The Permanent One Year Ban

An oxymoron? It may appear that way unless you are the subject of an SEC investigation. The regulatory defense practice area at our firm has seen a significant uptick in activity over the last few years, which was inevitable following: i) the Madoff and Stanford ordeals as the SEC attempts to uncover potential frauds and other wrongdoing earlier and prove itself; and ii) subpoena power being given to the local SEC branch offices (getting rid of the necessity of going back to the Washington D.C. office for all subpoenas like it used to be). However, like most things that become more expansive, the increase in regulatory actions brought by the SEC is capturing more and lesser actions and people than what used to be subject to SEC actions. With this expansion there is the greater chance that innocent parties will be subject to an SEC action. In these cases the hope is innocent parties can exonerate themselves in the end or at some point in the process and, in theory, that is how the system should work. However, the problem that arises for anyone facing a regulatory action is that the person faces the prospect of a lengthy, stressful, time-consuming, and possibly expensive process. In some cases the prudent course of action may be to "plead" to a very low allegation with a minor penalty, without admitting or denying any allegations, in order to avoid the process where anything can happen, regardless of fault.

This is where the problem arises for those wrongfully involved in SEC regulatory investigations. There are two components to the problem. The first issue is the way the SEC categorizes violations. The lowest level of SEC allegations and settlements are: i) an officer and director bar, which is a 5-year, 10-year or permanent ban from acting as an officer or director of a public company, ii) a "102(e) bar", which is applicable to accountants and prohibits them from practicing before the SEC for some period of time (typically 2 or 3 years), and iii) a cease and desist from violating certain securities laws in the future (it could name specific securities laws or just a general cease and desist without naming specific securities laws). Therefore, a person accused by the SEC of a securities law violation could plead to a low level penalty and possibly just have a one year 102(e) ban or possibly even just a cease-and-desist with no ban from being an officer, director or accountant for a public company. If this were the only penalty it would likely be an acceptable tradeoff for some who wish to avoid the SEC investigatory process and possible litigation due to cost, stress and time. However, this leads to the second problem, which is how the SEC settlements are announced. The process for all SEC regulatory actions that are "pled out" is to file a complaint against the individual and then immediately enter into the settlement agreement and announce it publicly. Therefore, although the subject of the investigation may have only pled to a low-level allegation with a comparatively low penalty without admitting or denying any of the allegations, and only be prohibited from practicing before the SEC for a period of time or possibly not at all, because the allegations are public and on the internet for all-time for all to see the punishment can act as a permanent bar. In this day and age of intense scrutiny and the risks related to hiring an individual with a past historical violation, even if a person only pled to an SEC investigation to avoid the time, stress and expense of litigation, a short ban or even just a cease and desist could in essence be a lifetime ban from being an officer or director of a public company. This is a very important factor for

those facing SEC regulatory investigations to consider prior to determining how best to handle any actions brought by the SEC.