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Good afternoon and thank you for that overly-generous introduction. Before I begin, let me give the required disclaimer that the views I express today are my own and do not necessarily represent the views of the Commission or its staff.

Introduction

I'm delighted to be here today among so many friends and colleagues, and I extend my thanks to the New York City Bar for hosting this important event. Because New York plays such a pivotal role in our financial system, members of the New York City Bar have long taken a leading role in many of the most significant securities and white collar matters. And the City Bar has been a key forum for education and dialogue about these important issues. I am honored to join today's distinguished group of speakers, panelists, and attendees.

This afternoon, I would like to address a practical topic that I hope will be useful for many in this audience: techniques for productive and effective communication with SEC staff during Wells meetings.

I have spent nearly 20 years focused on the criminal and civil enforcement of the federal securities laws, first as an Assistant U.S. Attorney, then in private practice, and now as Co-Director of the SEC's Division of Enforcement. Those of us who work on securities and white collar matters often take for granted how fortunate we are to be able to practice in a bar that is populated by some of the best lawyers in the country. The opportunity to be part of such a bar is one of the things that attracted me to work on securities matters in the first place, and I know that I am a much better lawyer for having had the chance to do so.

Over the course of my career, I have had many opportunities to interact with opposing counsel – both on behalf of the government and while representing private clients. Experience has taught me that open, effective, and productive dialogue between the government and defense counsel is critical for both sides in handling a complex securities matter. As a prosecutor, I found that frank communication with opposing counsel helped me understand complicated facts, focus an investigation, and – ultimately – reach the right result. In private practice, I think my clients were best served when the government was open to frank dialogue.

My time at the Commission has reinforced these conclusions.

At the SEC, we frequently confront issues that are novel, complex, or both. For the staff, productive communication with defense counsel can often provide a better understanding of complicated businesses, markets, and financial products. Effective communication allows us to tailor our theories, focus our inquiries and get to the end of our investigations efficiently.

I believe that the benefits of this communication flow in both directions. That is, effective dialogue can also yield significant benefits for defense counsel and their clients. In some instances, defense counsel will persuade us that we have gotten something wrong, leading us to abandon a charge, recommend different relief, or decline to pursue a matter entirely. Even where that isn't the case, effective communication often helps defense counsel to better understand our thinking, which in turn allows them to provide better advice to their clients.

An SEC investigation provides many opportunities for dialogue – from the time of the first contact with the staff through discussions about possible settlement or litigation. As many of you know, one of the most significant opportunities for communication is the Wells process.

The Wells process takes its name from an advisory committee, headed by the distinguished corporate lawyer John A. Wells, which was convened in 1972 to review and evaluate the Commission's enforcement policies and practices. As the Commission noted in responding to the recommendations of the committee, the purpose of the Wells process is to ensure that the Commission "not only [is] informed of the findings made by its staff but also, where practicable and appropriate, [has] before it the position of persons under investigation[.]"[1] The Commission declined to adopt a formal rule or procedure requiring a prospective defendant or respondent to be given notice of the staff's charges and proposed enforcement recommendation and an opportunity to respond, deeming such a requirement to be impractical given that the Commission is frequently required to act with exigency. Nevertheless, the Wells process is one that the Commission staff has followed in most cases where doing so would not compromise other law enforcement interests.

The Wells process has significant benefits for the Enforcement staff. It provides us with a chance to learn – and understand – the "position of persons under investigation."[2] This, in turn, allows us to ensure that we make appropriate recommendations to the Commission, and that the Commission has a full and accurate picture of the positions of both sides when it reviews our recommendations.

While some may consider Enforcement staff and defense counsel to be adversaries in the Wells process, I think our interests are often aligned. A Wells notice is an invitation for defense counsel to respond to the Enforcement staff's preliminary conclusions and try to persuade us we are mistaken. We are focused on getting it right, not bringing cases for the sake of bringing cases. So if we are on the wrong track, we want to know that before we proceed further. That benefits everyone.

For these reasons, my Co-Director, Stephanie Avakian, and I place great importance on the Wells process – and Wells meetings in particular. I believe all of our Regional Directors and other Senior

Officers are on the same page. We view these meetings as among the most important parts of our jobs, and we devote substantial time and care to preparing for them. I know they are viewed as milestone events by defense counsel and their clients, and they too devote substantial resources to preparing and making these presentations.

