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A Five-Step Guide for Responding to a Wells Notice

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Summary

- A Wells notice is written notice given by the Enforcement Division of the Securities and Exchange Commission that it may bring an enforcement action against an entity or an individual.
- The notice is brief, outlining the proposed charges and relief sought (and sometimes includes a very brief factual summary) relating to the entity or individual. The notice also invites any (voluntary) responsive submission, called a "Wells submission," in which counsel for the Wells notice recipient will have an opportunity to present their side of the story to persuade the SEC to not bring any enforcement action.
- Read more for tips and guidance from an experienced litigator on how to handle these notices.

What is a Wells notice?

It's a written notice given by the Enforcement Division of the Securities and Exchange Commission that it may bring an enforcement action against an entity or an individual. After the SEC completes or is near completing its investigation, it is the general practice of the SEC to notify an entity or individual, through counsel, if the entity or individual is represented, that the SEC Enforcement Staff (referred to hereafter as "SEC staff") has made a preliminary determination that it will recommend to the Commission (the governing body) an enforcement action to be brought for a federal securities violation. (The name "Wells" comes from the name of the committee chair of an SEC advisory group that came up with process in 1972.)

The notice is usually provided via email or mail, with an accompanying phone call by the SEC staff. The notice is brief, outlining the proposed charges and relief sought (and sometimes includes a very brief factual summary) relating to the entity or individual. The notice also invites any (voluntary) responsive submission, called a "Wells submission," in which counsel for the Wells notice recipient will have an opportunity to present their side of the story to persuade the SEC to not bring any enforcement action.

Practice Pointer

If counsel for the Wells notice recipient receives a Wells notice, they should promptly ask for a call with the SEC staff. Counsel will likely learn more about the potential charges and what the SEC Staff may be considering regarding the relief it may seek in an enforcement action.

I got a Wells notice, and am on call with the SEC. Now what?

At least three things usually will happen on the Wells call:

The SEC staff will provide an oral summary of the proposed charges and some factual summary. The SEC staff will likely not be providing extensive factual details—it's a notice call.

The SEC staff also will provide a deadline for submitting a voluntary Wells submission—usually within two weeks of the call. The SEC staff may extend the deadline, at its discretion, depending on the circumstances.

The SEC staff may provide some materials, such as the testimony of the Wells notice recipient (if they testified during the investigation), for review to prepare a Wells submission. Generally, the "discovery" provided by the SEC before a Wells submission will be limited.

Practice Pointer

When counsel gets on the Wells call with the SEC Staff, be professional and be in a completely listening mode. Counsel's job is to learn and understand the proposed charges as much as possible—to the extent that the SEC staff is authorized (or wants) to share such information at that time. Taking good notes is imperative.

This is not the time to express any views or arguments to the SEC staff. Taking an adversarial tone is counter-productive. Counsel should only ask clarifying questions to the SEC staff.

Should I really provide a Wells submission to the SEC?

The answer: It depends.

For many of its cases, the SEC staff expects that potential defendants/respondents will respond to the proposed charges with a Wells submission. The SEC staff frequently finds a well-prepared Wells submission to be helpful in making its charging recommendations to the Commission—particularly in close cases. If no Wells submission is provided, the SEC staff may not be able to accurately assess the litigation risk in bringing an enforcement action.

That concern about error, however, needs to be weighed against whether a Wells submission may realistically persuade the SEC staff to reverse or modify its preliminary determination that an enforcement action against the Wells notice recipient should be recommended.

For example, if there is a known parallel criminal investigation concerning an individual Wells notice recipient, providing a Wells submission is probably not advisable unless the submission addresses purely a legal issue, due to Fifth Amendment waiver concerns in light of SEC Form 1662 which expressly provides that the "Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors."

Next, even an expertly done Wells submission will likely not persuade the SEC staff to forego the enforcement recommendation altogether in a case in which the alleged misconduct appears to be straightforward, egregious, and well-founded.

Presenting a Wells submission is more prudent for the defense when they address and contextualize novel, unique, and/or complicated legal or regulatory issues. The industry's view of the alleged improper practice or conduct may assist the SEC staff in fully understanding the nuances in the nature, scope and materiality (or lack thereof) of the practice and conduct. Pointing to the murkiness of the applicable law governing the alleged improper practice or misconduct could force the SEC staff to reassess the litigation risk and reconsider or modify its preliminary determination. And, because the Wells submissions are reviewed by many people inside the SEC, including (ultimately) the commissioners, a persuasive discussion of the wider policy implications of bringing such case could be helpful as well.

It also makes sense to provide a Wells submission if an individual client has a unique and compelling personal story to tell. The SEC's senior staff and the commissioners do not know the potential individual defendant/respondent, and will likely never meet the individual. The Wells submission may be the only opportunity to discuss who the individual is and how an enforcement action may adversely affect themselves and their family.

Finally, Wells submissions are advisable when the evidentiary record on the alleged misconduct is equivocal, suggesting that it is subject to competing interpretations. In such cases, a persuasive presentation of a counter-narrative, with references to potentially exculpatory or mitigating evidence in the record, could be effective.

Practice Pointer

If there is an interest in resolving the matter during the investigative stage, making a strong, even if not successful, Wells submission could facilitate a dialogue with the SEC Staff about a more reasonable settlement.

OK, I'm going to prepare a Wells submission. What should I do?

