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REASSESSING THE SEC WELLS SUBMISSION

Lawyers representing clients who receive a "Wells" notice that the Commission staff intends to recommend an enforcement action against their clients have long debated the wisdom of making a Wells submission arguing against such charges. The author discusses the uses of a pre-Wells meeting or "white paper" in an effort to avoid a Wells notice entirely, and if that fails, the best practices for parties and counsel considering whether and how to respond to the notice once it is issued.

By Marc J. Fagel *

Counsel representing parties in Securities and Exchange Commission investigations have long debated the value of making a "Wells submission" – the post-investigation brief in which potential defendants attempt to dissuade the SEC from bringing an enforcement action. For the past 40 years, the SEC has had a policy requiring, in most cases, that the enforcement staff conducting an investigation give notice to potential defendants that the staff plans to recommend that they be sued. This so-called "Wells notice" (named for the attorney who chaired the committee recommending the notification procedure) provides an opportunity for the proposed party to make a written submission to the SEC explaining why such charges are unwarranted.[1]

One of the most challenging decisions facing counsel during an SEC investigation is how to respond to a Wells notice. Making a written submission can present significant risk. The submission is admissible against the party should litigation ensue and can help provide the SEC with a blueprint of the party's anticipated defense strategy. It can also be shared by the SEC with other regulators, including criminal authorities, and may be discoverable by private litigants. At the same time, the benefits of the submission may be limited. The enforcement staff handling the investigation is unlikely to change course by the time they have decided to send the Wells notice, and it is unclear how much impact, if any, the submission will have on the Commissioners,

[1] The SEC's Division of Enforcement may not institute or settle proceedings until authorized to do so by a majority vote of the five Presidentially appointed Commissioners. Hence, at the conclusion of the investigation, the enforcement staff will make

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a recommendation to the Commission that certain individuals and/or entities be charged with specified violations of the federal securities laws.

* *MARC J. FAGEL is a partner in Gibson, Dunn & Crutcher's San Francisco office and a member of the firm's Securities Enforcement practice. Prior to joining the firm, Mr. Fagel spent nearly 16 years with the SEC, including serving as Regional Director of the SEC's San Francisco Regional Office from 2008-2013 and, before that, as head of enforcement for the office. He can be reached at mfagel@gibsondunn.com.*

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who rarely second-guess enforcement staff recommendations.

Recently, however, a study by the *Wall Street Journal* provided at least some support for the utility of Wells submissions. Based on a review of data provided by the SEC, the *Journal* article found that of the 797 individuals who received Wells notices from 2010-2012, 159 (or nearly 20%) were not sued by the SEC.[2] Unfortunately, the study leaves many questions unanswered. Most significantly, the SEC did not indicate how many of those individuals actually made Wells submissions (as opposed to having the matter dropped on the SEC's own volition). Moreover, the *Journal* article solely addressed Wells notices sent to individuals rather than corporate entities. The SEC reported that 387 companies and other entities received Wells notices during the same two-year period, but did not disclose how many of those companies were ultimately sued by the agency.

Nonetheless, the study at least suggests that, in certain circumstances, a party may be successful in persuading the SEC not to bring charges. The question, then, is how to maximize the odds of a favorable result while minimizing the risks associated with making a written submission. What follows are some suggestions and best practices for parties and counsel considering how to respond to an SEC Wells notice.

Pre-Wells Considerations: Requesting a Pre-Wells Meeting or "White Paper"

One option for counsel to consider is attempting to avoid the Wells notice entirely. As an investigation draws toward its conclusion, and an individual or company thinks it likely that the investigative staff will be recommending charges, counsel can raise with the staff the possibility of a pre-Wells meeting. Such a discussion could provide a chance to try to talk the staff into forgoing a case entirely or pursuing lesser charges. In the alternative (or in conjunction with the meeting), counsel can offer to submit a "white paper" or other written presentation laying out the party's defense. An early conversation with the staff may also provide an opportunity to discuss a potential settlement without a Wells notice being sent.