As I approach one year on the job, overall I have been extremely impressed by the quality, sophistication, and effectiveness of the advocacy in the Wells process. Nevertheless, I've found that some Wells meetings have been more productive than others. Drawing on that experience, I'd like to share some observations about what I have found makes for effective Wells meetings.

Before I do that, however, let me pause to make clear that I am not telling defense counsel how to do their jobs. At the SEC, we expect that counsel will zealously represent their clients. And nothing I say should dissuade counsel from doing what they think is in their client's best interest. The arguments presented in a Wells meeting are – ultimately – up to the lawyer and the client. So I hope you will take the following in the spirit in which it is offered – which is an attempt to share my personal observations about what I have found does – and does not – tend to foster the most constructive, effective, and productive dialogue between Enforcement staff and defense counsel during a Wells meeting.

Observations

My first observation is an obvious one: Wells meetings tend to be the most productive when defense counsel focuses on the most important arguments and issues in the case, as opposed to taking a blunderbuss approach that attempts to address every possible argument, fact, element, and issue.

In most of our mature investigations, the true issues in dispute have been distilled, and there is typically one or a small number of live issues. In a fraud case, for example, perhaps it is a question of whether a statement was false or misleading? Or whether an omission was material? Or whether a person acted with scienter? Rarely, it seems to me, are all possible issues in serious dispute.

We view Wells meetings as counsel's opportunity to educate us on their positions on the key facts and issues before we make a decision about a charging recommendation. The time is yours, and you should use it how you see fit. But meetings can only last so long – typically about an hour. When counsel attempt to make every argument and address every issue, it distracts. And in certain circumstances, contesting facts and issues that are not subject to reasonable dispute adversely impacts credibility.

In my experience, the most effective advocates pick their battles and focus on the central issues and arguments. This may mean foregoing discussion of every argument made in a written Wells submission. In my view, that is fine. We read Wells submissions carefully, and we take them into account when preparing our charging recommendations.

I have also found that the best advocates listen carefully to us during a Wells meeting and adapt accordingly. If the discussion makes clear that we are not receptive to a particular argument, they move on. And if we suggest that counsel address a particular issue, they pivot to address it. Simply marching though prepared talking points is seldom the best approach.

My second observation is that while defense counsel should not try to cover all of the possible issues during a Wells meeting, the meetings tend to be most productive when the staff is aware of what defense counsel will contend are key facts before we meet.

By the time we reach a Wells meeting, the staff has concluded that the investigation is complete and that it has a sufficient record upon which to recommend charges. But the reality is that defense counsel and their client may know things that we don't. We want to know as much as we can before we make a recommendation to the Commission. Educating the staff on what you believe are the key facts – and explaining why, in your view, those facts don't support an enforcement action, or a particular charge or form of relief – can be effective.

But for the discussion in a Wells meeting to be productive, all of what you believe to be the operative facts need to be on the table before the meeting so that we can consider and analyze them and discuss them meaningfully at the meeting. In my experience, the parties are unlikely to make much progress during a Wells meeting if staff are surprised with new facts at the beginning of the discussion – especially if defense counsel takes the position that those facts are central to the case.

This is an issue that arises with some frequency where defense counsel has claimed privilege over supposedly key information during the investigation. I have found that it is not helpful for counsel to disclose supposedly key privileged information for the first time in a Wells meeting, and then spend the rest of the meeting arguing that the information is a defense to the proposed charges.

Likewise, it is not useful when parties submit lengthy supplemental submissions on the eve of a long-scheduled Wells meeting. Those who do this must perceive a strategic advantage in dropping in a new submission at the eleventh hour, providing staff with little time to digest it. But I think otherwise. This can make the meeting a waste of time. To be in a position to make progress at the meeting, we must know about – and have an opportunity to consider and test – information and arguments in advance.

Now, the reverse is also true. It makes no sense for defense counsel to go through the Wells process blind to key pieces of evidence that the staff has developed in its investigation. And so we have encouraged the staff to share with defense counsel key documents and information upon which our proposed case will rest. There will, of course, sometimes be reasons why we are unable to share some things. But our dialogue will be most robust, and the process most effective, when we are all talking about the same factual record.

