settle a civil or administrative enforcement action unless the defendant or respondent agrees not to publicly deny the SEC's allegations. In other words, a defendant can resolve an SEC case without admitting or denying the allegations, but cannot later publicly suggest that the allegations were unfounded. The rule was adopted as a statement of agency policy rather than through notice?and?comment rulemaking, and it applies across both federal court and administrative settlements.

Critics have long argued that this "Gag Rule" operates as a content?based prior restraint: it prohibits speech about the government's own conduct, permanently, under threat that the SEC could reopen the case or seek additional sanctions if a defendant publicly contests the charges.

The Powell/NCLA Challenge

The constitutional challenge pending before the Supreme Court arises from efforts by the New Civil Liberties Alliance (NCLA) and several former SEC defendants to attack Rule 202.5(e) directly. After individual challenges to no?deny provisions in particular cases were rebuffed on procedural grounds, NCLA petitioned the SEC to amend or rescind the rule to allow settlements that do not require permanent waivers of speech rights. The SEC denied that petition in January 2024, over a pointed dissent from Commissioner Hester Peirce, who described the Gag Rule as a "plain prior restraint" on speech and warned that it suppresses criticism of the agency itself.

NCLA and its clients then sought judicial review in the Ninth Circuit. The applicants include nine individuals who previously settled SEC cases and three organizations that argue they have been unable to receive and publish speech from gagged SEC defendants. The Ninth Circuit recognized that the rule raises "legitimate First Amendment concerns" but upheld it, reasoning that defendants can voluntarily waive constitutional rights as part of a settlement and applying a balancing test derived from a prior Supreme Court decision.

©2026 Troutman Pepper Locke

On January 2, 2026, counsel for the applicants filed an application with Justice Elena Kagan, in her capacity as circuit justice for the Ninth Circuit, seeking a 60?day extension of time to file a petition for certiorari. The application frames the Gag Rule as a textbook unconstitutional condition: the government conditions the benefit of settlement on a perpetual promise not to criticize its allegations, in an area where prior restraints on speech are supposed to be "the most serious and the least tolerable" infringements of the First Amendment. It also emphasizes that, because the SEC treats no?deny language as nonnegotiable, this petition may be the only practical vehicle for Supreme Court review of the rule's validity. According to the Supreme Court docket, the application for extension was granted. No further filings have been docketed.

Next Steps

In the near term, all eyes will be on two tracks: the conclusion of OMB's review and subsequent publication of the SEC's rule, and the Supreme Court docket in *Powell v. SEC* once the certiorari petition is filed. The content of the SEC's final rule may shape how the Court views the case — either as a dispute that has largely been mooted by regulatory change, or as an ongoing controversy about the extent to which agencies may condition settlements on constraints on speech about government conduct. Key questions include whether any change to the rule will apply across all enforcement actions and whether it will operate prospectively or also have retroactive effect.

RELATED INDUSTRIES + PRACTICES

- Regulatory Investigations, Strategy + Enforcement
- Securities Investigations + Enforcement