There are several advantages to engaging in such discussions outside of a formal Wells process. First, the Dodd-Frank Act mandated a 180-day time limit after the Wells notice for the SEC to commence an enforcement proceeding. While six months may seem like a long time for the SEC to decide whether or not to move forward, in a large, complicated case – particularly one involving multiple parties, multiple regulators, and protracted settlement negotiations – it is not unusual for the process to drag on for many months. Beginning the process of discussing the case and its possible resolution without the Dodd-Frank clock ticking could provide additional time for negotiations and prevent a situation where the SEC runs out of time and simply files the case.[3]

In addition, the receipt of a Wells notice may trigger public disclosure obligations (particularly for public companies or regulated investment entities).[4] Notably, the staff will typically include in its Wells notice all of the charges it could possibly bring and all of the relief it could conceivably seek, even though there is some likelihood that the staff would be willing to settle to lesser charges and reduced sanctions, or some possibility that counsel can persuade the staff to pursue a narrower

[2] Jean Eaglesham, SEC Drops 20% of Probes after "Wells Notice," Wall St. J. (Oct. 9, 2013).

[3] Dodd-Frank provides mechanisms for the Division of Enforcement to obtain extensions of the 180-day rule. However, particularly in an atmosphere where the SEC is under significant pressure to demonstrate its tenacity, the Division may have concerns about the optics of extending the time limit.

[4] Interestingly, a federal court recently held that a public company did *not* have a duty to publicly disclose its receipt of an SEC Wells notice, dismissing a class action in which plaintiffs alleged the company violated Section 10(b) by failing to disclose the notice. *Richman v. Goldman Sachs Group, Inc.*, 868 F.Supp.2d 261 (S.D.N.Y. 2012). Nonetheless, other courts may disagree, and the materiality of the notice may be fact-specific, turning on the company's assessment of the risk that the SEC will commence an enforcement action that could have a material impact on the company's financials.

litigated action. So a company could be put in the position of disclosing to the public a worst case scenario, even where such an outcome is highly unlikely. Talking to the staff before the laundry list of charges and relief is set forth in a Wells notice could help the company limit its disclosure risk.

Of course, the staff is under no obligation to engage in these pre-Wells discussions and is much more likely to do so if it believes the process may result in a settlement; if it appears simply to be an attempt for defense counsel to argue against the case, the staff may prefer to begin the formal Wells process and avoid delays. Nonetheless, even where a settlement is not on the table, in an unusually complicated or novel matter, the staff may have some desire to engage in discussions and receive a "white paper" elucidating the issues without the time pressure of the Dodd-Frank 180-day rule.

Wells Meetings and Related Discussions

Should the staff go forward and issue a Wells notice to a proposed defendant, counsel will need to move quickly to get a better understanding of the SEC's case and formulate a response strategy. The typical Wells notice is cursory in nature, setting forth only the causes of action the staff intends to pursue and the remedies it may seek. The written notice does not typically include any elucidation of the specific theories the staff plans to advance or the evidence on which these theories rely. It is thus imperative for counsel to set up a meeting, or at least a phone call, as soon as possible with the investigating staff. (As the Wells notice generally provides a short turnaround time for a written submission, typically two weeks, counsel planning to make a submission and meet with the staff in the interim would be well-served by seeking an extension of time.) A meeting with the staff gives the Wells recipient and counsel an opportunity to hear more about the SEC's case, both the nature of the evidence uncovered in the investigation and the staff's explanation for why it believes the evidence supports a particular securities law claim.

