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SEC's 'Wells' Process Is a Bad Bet

Recently, the Securities and Exchange Commission gave a Wells Notice to Maurice Greenberg, the former chief executive officer of American International Group. The document informed Mr. Greenberg that the SEC, under the Securities Exchange Act of 1934, intends to seek civil penalties against him for financial fraud he allegedly committed at AIG.

Mr. Greenberg now has the opportunity to respond to the Wells Notice with a Wells Submission, which gives him a chance, in theory, to defend himself against the accusations in the Wells Notice. The SEC's Wells process is often misunderstood, particularly the Wells Submission part. Most misunderstood are the efficacy and wisdom of making a Wells Submission.

To understand the Wells process, it is necessary to comprehend how SEC enforcement actions work. Much of the in-

vestigation of the SEC's target is done by the SEC's junior lawyers. Ultimately, it is those lawyers, with the support of their bosses who decide to, or not to, make a recommendation to the SEC Commissioners as to whether they should bring action against their target. It is the SEC Commissioners, five individuals, who have the power to authorize the action — or not.

If an action is recommended, the target is informed about it and is invited to make a Wells Submission, allowing the target to explain to the five commissioners why the staff's proposed enforcement action is wrong — factually, legally, policy-wise, or some combination of the three.

If a Wells Submission is made, the staff has the opportunity to submit a reply to it to the five commissioners.

So is making a Wells Submission a good idea? Occasionally, yes. At the end of the Carter administration, the commissioners rejected the staff's proposal of an en-

forcement action against two prominent New York securities lawyers for failing to stop a corporate client from engaging in securities fraud.

Most of the time, however, the commissioners do not reject what the staff proposes. On top of the fact that Wells Submissions seldom work, participating in the Wells process can be dangerous. Any factual statements made in the Wells Submission can be used at a court trial. Moreover, the SEC staff is free to share the Wells Submission with other law enforcement or regulatory agencies. Private plaintiffs also will likely get a copy of the Wells Submission in subsequent civil litigation. And the press or other members of the public can access the Wells Submission via a Freedom of Information Act request.

Many alumni of the SEC's staff believe that the Wells process provides targets with the "last best chance" to persuade the staff and the commissioners that an

enforcement action would be inappropriate. Technically, that might well be true. But more than a few defense lawyers, after weighing all the negatives built into the process, often advise clients to "just say no" to providing a Wells Submission. Sometimes, it is better to make the SEC staff lawyers prove their charges in court.

But Mr. Greenberg's lawyer has not heeded this advice. Instead, he was quoted in the press saying he looks forward to making a Wells Submission: "When the [Commissioners have] had the opportunity to consider all the facts, we believe they will agree [with our position]." If I were a betting man (which I am not), I would not go to Vegas on that one.

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