Proskauer

SEC Enforcement Co-Director Gives Guidance for Wells Process, Part 2

Corporate Defense and Disputes Blog on **June 20, 2018**

On June 4, we posted a summary of SEC Enforcement Co-Director Steven Peikin observations during his recent keynote address at the New York City Bar Association's 7th Annual White Collar Crime Institute. Co-Director Peikin imparted a few suggested "do's and don'ts" for effective communication with the SEC during the Wells process. Although Co-Director Peikin's suggestions should serve as helpful guides to defense counsel, we believe a few of the observations bear further consideration.

1. Potential Advice of Counsel Defense.

Co-Director Peikin stated that "[i]n my experience, alluding to privileged information [in connection with a potential advice of counsel defense] in [a] Wells meeting – but not sharing it with the staff – is not effective" because the Division "cannot ground our decision-making on documents we cannot see or testimony we cannot hear." While it may be true that the Division will not rest its decision whether to recommend an action solely on an undisclosed, potential reliance on advice of counsel defense, it is also unlikely that the Division will simply ignore such a possible defense. At the very least, the Division will have to consider the possible defense as a potential litigation risk. The Commission has been so concerned about the problems associated late claims of the reliance on advice of counsel or other professionals, that in 2016, it amended the Rules of Practice for its administrative proceedings to require, among other things, that respondents state in the answer whether the respondent relied on the advice of counsel, accountants, auditors, or other professionals.

There may be situations in which it makes sense to waive the privilege so that the Division can fully evaluate an advice or presence of counsel defense. But there may also be situations in which a respondent may have such a defense, but is not yet ready to waive the privilege. In those situations, defense counsel should not hesitate to raise the existence of the potential defense during a Wells meeting.

2. Commission Votes.

Co-Director Peikin also stated that "my experience has been that is not particularly persuasive when defense counsel argues at a Wells meeting that we won't have the votes for a particular case, or that a particular Commissioner will not support what we propose recommending."

However, Commissioners often publicly state their positions on enforcement-related issues. For example, Commissioner Peirce recently stated that "[c]ivil penalties against corporations are another area of concern and a reason that I have voted against some enforcement recommendations" because "[a]fter being the victims of the fraud that led to the SEC investigation, shareholders are now paying a corporate penalty to resolve the matter." While it will rarely be beneficial for defense counsel to argue that she knows "the Commissioners' views better than [the Co-Directors] do," defense counsel should not hesitate to raise during a Wells meeting arguments that have been endorsed publicly by a Commissioner – and to note that endorsement.

3. Saber-Rattling.

Co-Director Peikin stated that "I have found that it is rarely productive when defense counsel uses a Wells meeting to threaten to take us to trial." However, it is not unusual for a respondent to feel that certain issues are of such importance that they are willing to litigate over them. For example, an individual who is associated with an investment adviser will likely find an industry bar, which will almost certainly end the individual's career, to be a deal-breaker.

While "[s]imply telling [Enforcement] that the client will litigate" is unlikely to be productive, it can be beneficial for defense counsel to explain that a respondent feels strongly about certain issues or remedies and is willing to litigate over them. This is particularly true in the current environment in which the SEC has limited resources and must be judicious about expending resources on litigation.

4. Non-Starters.

Finally, Co-Director Peikin stated that “Wells meetings are least productive when defense counsel raise what I call ‘non-starters,’” which he described as “issues of programmatic importance on which counsel knows that the Commission and the Division have taken clear and consistent positions, and on which we simply don’t have any ability to compromise.” By way of example, he explained that “defense counsel will not make much progress if they ask us during a Wells meeting to forego an injunction in a settled district court action due to possible *Kokesh* statute of limitations issues.”

However, the SEC’s view that an issue is a “non-starter” does not insulate the issue from challenge or litigation risk. For example, the SEC had long held the position that its disgorgement claims were not subject to the five-year statute of limitations – until the Supreme Court ruled last year in *Kokesh* that they were. Defense counsel should not hesitate to explain during a Wells meeting that she intends to challenge a long-held position of the SEC if that is the case. At the very least, such arguments could impact the SEC’s willingness to compromise on other potential remedies as part of a settlement.

Our full summary of Co-Director Peikin’s observations can also be read in the June 13 *Law360* article, “Tips For Navigating The SEC Wells Process.”

View Original

Related Professionals

- **Joshua M. Newville**
  Partner