Counsel will, of course, have some general understanding of the facts by that point in the investigation. But counsel will not generally have been privy to testimony or interviews of other witnesses or documents produced by other parties. Although the Division of Enforcement does not have an "open file" policy requiring the staff to disclose its investigative records to a proposed party before initiating the enforcement action, the staff often has an interest in sharing at least some information at the Wells stage. Doing so may increase the ability of the parties to discuss settlement. It will also lead to a more useful Wells submission; the Commissioners, and others involved in reviewing the investigative staff's enforcement recommendation, expect to see a Wells submission that addresses the key facts and legal theories at issue in the case.

The SEC's Enforcement Manual encourages the staff to consider the extent to which sharing portions of its files will allow both the staff and the Wells recipient to assess the strength of the evidence.[5] At the same time, the Manual delineates certain instances where the staff is unlikely to share information from its files, such as where the prospective defendant failed to cooperate or invoked his or her Fifth Amendment rights, or where there is an ongoing investigation by the SEC or another regulator and disclosing the information could adversely impact that investigation.

Although the Manual provides that a Wells recipient will generally be limited to a single meeting with the staff, as a practical matter one should view this as a two-step process. During the initial post-Wells meeting or call, counsel should focus on learning as much as possible about the case, including the nature of the evidence, the staff's legal theories, and the relief the staff intends to seek. Once counsel has had an opportunity to process the information and, with the client, make a determination whether to pursue settlement negotiations or submit a written Wells, a follow-up meeting should also be considered. This subsequent meeting, which should include more senior enforcement supervisors at the SEC, provides the opportunity to present a defense of the case, whether or not accompanied by a written Wells submission (as well as to explore settlement if favored by the client).

One final matter for counsel to consider is whether to try to escalate the discussion to more senior Division of Enforcement officials in Washington, DC, up to and including the Division Director. These meetings are not necessarily granted and are often reserved for unusually high profile or controversial matters presenting significant policy questions. But where the stakes are high enough and there is a concern that the line-level staff may be too close to the investigation to have an objective appreciation of its implications, such a meeting may be appropriate. When seeking such a meeting, counsel should make the request through the staff, rather than attempting to reach out directly to more senior

[5] Enforcement Manual, §2.4, *available at* www.sec.gov/divisions/enforce/enforcementmanual.pdf.

personnel. As the senior officials will have much less detailed familiarity with the matter than the investigating staff, it is usually preferable to have made a written Wells submission in advance of the meeting (subject to the considerations discussed below).

To Write or Not To Write

As noted earlier, making a written Wells submission presents some risk to the party. The submission is generally considered to be admissible in court, and admissions contained in the document (or representations viewed by a finder of fact to be inaccurate or misleading) can prove damaging if the SEC decides to proceed with the action. Those risks are exacerbated by the fact that the SEC may share the Wells submission with other regulators, including criminal authorities. In addition, under some circumstances the document may be discovered by third parties (such as private class action plaintiffs or other litigants) through a Freedom of Information Act request to the SEC, where the SEC makes the submission part of the public litigation record (*i.e.*, as an exhibit to a motion), or through a subpoena to the party making the submission.[6]

Given the potential consequences of making a written Wells submission, there are certain circumstances where the balance may tip against doing so. For example, where there is known or likely criminal interest in the case, the collateral damage of handing the government a written statement could be significant. Similarly, the existence or likelihood of a parallel class action or other private litigation could render a written party statement too damaging, at least where the document concedes material facts.

Another scenario in which a Wells submission presents serious risk is in an unusually complicated case involving a large number of witnesses providing testimony and documents to the staff, and where the Wells recipient has limited access to such evidence. Absent an "open file" shared by the staff, there could be significant uncertainty about the stories told by other witnesses, and staking out a position in a Wells submission could be hazardous. The proposed party may make statements in the Wells contradicted by other evidence, damaging his or her credibility. (This does not necessarily mean that the party is being dishonest; given the passage of time, a party's recollection may be faulty until refreshed by other materials in the record.) A written Wells may also lock the party into a position and limit counsel's ability to revisit his or her arguments and strategy once additional facts come to light during discovery.