That point is related to my third observation, which is that it is not effective to allude to an advice-of-counsel defense without disclosing the key underlying facts, including the privileged communications themselves.

Sometimes, defense counsel will claim at a Wells meeting that privileged information they are unwilling or unable to share is central to the case. For example, during a meeting, they may allude to – but not formally raise – an "advice-of-counsel" defense by noting that they have privileged information that gives them comfort about the legality of the actions taken by a particular employee, or her lack of scienter.

In my experience, alluding to privileged information in Wells meeting – but not sharing it with the staff – is not effective. To be clear, I am not encouraging anyone to waive privilege in these circumstances. The decision whether to share privileged information is one that must be made by defense counsel and the privilege holder. I simply note that we cannot ground our decision-making on documents we cannot see or testimony we cannot hear.

Fourth, I have found that it can be very effective when defense counsel grounds their arguments in case law and prior Commission actions.

It is ultimately the Commission – not the staff – that decides whether to bring an action, or to accept a settlement. We take very seriously the recommendations we make to the Commission. In every case, we think hard about what we are recommending, why we are recommending it, and – critically – how it compares to what the Commission has done in past cases. This ensures that we are both fair to the parties in the case at hand and that we are sending clear, consistent messages to the public.

When you are asking us to make a particular recommendation to the Commission, it can be very helpful to show us how and why that recommendation compares with what happened in prior cases. This is particularly true when you are asking the staff to recommend that the Commission bring certain charges and not others, or only seek or impose certain types of relief. In these circumstances, pointing to what has been done before can be helpful.

Likewise, if an analogous case has been litigated and resulted in a decision that is at odds with what the Staff has proposed, point us to those precedents as well. Showing us that we are proposing something that is inconsistent with what we would likely obtain if we were to prevail in litigation can be powerful as well.

While pointing to what the Commission or courts have done in the past can be very effective, I will offer a few caveats.

The first is that in most cases, the more recent the court decision or Commission action, the more persuasive it is likely to be. With some exceptions, cases that are superannuated do not speak as clearly about what approach the Commission should or will take today.

Second, while prior Commission actions are very important, there are certainly some matters in which – for case-specific reasons – the Commission has taken an approach that is at odds with what it tends to do in a particular type of case. Where a case appears to be an outlier, you should take that into account before relying on it too heavily at a Wells meeting.

The third caveat is that we are fully aware that we, like you, are subject to the vagaries and vicitudes of litigation. The fact that the Commission suffered an adverse result in a particular litigation may be a relevant data point, but more often will not carry significant weight.

Fourth, while prior Commission actions are important, my experience has been that it 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.

Stephanie and I are well attuned to the Commission as a whole, and the views of individual Commissioners. We meet regularly with each of them, and we study carefully how they approach various issues. If you don't succeed in persuading us not to bring charges, you are of course free to take your arguments directly to the Commissioners. But, in my experience, telling us that you know the Commissioners' views better than we do is unlikely to meet with much success.

My next observation is that the most effective advocates think carefully about whether to use visual aids at a Wells meeting. And if they do, they are judicious about the materials they use.

We spend a great deal of time preparing for Wells meetings, and we are typically well-versed in the key facts and issues. For that reason, it is often not necessary for defense counsel to march through handouts or PowerPoint slides that cover background or elementary issues, facts, and legal standards, or which summarize the Wells submission.

So what is helpful? Consider not using anything at all. Although handouts and presentations have their place, they can sometimes inhibit natural and open dialogue.

If you do decide to use some sort of handout or visual aid, I have found that succinct presentations that cover the key evidence and central issues often have the most impact. Of course, what that looks like will depend on the case. If a particular issue turns on a handful of key documents, a short PowerPoint that highlights those materials can be helpful. Or, if a specific witness is particularly important, it can be helpful to focus on key excerpts from her testimony. In short, I have found that presentations that are focused on the key evidence often have a greater impact.

My next observation is that I have found that it is rarely productive when defense counsel uses a Wells meeting to threaten to take us to trial. For me, saber-rattling is a rhetorical dead-end.

The SEC staff includes experienced and talented trial attorneys. We regularly solicit their views during the investigative process. Defense counsel can safely assume that if a case has gotten to the Wells stage, we are serious about the case and we have come to the preliminary conclusion that we can prevail if the case is litigated. Simply telling us that the client will litigate achieves nothing.

