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Securities Regulation Daily Wrap Up

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Grewal forced to defend strong stance on Wells process streamlining and admissions.

After signaling a tougher enforcement stance in remarks in October, the SEC’s Director of Enforcement Gurbir Grewal faced a stern panel of former SEC Enforcement Directors at this year’s Securities Enforcement Forum 2021, hosted by Securities Docket. Six former Enforcement Division Directors, all now active members of the defense bar, questioned Grewal on his SEC Speaks remarks pertaining to the division’s approach to the Wells process and individual admissions of wrongdoing.

Wells meetings. Moderator Bradley Bondi, of Cahill Gordon & Reindel, mentioned that there had been “rumblings” among defense lawyers about Grewal’s remarks at SEC speaks on streamlining the Wells process. Grewal said he expects to be present for some Wells meetings, but for more routine cases, front-line staff such as unit chiefs will handle the meetings. The approach is not a change, he said, but a recognition that the division needs to move cases, and a streamlined approach would help minimize scheduling conflicts and other delays. “Sometimes there are not novel, legal issues at play in a particular investigation. Sometimes, there are not actual disputes.”

Bill McLucas, who headed the Enforcement Division between 1989 and 1997 and is now a partner at WilmerHale, warned Grewal not to create the impression that he is closing the door to discussion if he wants to create confidence in the process. “It is really important that people feel like they get a fair hearing.” He said he too was at Wells meetings wondering sometimes “do I really need to meet on this?” But by sitting through the articulation of the defense position and hearing the evidentiary issues, “your sense of the case may well change dramatically.”

Grewal seemed taken aback by the reaction to his SEC Speaks remarks, saying “I’m talking about reducing maybe 5 percent or 10 percent of the meetings that don’t make sense.” Andrew Ceresney, former enforcement chief from 2013-2017 and current partner at Debevoise & Plimpton, offered that Grewal has given him Wells meetings, and that he listened carefully and conducted a good, interactive meeting.

Admissions. Director Grewal also indicated at SEC Speaks that the Commission will stay closer to the policy of former Chair Mary Jo White on requiring admissions from respondents in egregious cases; a policy that Chair Gensler’s predecessor Jay Clayton did not emphasize.

Noting that admissions can have powerful consequences in collateral civil litigation, Bondi asked about what specific circumstances would prompt Grewal to seek individual admissions of wrongdoing. There are considerations that must be taken into account when considering seeking an admission, Grewal said, but in some cases, “there is a special need for public accountability.” He said the guideposts have not moved since the Mary Jo White-era admissions policy. As was the case in that era, he said, admissions are a tool in the SEC’s tool kit and they will use it in appropriate cases.

“The guidebooks are those cases where there are large numbers of harmed investors or the conduct was otherwise egregious and poses significant risks in the market. Cases where admissions would aid investors in deciding whether to deal with a particular party in the future.”

Regarding negotiations with companies, “do you bluff?” asked Bondi, clarifying that he was asking whether staff can tell defense counsel that they may seek a particular remedy or bring an enforcement action when they don’t anticipate that they have the votes on the Commission or permission to pursue that remedy. “No, bluffing is not

permitted,” responded Grewal.” Once we lose our credibility in these conversations our job is much more difficult to do. So it is not a tactic.”

ESG enforcement. Asked what role he expects the Enforcement Division to take in promoting the SEC’s ESG agenda, Grewal responded that while there is a lot of talk about rulemaking, his focus is on the rule of law. The division is watching for “greenwashing,” he said, and carefully watching ESG-branded products and funds in the asset management space.

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