



The SEC's Gag Rule: An Educational Tool or Agency Overreach?

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The Securities and Exchange Commission (the Commission) has a longstanding policy under its No-Admit/No-Deny Rule (or the Gag Rule) that prohibits defendants from openly denying, or even criticizing, allegations made by the Commission after settling an enforcement action. The Gag Rule has come under scrutiny for its First Amendment implications and “muzzling” effect, even as the Commission stands behind the policy’s reasoning.

Enacted in 1972, the official policy of the Commission is to prevent defendants from consenting to judgments or orders imposing a sanction while denying the allegations against them. “[T]he Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.”¹ In response to a recent challenge to the Gag Rule, Commission Chair Gary Gesler emphasized that a settlement allowing denial of allegations “undermines the value provided by the recitation of the facts, and it muddies the message to the public.”² In practice, the Gag Rule is imposed in almost every settlement to which the Commission agrees.

While challenges to the Gag Rule are not a new phenomenon in its over fifty-year history, the anti-Gag Rule movement has gained speed in recent years after prominent individuals such as Elon Musk criticized the rule. In 2018, the New Civil Liberties Alliance (NCLA) called for the Commission to revise the rule, offering simplified language that permits defendants, in settling with the Commission, to admit, deny, or state they neither admit nor deny the allegations.³ The NCLA renewed this petition in December 2023.⁴ Various federal judges have expressed similar concerns against the policy under First Amendment and administrative law reasoning, including U.S. Supreme Court Justice Neil Gorsuch in his concurrence in *Axon Enter., Inc. v. FTC and Cochran v. SEC* (“...few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way.”).⁵

Many critics of the Gag Rule note the expense and time burden of litigating against the Commission, making settling “the only economically viable option,” as Commissioner Hester Peirce notes in her dissent from the Commission’s denial of the NCLA’s petition to amend the Gag Rule.⁶ Commissioner Peirce also argues that the net effect of settlement agreements with the Commission results in defendants rescinding their “past in-court statements contesting the truth of the Commission’s allegations and promis[ing] to never again contest the truth of the

Commission’s allegations.”^[1] Opponents of the rule argue that the unrestrained scope and ambiguity of the Commission’s ability to restrict both past and future speech creates First Amendment concerns.

The Commission’s statement on the denial of the NCLA petition emphasizes the educational component that settlements provide. The public recitation of the facts that led to the Commission’s enforcement action “informs the market as to what conduct is violative of the securities laws,” and signals what conduct the Commission seeks to deter.^[2] Allowing settling defendants to deny the allegations would inhibit clarity on the securities laws for market participants. The Commission also acknowledges that the settlement process is one of negotiation, and defendants that do not agree with the Gag Rule do not have to accept settlement. Considering this argument, opponents note the Commission’s own words: it does not settle without preventing denial of the allegations.

With the Commission’s refusal to amend the Gag Rule on January 30, 2024, the rule is here to stay for now, although the NCLA intends to challenge the denial. With a Supreme Court that is increasingly wary of administrative agency overreach, the Gag Rule’s future remains uncertain. Winston’s Capital Markets & Securities Law Watch team will continue to provide updates on the Gag Rule as they become available.

^[1] 17 C.F.R. § 202.5(e).

^[2] Statement on the Denial of a Rulemaking Petition Regarding the Commission’s No-Admit/No-Deny Policy, SEC Chair Gary Gensler, January 30, 2024.

^[3] NCLA Petition to Amend 17 C.F.R. § 202.5(e), October 30, 2018.

^[4] NCLA Renewed Petition to Amend 17 C.F.R. § 202.5(e), December 20, 2023.

^[5] 598 U.S. 175, 216 (2023).

^[6] Dissent from Commission’s Denial of a Petition to Amend the Rule, SEC Commissioner Hester Peirce, January 30, 2024.

^[7] *Id.*

^[8] See Gensler, *supra* note 2.

3 Min Read

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