

SEC Chairman Jay Clayton Announces Modification to Process for Considering Contemporaneous Settlement Offers and Waiver Requests

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Wednesday, July 31, 2019

On July 3, 2019, SEC Chairman Jay Clayton issued a statement regarding a modification to the process of considering certain settlement offers in enforcement matters that are accompanied by contemporaneous requests for waivers from statutory disqualifications and other collateral consequences. Mr. Clayton noted the SEC's long-held view that appropriate settlements may be preferable to litigation because "the sooner harmed investors are compensated, the offending conduct is remediated, and appropriate penalties are imposed, the better." With these priorities in mind, Mr. Clayton announced "that a settling entity can request that the Commission consider an offer of settlement that simultaneously addresses both the underlying enforcement action and any related collateral disqualifications."

Mr. Clayton noted that settlements with the SEC can have significant collateral consequences for the settling parties, including, among other things, the ability of a registered investment adviser to receive cash fees for solicitation under Rule 206(4)-3 under the Investment Advisers Act of 1940. These collateral consequences may be triggered by settlement provisions such as injunctions against future violations of the federal securities laws or a requirement to retain an independent compliance consultant. In light of these potentially severe consequences, the SEC

often receives requests for waivers as part of the settlement negotiation process. However, the process of considering settlement offers and waiver requests has been bifurcated, with the Division of Enforcement handling settlement negotiations and the Division of Corporation Finance or the Division of Investment Management handling the “robust analysis” associated with waiver requests.

In his statement, Mr. Clayton indicated that the separation of negotiating settlements and analyzing waiver requests can result in an unnecessarily long and complex process that diminishes the investor benefits and resource preservation associated with settlement. Consequently, offers of settlement accompanied by contemporaneous waiver requests will now be presented to the SEC for consideration “as a single recommendation from the staff.” Mr. Clayton stated that, in the event a settlement offer is accepted by the SEC but a simultaneous waiver request is rejected, in whole or in part, he would expect the party seeking the settlement and waiver to notify the SEC, typically within five business days, as to whether it agrees to move forward with the settlement only (i.e., without the waiver).

Read the full text of Mr. Clayton’s statement is available [here](#).

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