Finally, where the nature of the case – such as the egregiousness of the alleged misconduct – makes it all but certain that the SEC will be moving forward with the enforcement action, one has to question whether a Wells submission is worth the risks (or the resources). Where litigation is inevitable, counsel may determine that providing the government with a blueprint of the defense strategy is not in the best interests of the client.

The Written Wells

The above circumstances aside, the Wells notice usually provides the final opportunity to convince the SEC to stave off an enforcement action, and an opportunity whose up-side will generally outweigh the risks and resource costs. Once a decision is made to provide a Wells submission, it is important to understand the audience for the submission and the arguments most likely to carry weight with various constituencies within the SEC. To do so, one should first step back and appreciate the somewhat convoluted process the enforcement recommendation must go through before an action is ultimately filed by the SEC.

As noted above, the enforcement staff can only recommend a course of action; the five-member Commission itself must vote to authorize the case. Hence, at around the same time that the Wells notice is issued, the staff will begin drafting what is known as the Action Memo, a 20-odd page brief for the Commission detailing the essential facts, the legal basis for the claims, any significant policy issues or litigation risks posed by the matter, and the proposed remedies. (Where applicable, the memo will also address any settlement offers made by proposed defendants and the staff's recommendation for accepting or rejecting the offers.)

The Action Memo – accompanied by any Wells submissions – will be circulated to senior Enforcement

[6] A party may attempt to preserve the confidentiality of the submission by including some discussion of proposed settlement terms and arguing the document to be inadmissible under Federal Rule of Evidence 801(d)(2). However, one federal court has held that the settlement discussion within a Wells submission could be carved out and the rest of the document subject to production in related securities litigation. *In re Initial Public Securities Litigation*, 2003 US Dist. LEXIS 23102 (S.D.N.Y. Dec. 24, 2003). Similarly, the SEC's Enforcement Manual provides that "The staff may reject a submission if the person making the submission limits its admissibility under Federal Rule of Evidence 408 or otherwise limits the Commission's ability to use the submission pursuant to" the SEC's routine uses of information. Enforcement Manual, §2.4.

officials, including supervisors in headquarters or the local regional office overseeing the investigation, unit chiefs (for cases investigated by one of the Division's specialized units), and ultimately the Director(s) of the Division of Enforcement. The Memo will then be forwarded to the appropriate rulemaking/policy Divisions, such as the Division of Corporation Finance and the Office of the Chief Accountant for public company accounting fraud cases, or the Division of Investment Management for matters involving investment advisers. The Memo will also be provided to the SEC's Office of the General Counsel, and ultimately to the five Commissioners and their counsel. Following review of the recommendation, the matter will be discussed and voted upon at a nonpublic "closed meeting," after which, if authorized, the staff will file the action. Not surprisingly, the entire process from Wells notice to case filing can take several months.

Each of these audiences may have a different set of concerns and priorities. The Enforcement Division leadership, for example, may be focused on specific evidentiary issues and the ability of the trial team to prevail in litigation, while the rulemaking Divisions may be more focused on the policy implications of the case. As described in more detail below, different arguments may carry weight with different reviewers.

Facts. Members of the defense bar have divergent opinions on delving too deeply into the facts and evidence in the Wells submission. Some advise against doing so, viewing it as rarely proving persuasive to the SEC; indeed, the 1972 Wells Release announcing the Wells policy (which is sent along with the Wells notice) specifically recommends that parties instead focus on legal and policy arguments.[7]

Nonetheless, in certain situations there can be great benefit in a strong factual presentation. Rather than diving too deep into the weeds and arguing over contested facts, the submission should emphasize evidence that rebuts the staff's case in chief or supports an affirmative defense. While the Action Memo is intended to present an objective assessment of the case for the Commissioners, there may be a tendency among some enforcement attorneys to advocate on behalf of the case they just spent the past few years investigating. Coupled with pressure from the Commissioners and their staff to keep recommendation memos to a manageable length, the enforcement staff may give short shrift to the weaknesses in their case and the strength of the proposed parties' defenses. Similarly, during the investigation itself, the staff may have focused on uncovering evidence supporting its theory of the case and failed to explore exculpatory evidence. As a result, there may be an opening for defense counsel to educate the various SEC reviewers of the recommendation on the evidentiary shortcomings of the proposed action.

