Is Policy Shift on the Way for SEC Settlements?

by Bettina Eckerle

The SEC currently allows investment advisers and other registered entities to resolve enforcement actions without admitting fault. Press releases and SEC orders frequently state that the charged firm or individual "consented to the entry of the settled order without admitting or denying any of the findings."

It looks as if that is about to change. SEC Chair Mary Jo White recently announced that the agency will require admissions of wrongdoing prior to settling some cases going forward. Speaking before reporters at a CFP Network conference, she stated, "There may be particular individuals or institutions where it is very important it be a matter of public record that they acknowledge their wrongdoing, and if not you go to trial."

The SEC's neither-admit-nor-deny settlement practice has come under fire in recent years, particularly in the wake of the financial meltdown. U.S. District Court Judge Jed Rakoff famously refused to sign off on a settlement between Citigroup and the SEC that contained the language and has been a vocal critic of the SEC's policy.

While a formal policy has not yet been announced, a June 17 email from Co-directors of the Division of Enforcement to SEC staff notes that "there may be certain cases where heightened accountability or acceptance of responsibility through the defendant's admission of misconduct may be appropriate, even if it does not allow us to achieve a prompt resolution."

The email further clarifies that the new requirements would be limited to certain types of cases, including:

- Misconduct that harmed large numbers of investors or placed investors or the market at risk of potentially serious harm;
- Where admissions might safeguard against risks posed by the defendant to the investing public, particularly when the defendant engaged in egregious intentional misconduct; or
- When the defendant engaged in unlawful obstruction of the Commission's investigative processes.

In order to encourage settlement and avoid costly litigation, the old policy will still apply to the majority of cases, according to Mary Jo White.

As always, if you have questions or comments, please call, e-mail or tweet me @NYBusinessLaws.

Eckerle Law offers legal advice in a variety of transactional and regulatory matters and serves companies' plenary business law needs. Its founder, Bettina Eckerle, is a veteran of Debevoise & Plimpton and Wachtell, Lipton, Rosen & Katz. She also served as the General Counsel of two companies en route to IPO. Please visit the Eckerle Law website for more details.