In many ways, preparing a Wells submission, which has a 40-page limit, is like preparing a brief for a dispositive motion or an appellate brief. It is a serious undertaking and sufficient thought should be given.

First, ensure that all available record materials concerning the Wells notice recipient have been obtained from the SEC, your client, or elsewhere. As mentioned above, the SEC staff will likely provide limited investigative materials for review. Upon request, SEC staff may provide transcripts of investigative testimony taken during the investigation and the exhibits used in such testimony, which can be particularly helpful in preparing a Wells submission.

Second, while there is more than one way to prepare a Wells submission, an effective response generally includes the following: (1) a factual counter-narrative to the SEC's version of the facts that could be appealing to a potential jury or trier of fact; (2) a discussion of an identified thorny or difficult legal issue that could create a significant litigation risk in the matter; and (3) an analysis of a potential broader policy issue that an enforcement action may raise, potentially adversely affecting the investing public or certain regulated industry sectors. To the extent possible, a Wells submission should include all three elements and carefully discuss them (though the third element—an analysis of policy issue—may not be possible for every case).

Every so often, a counsel for a Wells notice recipient presents a video in lieu of a written submission. While a video may allow a client to come to life, a written medium is generally better to address all key factual and legal issues more thoroughly. In addition, submitting a video of a Wells notice recipient during the Wells stage may become a regrettable decision later (for example, at trial), as that individual's video will likely be treated as an admissible party statement/admission.

Third, if there is evidence that the SEC Staff may not be aware of, overlooked, or tends to be exculpatory or mitigating, that evidence should be weaved into the Wells notice recipient's factual counter-narrative and included as exhibits to the submission. Once the decision is made to provide a Wells submission, there is generally nothing to be gained by holding back such evidence from the SEC Staff during the Wells process as this is the last opportunity to persuade the SEC to reverse its course.

Fourth, if the proposed charges involve a highly technical matter (outside the garden-variety securities context), counsel should consider retaining an expert and providing a copy of the expert's statement/view of such technical matter as part of the Wells submission, particularly in areas where there are few recognized experts.

Fifth, counsel for a Wells notice recipient should consider requesting a meeting with the front office (director and/or deputy director of the Enforcement Division) and/or another senior officer (senior manager, whether in Washington, D.C., or in one of the SEC's regional offices) in the Wells submission for at least three reasons: (1) to further advance and support a Wells submission; (2) to address and answer any questions that the SEC Staff and managers may have after reviewing a Wells submission; and (3) to start a dialogue for a potential resolution of the matter, if there is any mutual interest in resolving the matter before any litigation ensues.

Finally, it should be noted that an effective Wells submission does not contain ad hominem attacks on the SEC staff. Irrespective of the client's (or counsel's)view of the Wells notice, the SEC's investigation that preceded the Wells notice, or

the individual enforcement staff member, the tone in a Wells submission should always be professional. Excessive exhortations are not effective and should be avoided.

Practice Pointer

While the Wells submission may facilitate a settlement, it is, as noted above, not treated as settlement documents entitled to FRE 408 protection. The SEC's Enforcement Manual---which has received judicial deference—provides that attempts to limit either the admissibility of a Wells submission pursuant to Rule408 of the Federal Rules of Evidence or use for purposes described in Form1662 may lead to rejection of the Wells submission. Thus, counsel for Wells notice recipient should not include any settlement discussion or offers in the submissions and, as discussed above, may want to consider the implications of having a Wells submission admitted at trial. Any settlement offer should be made in a separate submission to the SEC.

I've submitted the Wells Submission and learned that I have a meeting with the SEC Staff, including a Senior Officer. What should I do?

First, treat the meeting—which will generally consist of a senior officer, the team that investigated the matter, trial counsel, and other supervisors—like a court appearance. Be on time.

Second, be prepared. The front office/senior officer meetings generally last about an hour, and you need to seize that small window of opportunity to the fullest. Have a prepared, organized set of talking points to address the key issues first. Making a rambling or a "stream of consciousness" speech is not effective.

Third, fully answer the SEC staff's questions. Not knowing the record or law could significantly diminish counsel's credibility before the SEC staff. If additional information could be provided after the meeting, volunteer to do so. Participating in a moot meeting before a Wells meeting may be helpful.

Fourth, the goal is to have an intelligent, respectful dialogue with the SEC staff to persuade them to reverse or modify its preliminary determination about recommending an enforcement action. You should avoid making a fiery closing argument at a Wells meeting—generally, that type of trial-like presentation does not work well in such a meeting. (If such a tactic appears to have worked in a prior SEC matter, that tactic probably was not dispositive; there were probably other reasons why the SEC declined to proceed with an enforcement action.)

Finally, should a client attend the meeting? The answer again: It depends. Sometimes an in-house counsel's presence can show how seriously the entity is taking the matter. The in-house counsel can also describe the entity's innerworkings better than anyone else. For a matter against an individual, the client's presence can really personalize the matter. Having said that, depending on the facts and circumstances, it is sometimes better for counsel to address the questions and comments from the SEC staff.

Practice Pointer

Frequently, the senior officer in attendance at a Wells meeting conveys directly or indirectly their views of the matter during a Wells meeting. Sometimes, a settlement possibility is even expressed. If there is an interest in resolving the matter, be prepared to discuss at least the client's opening settlement framework or position at the meeting as it could help jump start the discussion.

For further guidance on the Wells process, please see: SEC Division of Enforcement's Enforcement Manual § 2.4, at 19–22 (2017).

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