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Securities Enforcement Update September 29, 2025

SEC Resets Stated Waiver Policy: Commission to Simultaneously Consider Enforcement Settlements and Collateral Waivers

The policy change will enable entities considering settlement of a Commission enforcement action to make a decision fully informed of the collateral regulatory consequences of a settlement.

On September 26, 2025, SEC Chairman Paul S. Atkins issued a statement announcing that the Commission will simultaneously consider enforcement settlements and collateral waiver requests. The announcement is a reversal of the Commission's stated approach during the Biden administration and a return to a policy adopted in 2019 by then-Chairman Jay Clayton, and demonstrates the Commission's focus on its capital formation mission. The policy change will enable entities considering settlement of a Commission enforcement action to make a decision fully informed of the collateral regulatory consequences of a settlement.

Key Takeaways

The September 26, 2025 announcement:

- Restores the Commission's practice to simultaneously consider offers of settlement by entities and requests by those entities for waivers from certain collateral effects of the settlement, such as WKSI ineligible issuer status and Regulation A and D disqualification;

- Establishes a process permitting an entity to withdraw its offer of settlement if the Commission denies the accompanying waiver request, effectively making settlement offers contingent on the waivers;
- Provides greater transparency to potential defendants and respondents in enforcement proceedings that trigger collateral consequences; and
- Mitigates the uncertainty and risk to a settling party of being bound to a settlement without knowing whether the Commission or, by delegation, the Commission's Staff will grant important waiver relief from a regulatory disqualification.

Disqualification Waivers: What They Are and Why They Are Important

Parties that are considering settling an SEC enforcement proceeding must consider not only the sanctions expressly contained in the settlement order, such as disgorgement and penalties, but also the potential collateral consequences that the order might trigger. For example, SEC regulations provide that an issuer may become "ineligible" to register and offer securities as a well-known seasoned issuer (WKSI) for three years if it is found to have violated the anti-fraud provisions of the federal securities laws or is subject to an injunction prohibiting such violations.[1] Other privileges that may be affected by an SEC enforcement order, depending on the respondent and violation, include:

- For issuers,
    - The statutory safe harbors under Section 27A of the Securities Act of 1933 (Securities Act) and Section 21E the Securities Exchange Act of 1934 (Exchange Act) for forward-looking statements, for a three-year period;
    - Private offering exemptions under Securities Act Regulations A, D, and Crowdfunding, for varying time periods depending on the nature of the violation;[2] and
    - For certain small business investment companies and business development companies, exemption from registration under the Securities Act under Regulation E;[3]
- For broker-dealers (in addition to impacts to securities offerings), membership in self-regulatory organizations such as FINRA;
- For registered investment advisers, the ability to receive cash fees for solicitation under Rule 206(4)-3 of the Investment Advisers Act of 1940 (Advisers Act);[4] and
- For individuals, the ability to serve in certain capacities pursuant to Section 9(a) of the Investment Company Act of 1940 (Investment Company Act).[5]

Loss of these privileges can have significant adverse consequences—for instance, on the ability of a public company to access capital on an immediate basis, with no involvement by the SEC Staff, which can be particularly important in volatile and dynamic markets, or the ability of an investment adviser to participate in the private capital markets pursuant to the safe harbor from registration. The loss of these privileges can also create administrative hurdles – and even barriers, in the case of Regulation A and D disqualifications – that increase cost and delay and act as an additional “penalty” on market participants seeking to settle an SEC investigation.

As an escape valve, the legal framework for each privilege allows entities and individuals subject to such disqualifications to seek waivers from these prohibitions from the Commission. Many requests are granted at the discretion of the Commission for “good cause,”[6] though often without much explanation or analysis.[7] The lack of clear criteria can create challenges for companies and individuals weighing whether to settle SEC enforcement actions, as it can be difficult to predict whether a particular waiver request will be granted.[8]

Recent History of the SEC’s Approach to Disqualification Waivers

To alleviate some of the uncertainty in the waiver-request process, in 2019, SEC Chairman Jay Clayton announced that “an offer of settlement that includes a simultaneous waiver request” will be “presented to, and considered by, the Commission as a single recommendation from the staff,” thereby streamlining the process and creating more predictability and transparency for regulated entities and individuals. While the Commission would be “under no obligation to accept any settlement offer and may determine not to accept a simultaneous offer of settlement and waiver request,” it would allow an issuer whose waiver request is denied to decide not to proceed with the settlement at all under those circumstances.

