

[Securities Regulation Daily Wrap Up, TOP STORY—Lee continues to sharpen SEC’s enforcement claws with waiver-settlement separation policy, \(Feb. 12, 2021\)](#)

Securities Regulation Daily Wrap Up

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Acting Chair Lee stated that separating the settlement process from the waiver process will help preserve the independence of the processes and better protect investors and markets.

Acting SEC Chair Allison Herren Lee has for the second time this week announced a change in the SEC’s enforcement policies that were implemented by her predecessors under the Trump administration. In her latest [statement](#), Lee announced that the Division of Enforcement will no longer recommend to the Commission a settlement offer that is conditioned on granting a waiver, which marks a return to the Division’s previous long-standing practice. The revoked policy had been implemented under Chairman Jay Clayton in 2019. Earlier this week, Lee announced an expansion of the Enforcement Division’s subpoena powers.

Waivers and settlements. When entities enter into a settlement agreement with the Commission in an administrative proceeding, it can often subject them to automatic disqualification from exercising certain privileges, including from being considered a "Well-Known Seasoned Issuer" (WKSI), from engaging in certain private securities offerings under Rule 506 of Regulation D, and from serving in certain capacities for an investment company. The SEC has frequently granted waivers from these disqualifications, although the practice had been criticized by then-Commissioners [Kara Stein](#) and [Luis Aguilar](#). In 2017, Rep. Maxine Waters, then the Ranking Member of the House Committee on Financial Services and its current chair, [introduced](#) a bill titled the [Bad Actor Disqualification Act of 2017](#), which proposed a series of requirements for SEC waivers, including that the waiver process should be conducted and voted on at the Commission level, rather than at the staff level.

In July 2019, then-Chairman Clayton [announced](#) a new policy regarding the use of waivers in settlement negotiations with respondents in administrative proceedings. In his statement, Clayton opined that using a segregated process for considering contemporaneous settlement offers and waiver requests as if they are two separate and unconnected events can add complexity because a "formulaic separation" can be inconsistent with the interconnected nature of the matters at issue. It can also undermine factors that drive appropriate settlements, according to Clayton.

Citing these considerations, Clayton stated that an offer of settlement that includes a simultaneous waiver request negotiated with any of the SEC’s associated divisions would be presented to and considered by the Commission as a single recommendation from the staff, as opposed to using a segregated process of waiver and settlement. According to Clayton, this policy of simultaneous offer of settlement and waiver request would reduce complexity, as well as conserve the Commission’s already-strained resources.

Lee sets the stage for more potent enforcement. In her statement announcing the policy change, Lee proclaimed that these waivers should not be used as a "bargaining chip" in settlement negotiations. They also should not be regarded as an "obstacle to overcome" on the way to a settlement. "A waiver is not the default position under the law and should not be considered one under our processes," Lee advised.

Lee acknowledged that a waiver, either in full or with conditions, may be appropriate. However, she emphasized that the determination to grant a waiver should be made separately from considerations related to the settlement of an enforcement case.

"Today's action is meant to enshrine best practices and ensure that our policies and procedures are designed to eliminate the potential for any structural conflicts or pressures," Lee said, adding that it will "help preserve the independence of these separate processes and better protect investors and markets."

Future of SEC enforcement. The long-term enforcement priorities under the new administration remain to be seen as President Biden's [nominee](#) for the SEC chairmanship, Gary Gensler, awaits Senate confirmation. Observers have noted that Gensler's tenure as CFTC chairman has indicated that he will be active in the enforcement as well as the regulatory space.

As the financial world awaits Gensler's confirmation, Lee's actions may be paving the way for a more robust enforcement regime. Earlier this week, Lee [announced](#) the return of expanded subpoena powers for the staff of the Division of Enforcement. Former Commissioner Michael Piowar, who briefly served as acting chairman of the SEC prior to Clayton's confirmation in 2017, reined in the enforcement staff's subpoena powers to require approval by the Enforcement Division director (or co-directors at the time). Under Lee's directive, subpoena powers were returned to senior SEC enforcement officials.

Advocacy group Better Markets [welcomed](#) Lee's announcement. Under the prior policy, "SEC [had] unilaterally disarmed itself from using all of the tools in its arsenal against lawbreakers," Better Markets proclaimed. It also voiced support for the rejection of "light-touch enforcement actions that only charges disclosures violations."

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