That doesn't mean you should shy away from providing your views on the risks we will face in litigation and trying to explain to us why we are unlikely to prevail. I have found that it can be very effective if defense counsel summarizes how they might try a case. That could mean previewing anticipated trial themes, or summarizing how you plan to use or diffuse key evidence or witnesses.

I have also found that Wells meetings are least productive when defense counsel raise what I call "non-starters." By "non-starters," I mean 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.

For example, 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.[3] Our district court settlements uniformly include injunctive relief, and the Commission has consistently taken the position that the Supreme Court's *Kokesh* decision does not apply to injunctive relief.[4] You are welcome to try to persuade a court to extend *Kokesh* in a litigated case, but that is not something we are likely able to agree to in a settled context or to forgo based on litigation risks.

My next-to-last recommendation relates to cooperation credit. The SEC has a robust program that is intended to encourage cooperation in SEC investigations and enforcement actions. The program provides incentives to those who come forward and provide valuable information to SEC staff.

As many of you know, we use a framework to evaluate whether, how much, and in what manner to credit cooperation by individuals and entities. The factors we consider are well known and have been set out in a number of public documents, including the Seaboard Report[5] and other Commission policy statements.[6]

When arguing in a Wells meeting that a client should receive cooperation credit, I have seen defense counsel take a number of approaches. Some are more effective than others.

Some, for example, simply run down a laundry list of actions their client has taken during the course of an investigation – such as producing a certain number of documents, or making a certain number of witnesses available for a certain number of days of testimony – and claim that they should receive cooperation credit. In my view, this is not effective.

For one, doing something that your client is already required to do – such as producing documents in response to a subpoena – is not what we consider "cooperation."

Second, simply listing out what actions your client has taken, without more, does not explain the significance of the cooperation. In my view, the more effective approach is to carefully and specifically explain at a Wells meeting how each action your client took aided the staff's investigation in a material way. How did you help the staff to tailor its investigation, discover new witnesses, or uncover material facts they otherwise would not have known about? In short, explain to the staff – with specificity – how each action your client took materially aided our investigation. Doing so will assist us in explaining to the Commission why your client should receive credit for its cooperation.

My final observation is simple and straightforward: a Wells meeting is not the place to re-hash battles fought with the staff during the investigation.

Long-running SEC investigations – like any high-stakes litigation – can be contentious and hard fought. We strive to keep the scope of our work reasonable and proportionate, but our investigations can take time, and they can often require your clients to expend considerable resources.

While I understand the temptation, a Wells meeting is simply not the place to air grievances about the length of the investigation or shifting theories of the case, or positions the staff took on things like subpoenas, search terms, privilege logs, production deadlines, or testimony schedules.

Stephanie and I expect the Staff to conduct themselves professionally at all times. But just as your clients expect you to be aggressive in representing them, we also expect our staff to be appropriately aggressive as they work to support the Commission's mission of policing the markets and protecting investors.

Ultimately, the Wells meeting is your client's opportunity to educate us on your positions about the key issues. I have found that it is rarely a productive for defense counsel to rehash old disagreements with the staff about the way the investigation was conducted. Those disagreements won't have a bearing on what we decide to recommend to the Commission. We will make more progress when everyone sticks to the facts and the law.

Conclusion

In conclusion, I'll say that, as I mentioned at the outset, my thoughts today are not grounded in some presumption that we can or should tell you how to do your jobs. How you represent your clients is up to you. But I do hope that you will find my observations about what we find to be effective helpful as you prepare for your next Wells meeting.

Thank you again to the City Bar for giving me the chance to spend time with you this afternoon, and I hope you enjoy the rest of the conference.

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[1] Securities Act of 1933 Release No. 5310, "Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations."

[2] *Id.*

[3] *See Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

[4] *See* SEC Enforcement Manual § 3.1.2 (2017) ("[C]ertain claims are not subject to the five-year statute of limitations under Section 2462, including claims for injunctive relief.")

[5] *See* Report of Investigation Pursuant to § 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Rel. No. 34-44969 (Oct. 23, 2001), *available at* https://www.sec.gov/litigation/investreport/34-44969.htm#P54_10936.

[6] Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, SEC Rel. No. 34-61340 (Jan. 19, 2010), *available at* https://www.sec.gov/rules/policy/2010/34-61340.pdf.