

SEC Now May Consider a Simultaneous Settlement Offer and Waiver Request

October 04, 2019

Certain “bad actors” who settle with the SEC may be subject to automatic disqualifications or collateral consequences under federal securities laws and regulations. The Commission, however, may grant a settling party’s request for a waiver, which is often preceded by a lengthy process wherein one or more of the SEC’s divisions recommend a full or conditional grant, or a denial, of the waiver.

The Commission generally has considered offers of settlement distinct from waiver requests, subject to separate Commission votes at different times. This bifurcated process left a settling party in an uncertain position because the Commission could accept a settlement, which triggered a disqualification, in advance of its decision on the requested waiver. Then, if the Commission denied the waiver, the settling party could be subject to crippling consequences (e.g., a bar, an injunction, or the retention of an independent compliance consultant), with little to no recourse.

Previously, the SEC had appeared to take a harder line in granting these waivers. For example, the commissioners had been giving more attention to waiver requests (rather than allowing staff members to make the decisions), including imposing additional conditions on some waivers. See “Can ‘Bad Actors’ Wave Goodbye to SEC Waivers?” *Expect Focus – Life Insurance*, Vol. II (Spring 2015). In July 2019, however, SEC Chairman Jay Clayton announced that a settling party may now request that the Commission consider an offer of settlement that includes a simultaneous waiver (negotiated with the relevant divisions) in a single recommendation from the enforcement staff. So, where appropriate, the Commission now jointly considers offers of settlement with waiver requests in a single vote.

Chairman Clayton’s statement may speed up the settlement process and provide settling parties with more certainty regarding the waiver process. Although the Commission is not obligated to

approve either the offer of settlement or the waiver, settling parties will now have the opportunity to consider how — or whether — to proceed with a settlement if their waiver request is denied.

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