A strong factual presentation may be particularly useful in a broad investigation involving multiple potential defendants, where the staff's memo may pay limited attention to any one individual or entity. For example, the staff may lay out the general parameters of the alleged violations, but not delineate evidence supporting (or refuting) a particular defendant's scienter and precise role in the misconduct. The Wells submission should thus focus directly on the targeted individual or entity, and highlight evidence (or lack thereof) pertaining to scienter and that actor's specific involvement or disconnect from the activities at issue in the case.

Law & Policy. As noted in the 1972 Wells Release, the Wells submission should focus particular attention on legal and policy arguments. From a legal standpoint, the Wells submission should be viewed as akin to a summary judgment motion, emphasizing that even if the Commission accepts the staff's factual assertions, such facts do not support the proposed causes of action. Counsel should be mindful of each element of the cause

[7] Specifically, the Release provides:

> "Where a disagreement exists between the staff and a prospective respondent or defendant as to factual matters, it is likely that this can be resolved in an orderly manner only through litigation. Moreover, the Commission is not in a position to, in effect, adjudicate issues of fact before the proceeding has been commenced and the evidence placed in the record. In addition, where a proposed administrative proceeding is involved, the Commission wishes to avoid the possible danger of apparent pre-judgment involved in considering conflicting contentions, especially as to factual matters, before the case comes to the Commission for decision. Consequently, submissions by prospective defendants or respondents will normally prove most useful in connection with questions of policy, and on occasion, questions of law, bearing upon the question of whether a proceeding should be initiated, together

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> with considerations relevant to a particular prospective defendant or respondent, which might not otherwise be brought clearly to the Commission's attention."

Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations (Sept. 27, 1972), *available at* www.sec.gov/divisions/enforce/wells-release.pdf.

of action, particularly the applicable scienter standard and any materiality threshold, and focus the argument on the evidentiary deficiencies relating to these elements.

A challenge to the staff's legal theories may be particularly useful when the theory is relatively novel, untested in prior litigated cases, or subject to divided court opinions. While the investigative staff may be focused on the odds of prevailing at trial in the immediate case, other constituencies within the agency, most notably the SEC's General Counsel, may have broader concerns about the implications of an adverse ruling for the SEC's enforcement program. The risk of creating bad precedent may outweigh the benefit of pursuing the case, or at least the legal theory, even if the SEC believes the claims may be meritorious.

Likewise, policy arguments can be powerful when the case presents novel or controversial issues. Again, while the enforcement staff may not be as concerned with the implications for the case beyond the four corners of the immediate recommendation, other constituencies within the SEC may be particularly receptive to these arguments, and the Wells submission may find a sympathetic ear in one of the rulemaking Divisions or with one or more of the individual Commissioners. A credible argument that the case, or a particular cause of action or remedy under consideration, may have broader implications for or negative impacts on the industry or investor may cause concern for one of the rulemaking Divisions. And while the Commission is typically deferential to the Enforcement Division, authorizing the vast majority of enforcement recommendations, the Commissioners may give more deference to other Divisions on policy considerations for which they have particular expertise.

By the same token, some Commissioners may hold strong views on policy matters raised by the enforcement recommendation. Reviewing public statements by the Commissioners or votes on rulemaking at open Commission meetings can give insight into whether one of the Commissioners is likely to be particularly receptive to a policy-based argument. Although only three votes are required to authorize the enforcement action, a Commissioner with a strongly held position may sway the views of other Commissioners; moreover, recusals due to conflicts (or even simply an absence on the day of the meeting at which the recommendation is considered) can make even one Commissioner's vote crucial.

