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Reforming SEC’s Wells Process Can Promote Transparency, Fairness

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The Securities and Exchange Commission’s enforcement division has long protected US markets by rooting out fraud and other misconduct. But despite many changes in the enforcement function, the Wells process—the mechanism through which prospective respondents are given notice of potential charges and allowed to explain why action is unwarranted—remains largely the same.

Since the 1970s, the commission has created specialized units, flattened the organizational chart, and embraced new theories in response to high?profile scandals and market events. Enhanced remedies have developed through the Insider Trading Sanctions Act of 1984, the Remedies Act of 1990, the Sarbanes–Oxley Act in 2002, and Dodd–Frank Wall Street Reform and Consumer Protection Act in 2010.

Revisiting the Wells process periodically makes sense for the staff, the agency, and respondents, and wouldn’t weaken enforcement. Instead, it would enhance the consistency and reliability of charging decisions, improve perceptions of fairness, and reduce the risk that the agency’s extraordinary but necessary powers are misused.

Need for Reform

The SEC’s growing reach has amplified the stakes of every enforcement action. The scope of data involved for collection and production in an investigation likely looks far different compared with the 1970s. Penalties can seem to bear little relation to the statutory framework and relevant legislative histories, and negligence claims under statutes not intended to be punitive are increasingly common. Respondents face lifetime bars, multimillion?dollar fines, and follow?on civil litigation.

At the same time, the division’s discretion can seem opaque and inconsistent. Certain practices foster uncertainty and undermine the process’s core purpose: to ensure that both staff and commissioners consider all relevant material before imposing sanctions.

Process Criticisms

Wells submissions come in a wide variety. Chairman Paul Atkins referenced some submissions that may shade facts or advance bad arguments, some that nudge the commission in a different direction, and some that may be truly exceptional. Regardless of the substance, improvements could be made to the process.

Lack of uniformity and predictability. Investigations with similar facts can result in entirely different procedures. Some regional offices and groups routinely send notices and allow for meaningful advocacy; others don’t. Even within a single investigation, the enforcement manual affords the staff broad discretion to deny access to non?privileged documents or to bypass the notice altogether when they deem time is of the essence.

Limited transparency. Many Wells notices identify only the statutes and remedies the staff intends to recommend. Without a factual proffer, counsel must piece together the case from testimony and subpoenaed documents, often with only a few weeks to respond. Reverse proffers and “open jacket” reviews, where the staff shares the core evidence and legal theory, remain inconsistent. The commission doesn’t publish statistics on how often notices are issued, how frequently submissions change outcomes, or whether certain offices are more receptive than others. This opacity makes it difficult to advise clients and undermines public confidence.

Fairness concerns. The Wells process was created when the SEC primarily sought injunctions and disgorgement. Today, a submission may be used by the staff in subsequent litigation and shared with other regulators. Courts have held that submissions are discoverable by private litigants and not protected by settlement?privilege rules.

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Expressing remorse or offering remediation carries downside risk. Further, the time afforded to prepare a submission is often too short. Respondents may have spent years cooperating with an investigation only to be given 14 to 21 days to rebut complex allegations and propose appropriate remedies. Meetings with senior enforcement officials are limited, and guidance on what makes an effective submission is minimal.

Enhancing Wells

Improving the Wells process doesn't require diminishing enforcement or taking away all discretion; it requires codifying practices that promote fairness, consistency, and transparency.

Adopt uniform rules. Through notice?and?comment rulemaking, the SEC could formalize when a Wells notice will be provided, the content it must contain, and the presumptive response period. Consistency should be the goal. Absent exigent circumstances, every respondent should receive a notice or similar process that identifies the conduct at issue, the applicable statutes, and the key facts on which the staff relies. A baseline 35?day response window would give counsel time to review the record and prepare a meaningful submission.

Guarantee file access. Respondents should have a presumptive right to review non?privileged portions of the investigative file. Denials should require approval by senior officials and a written explanation. A reverse proffer or charge conference should be standard to ensure respondents understand the evidence and theory they must address.

Protect advocacy. The commission should treat advocacy in a Wells submission as non?admission settlement material that can't be used as an admission of wrongdoing. Sharing with other agencies should be limited to instances where the submission contains false statements or where sharing is legally required. The SEC should seek a narrow FOIA exemption for closed?investigation submissions to reduce the risk of discovery by private litigants.

Publish metrics. Regularly publishing anonymized statistics on the number of notices issued, the percentage of investigations closed after submissions, and the average response period would build confidence and help practitioners advise clients.

Resource fairness for individuals and small businesses. Large corporations may be able to afford extensive advocacy; individuals and small businesses often can't. The commission should provide guidance templates and, where appropriate, pro bono resources for pro se respondents and small businesses. An independent advisory committee could assess whether the process remains fair and recommend improvements.

The enforcement division's formidable authority is vital to market integrity. A strong enforcement program will always remain key to protecting investors and the integrity of our markets. But with great power comes the responsibility to afford those under investigation an opportunity to be heard. The Wells process was born out of a recognition that fairness enhances enforcement by ensuring the staff and commissioners see the complete picture.

By formalizing procedures, improving transparency, and respecting due process, the commission can restore balance, strengthen the legitimacy of its enforcement program, and better serve the investing public.

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