

SEC Waivers with Strings Attached: the Wave of the Future?

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The SEC recently attached potentially precedent-setting conditions to a waiver from certain automatic disqualifications under the federal securities laws. Without such waivers, defendants that settle securities law charges may automatically be barred from engaging in certain activities or relying on certain advantageous provisions under the federal securities laws. We have previously reported on the SEC's increasing practice of granting such waivers and the criticism this practice has drawn from SEC Commissioner Kara M. Stein and others. See "Can 'Bad Actors' Wave Goodbye to SEC Waivers?" in the Spring 2015 issue of *Expect Focus*. In December, however, the SEC and CFTC settled an action against a large bank over allegations that the bank failed to disclose material information about investment funds offered to its clients. The SEC also conditionally waived a disqualification from future reliance on the private offering exemption in Rule 506 of Regulation D that would otherwise have resulted. The waiver's conditions included that:

- the bank retain an independent consultant to review and monitor its policies and procedures relating to compliance with the allegedly violated requirements;
- the consultant submit a written report annually for five years;
- the bank's management submit each year's report to the SEC for public dissemination, together with a certification that management reviewed the report; and
- the SEC may, for a period of five years, revoke or impose additional conditions on the waiver under certain circumstances.

In a publicly-released statement, Commissioner Stein wrote that the conditional waiver represented a "more outcome-focused approach" than the historically "binary nature of granting or denying waivers." She also touted the transparency that would come from the SEC making public the annual

reports and certifications. It will be interesting to see the extent to which conditions similar to those in this case will become the norm in waivers of this type.

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