Additional Uses of the Written Wells

In addition to using the Wells submission to challenge the factual, legal, and policy underpinnings of the staff's proposed enforcement action, counsel and the proposed party should consider several other valuable uses of the document. First, although in the best case scenario a convincing Wells submission may result in a determination not to bring an action, even a favorable reading of the statistics in the *Wall Street Journal* article demonstrates that this is not a typical outcome. However, even where it seems unlikely that the SEC will forgo the action entirely, the Wells submission presents a useful opportunity to argue for less onerous charges. For example, a party can try to establish that there is insufficient evidence to support a scienter-based charge, and that at most only negligence-based causes of action should be pursued. Similarly, the submission can emphasize the deficiency of the record establishing some element of a fraud charge, and push the SEC toward a non-fraud, more technical violation such as a failure to comply with recordkeeping requirements.

While a more limited argument may not prevent the case from going forward, the implications of a non-scienter or non-fraud case may be less damaging to an individual or company in terms of both reputational harm, and potential regulatory or criminal repercussions. Similarly, a narrower complaint with less egregious allegations may also limit the utility of the case for class action plaintiffs or other private litigants seeking to use the SEC's action as a blueprint for their own case.

Second, the Wells submission should emphasize any mitigating factors that weigh against bringing an enforcement action (or at least in favor of reduced charges). The proposed party's cooperation with the government's investigation, remedial measures taken once the impropriety was discovered, prophylactic controls put in place to prevent future violations, and absence of actual harm caused by the alleged violations are all important considerations for the Commission, and may not be given adequate recognition by the enforcement staff in its Action Memo.

Third, the submission may be used to humanize a potential defendant. If there were personal difficulties facing the individual at the time of the alleged misconduct, or something about the individual that would make him or her particularly sympathetic to a jury or other eventual fact finder, this should be highlighted. Even if the Commissioners aren't necessarily swayed by sympathy, they may recognize a legitimate litigation risk in putting the case before a jury notwithstanding the perceived strength of the evidence and moderate the action accordingly. That said, over-reliance on the individual's reputable character is unlikely to be effective. Alas, many perpetrators of securities fraud are upstanding members of the community who attend little

league games and church each weekend, and thus an argument along these lines will likely only gain traction if it truly mitigates the allegations.

Fourth, a vigorously presented defense will help ensure that the staff and Commission appreciate the party's willingness to litigate the matter. The staff may believe there is a good likelihood that the party will settle, and the staff might thus undertake a less thorough review of the strength of the evidence and its legal arguments before presenting its recommendation. While the SEC has an obligation to satisfy itself with the viability of its case even where the parties are settling, as a practical matter the incentives to fairly consider the litigation risks are reduced in settled actions. Emphasizing a party's preparedness to take the matter to trial may cause the Commissioners and other reviewers to more closely scrutinize the recommendation and probe the strengths and weaknesses of the case.

Finally, it is important to recognize that the receipt of a Wells notice does not invariably signal the staff's intent to pursue an enforcement action against the Wells recipient. There are occasions when the staff is uncertain whether to go forward against a particular party or which causes of action should be pursued. Moreover, in a matter involving multiple potentially culpable individuals and entities, the Commission will review not just the staff's recommendations regarding who should be sued, but who should *not* be sued. Particularly when dealing with senior executives, "gatekeepers," and others whose role in the alleged violations is subject to question, the staff may be forced to defend its decision not to recommend charges against a particular actor. In such a case, the staff may "outsource" some of its work, looking to the party itself to put forth his or her best defense for the benefit of the Commission. This does not mean the staff will haphazardly send Wells notices to individuals and entities it has no intention of ever charging; but where it is a close call, the staff may turn to potential defendants to help it make the case for why the case should not be brought.[8] Under these circumstances, it could be a big mistake not to make a Wells submission.

