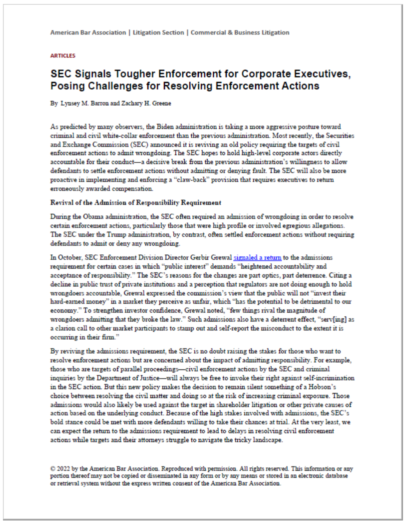
White Collar Attorneys Barron and Greene Address Tougher SEC Enforcement for Corporate Execs in ABA Article

Posted in Publication on March 22, 2022

Miller & Martin White Collar & Corporate Investigations practice leaders Lynsey Barron and Zac Greene published an article titled “SEC Signals Tougher Enforcement for Corporate Executives, Posing Challenges for Resolving Enforcement Actions” in the American Bar Association’s Commercial & Business Litigation Winter quarterly newsletter in March 2022.

To read the full article as published by *ABA*, please click here.



American Bar Association | Litigation Section | Commercial & Business Litigation

ARTICLES

SEC Signals Tougher Enforcement for Corporate Executives, Posing Challenges for Resolving Enforcement Actions

By Lynsey M. Barron and Zachary H. Greene

As predicted by many observers, the Biden administration is taking a more aggressive posture toward criminal and civil white-collar enforcement than the previous administration. Most recently, the Securities and Exchange Commission (SEC) announced it is reviving an old policy requiring the targets of civil enforcement actions to admit wrongdoing. The SEC hopes to hold high-level corporate actors directly accountable for their conduct—a decisive break from the previous administration’s willingness to allow defendants to settle enforcement actions without admitting or denying fault. The SEC will also be more proactive in implementing and enforcing a “claw-back” provision that requires executives to return erroneously awarded compensation.

Revival of the Admission of Responsibility Requirement

During the Obama administration, the SEC often required an admission of wrongdoing in order to resolve certain enforcement actions, particularly those that were high profile or involved egregious allegations. The SEC under the Trump administration, by contrast, often settled enforcement actions without requiring defendants to admit or deny any wrongdoing.

In October, SEC Enforcement Division Director Gerbir Grewal signaled a return to the admissions requirement for certain cases in which “public interest” demands “heightened accountability and acceptance of responsibility.” The SEC’s reasons for the changes are part optics, part deterrence. Citing a decline in public trust of private institutions and a perception that regulators are not doing enough to hold wrongdoers accountable, Grewal expressed the commission’s view that the public will not “invest their hard-earned money” in a market they perceive as unfair, which “has the potential to be detrimental to our economy.” To strengthen investor confidence, Grewal noted, “few things rival the magnitude of wrongdoers admitting that they broke the law.” Such admissions also have a deterrent effect, “serv[ing] as a clarion call to other market participants to stamp out and self-report the misconduct to the extent it is occurring in their firm.”

By reviving the admissions requirement, the SEC is no doubt raising the stakes for those who want to resolve enforcement actions but are concerned about the impact of admitting responsibility. For example, those who are targets of parallel proceedings—civil enforcement actions by the SEC and criminal inquiries by the Department of Justice—will always be free to invoke their right against self-incrimination in the SEC action. But this new policy makes the decision to remain silent something of a Hobson’s choice between resolving the civil matter and doing so at the risk of increasing criminal exposure. Those admissions would also likely be used against the target in shareholder litigation or other private causes of action based on the underlying conduct. Because of the high stakes involved with admissions, the SEC’s bold stance could be met with more defendants willing to take their chances at trial. At the very least, we can expect the return to the admissions requirement to lead to delays in resolving civil enforcement actions while targets and their attorneys struggle to navigate the tricky landscape.