

Securities Regulation Daily Wrap Up, TOP STORY—Chair White defends Commission’s waiver process, (Mar. 12, 2015)

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By Amanda Maine, J.D.

Responding to recent criticism directed at the SEC’s process for granting waivers from regulatory disqualifications, Chair Mary Jo White maintained that the process is a “thorough, rigorous, and principled application of the law.” The Commission’s main objective is to protect investors and safeguard the public interest, and its waiver process does not detract from its dedication to this principle, White said. White made her remarks at the Corporate Counsel Institute at Georgetown University.

Facts and circumstances. When determining whether to grant a waiver, the Commission looks at the facts and circumstances of a particular case, White said. These include the nature of the violation, the duration of the wrongdoing, the specific employees involved, the level of seniority of the employees, and the state of mind of the participants. The staff will consider whether the employees involved in the wrongdoing are still at the institution or if they have been removed from the role they held when the violation occurred.

White acknowledged that others have raised concerns that the SEC’s waiver process favors large financial institutions and whether some institutions are “too-big-to-bar.” White assured that the Commission treats large financial institutions exactly the same way as any other firm or person when evaluating the appropriateness of a waiver.

Disqualification distinguished from enforcement remedies. White also emphasized the distinction between enforcement remedies and the disqualifications resulting from them. Sanctions for an enforcement violation are meant to punish and deter, she said. Disqualifications, such as ineligibility for well-known seasoned issuer (WKSJ) status and “bad actor” disqualification from Rule 506’s private placement exemption, prevent individuals and entities from engaging in specific, regulated activities to protect the public interest.

It would be an inappropriate exercise of the SEC’s authority, White said, “to deny a waiver to further punish an entity for its misconduct...by letting stand an automatic disqualification where the circumstances do not warrant it.” The unjustified denial of waivers could deter entities from settling charges and require further expenditure of Commission resources on litigation that could be put to better use elsewhere, she advised.

Rigorous analysis. White denied accusations that the Commission routinely grants waivers without rigorous analysis. She observed that it should not be surprising that financial institutions have sought a number of waivers, noting that corporate liability can be triggered through the act of a single employee. She said that the number of waivers should be seen as a good reflection on the aggressiveness of the SEC’s enforcement efforts. White also explained that critics of the waiver process are not witness to the many instances where waivers are either never requested or requests are withdrawn after discussion with the staff. Those instances do not become a matter of public record, but are still part of a full, fair, and accurate picture of the process, according to White.

While acknowledging that numbers and the public record do not reflect the “extensive and exacting work” performed by SEC staff in analyzing waiver requests, White said she recently initiated a staff review of WKSJ and Rule 506 bad actor waiver requests, the results of which were “interesting.” During the period of review, the staff granted seven WKSJ waiver requests and denied at least four. The staff granted 13 bad actor waivers and denied at least 14. She cautioned, however, that those figures do not paint a complete picture, as they do not capture situations where no waiver was ever sought.

White also reported that the staff last year revised its 2011 written guidance on WKSJ waivers and undertook to develop similar guidance for other waivers, with the aim of improving the transparency of the Commission’s waiver process. She hopes that the guidance will facilitate predictability in the results of waiver requests to help entities better understand the consequences of enforcement actions while engaging in settlement negotiations.

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