In 2021, at the outset of the Biden administration, Acting Chair Allison Herren Lee reversed course. Stressing the need “to reinforce the critical separation between the Commission’s enforcement process and its consideration of requests for waivers,” she announced that the Commission would “no longer recommend to the Commission a settlement offer that is conditioned on granting a waiver” so that the waiver process would not be “used as a bargaining chip in settlement negotiations.” Commissioners Peirce and Roisman issued a statement disagreeing with the change and noting that it “marks a return to an unwieldy process that treats as completely separate what is in fact interrelated.”

Friday’s Announcement – What It Means

Chairman Atkins’s announcement returns the Commission’s consideration of waivers to the approach under Chairman Clayton and sets forth a clear, formalized process. The SEC will permit “simultaneous consideration” of settlement offers and waiver requests that are submitted by the SEC Staff as a single recommendation. Should the Commission deny the waiver request, the settling party will have five business days to confirm to SEC Staff that it is willing to move forward with that portion of the settlement offer accepted by the Commission; otherwise, the settlement order will not be issued.

During periods when the consideration of settlement offers and waiver requests has not been linked, entities navigating SEC enforcement actions have experienced frustration in attempting to weigh the costs and benefits of a proposed resolution given the uncertain outcome of their waiver request. This uncertainty has been compounded by a lack of reporting and information concerning the likelihood of any specific request being granted, particularly if the respondent is a financial institution and has a relatively recent history of settled SEC enforcement actions. As a result, Chairman Atkins's announcement adds much-needed transparency to the SEC settlement process and reduces administrative hurdles to capital formation.

For any entity making a settlement offer, careful consideration is required of, among other things, the specific charges, the forum for resolution, and the impact of continuing obligations on any disqualification. And beyond any SEC resolution, entities must also understand the full extent of disqualifying events that may result from other resolutions or orders not involving the SEC. Indeed, orders issued by other federal agencies and departments—including the U.S. Commodity Futures Trading Commission, the National Credit Union Administration, and the United States Postal Service—by state securities, banking, or insurance regulators, or by any court of competent jurisdiction could trigger collateral consequences under the federal securities laws.

[1] Securities Act Rule 405 (defining "well-known seasoned issuer" and "ineligible issuer").

[2] *See* Securities Act Rule 262 (Regulation A disqualification); Securities Act Rule 506(d) (Regulation D bad actor disqualification); Regulation Crowdfunding Rule 503 (Regulation Crowdfunding disqualification).

[3] *See* Securities Act Rule 604 (Regulation E suspension of exemption).

[4] *See* Investment Advisors Act Rule 206(4)-3 (disqualification from ability to receive cash fees for solicitation).

[5] *See* Section 9(a) of the Investment Company Act.

[6] *See, e.g.*, Securities Act Rule 405 ("An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.")

[7] *See* U.S. Securities and Exchange Commission, Division of Corporation Finance No-Action, Interpretive and Exemptive Letters, "Rule 405 - Determination regarding ineligible issuer status", available at https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action#405 (publishing WKSI waiver requests and associated Commission orders).

[8] There have also been voices objecting to the granting of waivers, especially in cases of issuers that have committed criminal violations or entered into multiple disqualifying settlements. *See, e.g.*, Commissioner Kara M. Stein, Remarks Before the Consumer Federation of America's 27th Annual Financial Services Conference (Dec. 4, 2014), available at http://www.sec.gov/News/Speech/Detail/Speech/1370543593434 ("automatic disqualifications strengthen accountability, and carry the potential for deterrence that no injunction or financial penalty can match. They are the law, they are powerful, and they matter. The Commission can waive the disqualifications, but only if there is good cause. That standard must be applied with the utmost care."); Commissioner Kara M. Stein, Remarks at the "SEC Speaks" Conference (Feb.

20, 2015), available at https://www.sec.gov/newsroom/speeches-statements/022015-spchckms ("The fact that violation of law is distinct from the particular privilege does not mean that a waiver should automatically be granted. If we were to follow that approach, then we would be simply ignoring the statutory and regulatory requirements that impose disqualifications based on serious misconduct."); Commissioner Kara M. Stein, Dissenting Statement Regarding Certain Waivers Granted by the Commission for Certain Entities Pleading Guilty to Criminal Charges Involving Manipulation of Foreign Exchange Rates (May 21, 2015), available at https://www.sec.gov/newsroom/speeches-statements/stein-waivers-granted-dissenting-statement ("Allowing these institutions to continue business as usual, after multiple and serious regulatory and criminal violations, poses risks to investors and the American public that are being ignored. It is not sufficient to look at each waiver request in a vacuum.").

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