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
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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.
- **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.
- Sanctioning patterns and implications for settlement v. litigation.
Presented by
Linda Thomsen
Partner

January 6, 2010

Davis Polk

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
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