



presents

The Wells Process in SEC Enforcement Actions

Settlement Submissions in SEC Investigations: Evaluating Whether and How to Submit

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

James R. Doty, Partner, **Baker Botts**, Washington, D.C.

Linda Chatman Thomsen, Partner, **Davis Polk & Wardwell**, Washington, D.C.

John J. Carney, Partner, **Baker Hostetler**, New York

Wednesday, January 6, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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Wells Process

James R. Doty

January 6, 2010



What Is The "Wells Process": How Did We Get It And How Has It Evolved?

- **Chairman William J. Casey's Advisory Committee on Enforcement Policies and Practices (the "Wells Committee") and the September, 1972 "Release No. 5310".**
 - An informal process, not a rule.
 - Limited objectives: to place before the Commission, prior to authorization of an enforcement proceeding, the contentions of both the staff and the adverse party.
- Not intended to promote "facial" challenges to Commission process.
- Permissive and voluntary: no requirement of a sworn statement. Exchange Act Section 21(a)(1).

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- Discretion in the Staff to advise prospective defendants or respondents of the general nature of its investigation, including the indicated violations" and the time available for preparing a submission.
 - How has the process evolved, and how has it worked?
 - Timing issues
 - Access to evidence
 - Commission review
 - Disclosure implications

What Comes Next For The Wells In SEC Enforcement Patterns?

- **A "Seaboard" for individuals: Director Khuzami's remarks to the New York City Bar (August 5, 2009)**
 - Cooperation agreements modeled on Deferred Prosecution Agreement?
 - Implications for defense practices.
- Implications of SEC v. Bank of America for settlements.
- Sanctioning patterns and implications for settlement v. litigation.

Presented by
Linda Thomsen
Partner

January 6, 2010

Davis Polk

Davis Polk & Wardwell LLP

NAVIGATING THE WELLS PROCESS IN SEC ENFORCEMENT ACTIONS

How Useful is a Wells Statement: What Makes a Wells Statement effective?

- Focus on the key issues
- Look at the issues from an SEC perspective
- Don't make it personal; don't attack the line staff
- Pay attention to practical issues: time limits, page limits, etc.
- Think about your audience (is it the General Counsel's office, the Commissioners, Enforcement management?) and what will be persuasive to that audience
- Focus on your best arguments; avoid the kitchen sink
- Know what you want to accomplish and write with those goals in mind

What are the Strategic Risks of a Wells Submission?

by
John J. Carney, Esq.

What are the Strategic Risks of a Wells Submission?

- Admissible in an SEC Action?
 - Possibly admissible under FRE 801(d)(2) as either statement against interest or to impeach
 - Wells Submission containing settlement discussions may still be admissible. See, *In re Initial Public Offering Securities Litigation*, 2004 WL 60290, 64 Fed. R. Evid. Serv. 420 (S.D.N.Y. Jan. 2004)

What are the Strategic Risks of a Wells Submission?

- Admissible in Parallel Criminal Proceeding?
 - Common SEC practice is to share Wells with other government agencies to aid in their investigations
 - Statements from Wells submission could be admissible under FRE 801(d)(2) in the parallel proceeding
 - Statements in Wells submissions could be argued to be a waiver of Fifth Amendment

What are the Strategic Risks of a Wells Submission?

- Discoverable by Third Parties in Civil Litigation?
 - After SEC investigation is concluded, a Wells submission may be discoverable under FOIA
 - Third parties can seek discovery of Wells submission in related civil litigation

What are the Strategic Risks of a Wells Submission?

- False Statement Charges?
 - Possibility of inadvertent false statements could lead to risk of prosecution under 18 U.S.C. § 1001

What are the Strategic Risks of a Wells Submission?

- Roadmap to your Defense?
 - Outlines how you plan to defend against the charges, providing the SEC with better insight into how to prosecute the case
 - Once a theory of defense is in writing and shared with the SEC it could be more difficult to adapt to newly discovered facts