Cautionary Notes

It is worth noting a few approaches to the Wells submission that are generally best avoided. First, alleging misconduct or bias on the part of the investigating staff is unlikely to be well-received. If a party truly believes that the staff is acting unethically or unreasonably during the course of the investigation, consideration may be given to raising the concern with the staff member's supervisors. But questioning the staff's integrity for the first time in a Wells submission will probably not be fruitful; even worse, it may be taken as a sign of desperation, and cause the reviewers of the recommendation, and the Commission, to give less credibility to the remainder of the arguments in the submission.

Second, questioning the SEC's use of resources for a particular case will not typically prove helpful. Particularly in smaller cases, whether in terms of investor harm or the egregiousness of the alleged misconduct, there is a tendency among some counsel to challenge the value of the SEC's pursuit of a particular investigation. The SEC in recent years has become accustomed to hearing accusations that it should be out hunting down the next Madoff or doing something about Wall Street, rather than squandering its limited resources on the matter at hand. However, the SEC has long taken a "cover the waterfront" approach to enforcement, bringing not just large, high-impact cases, but also smaller matters viewed by the agency as important for deterrence purposes or to send a message to some segment of the market.[9] This is not to say that a Wells submission should not take steps to emphasize the technical nature of the case, the lack of investor harm, or the absence of other aggravating factors. Nor need a party refrain from highlighting, where appropriate, the

[8] This approach to the Wells notice may also help the SEC avoid delays. In the event that the Commission concludes an individual or entity should be charged notwithstanding the enforcement staff's recommendation to the contrary, and the individual or entity was never given the opportunity to make a Wells submission, the SEC may feel obligated to begin the Wells process at that late date, causing significant delay. It is a similar concern that may lead the staff to include causes of action and remedies in the Wells notice even where the staff

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may not intend to recommend such charges – better to "overcharge" in the Wells notice than to face a situation where the Commissioners take a different view of the case and the party had no opportunity to address the charge in the Wells submission.

[9] Indeed, in an October 2013 speech, Chair Mary Jo White stated, "Investors do not want someone who ignores minor violations, and waits for the big one that brings media attention. Instead, they want someone who understands that even the smallest infractions have victims, and that the smallest infractions are very often just the first step toward bigger ones down the road." Chair Mary Jo White, SEC, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), *available at* www.sec.gov/News/Speech/Detail/Speech/1370539872100.

unusually resource-intensive nature of the litigation relative to the benefits of a favorable outcome for the SEC. But second-guessing the SEC's case-selection criteria or resource-allocation decisions is unlikely to be given much deference by the agency.

CONCLUSION

The recent analysis of SEC enforcement data by the *Wall Street Journal*, as well as the experience of agency veterans, confirms that at least in certain cases, making a Wells submission can prove highly beneficial for potential defendants, and a knee-jerk reaction against giving the SEC an early look at one's litigation defense strategy may lead to a lost opportunity. In closing, however, it is important to take note of one significant variable arising since the time period assessed by the *Journal*: A dramatic changing of the guard at the Commission. New Chair Mary Jo White (a former criminal prosecutor) and her team of senior enforcement officials (similarly drawn from the ranks of former criminal prosecutors) have wasted no time in establishing a zealous approach to enforcement. The revision of the SEC's long-standing policy allowing parties to settle without admitting wrongdoing is but one example of an aggressive enforcement program. It thus remains to be seen whether the new leadership will be less receptive to defense arguments advanced in Wells submissions. (In addition to Chair White, two additional Commissioners have turned over this year, creating further uncertainty.)

Nonetheless, on balance, it remains essential to consider the potential benefits of a well-crafted Wells submission. Indeed, as the SEC continues to ratchet up the stakes, it becomes all the more important, where feasible, to make one's case as forcefully as possible before the Commission reaches its charging decision. ■