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SEC Denies NCLA Petition Against Agency’s Illegal Gag Rule on Targets of Settled Enforcement Cases

Re: Petition for Rulemaking to Amend the Rule Restricting Speech, set forth in 17 C.F.R. § 202.5(e)

Washington, DC (January 30, 2024) – Today, the Securities and Exchange Commission [denied](#) the New Civil Liberties Alliance’s long-standing [petition](#) to amend the agency’s “Gag Rule,” under which SEC forbids every American with whom it settles a regulatory enforcement case from even truthfully criticizing their cases in public. SEC had ignored the initial petition for more than five years, prompting NCLA to file a [renewed petition](#) against the Gag Rule in December 2023. NCLA will challenge SEC’s denial of the petition in court, defending Americans against the Gag Rule’s constitutional and statutory defects.

SEC’s denial letter is internally contradictory, asserting that its gag orders are negotiated terms of settlement between the parties. But the ruling itself later admits that the agency will not settle without a gag, which suggests its claim that defendants have negotiated these gags is wrong. SEC’s assertion that the agency does not try its cases through press releases is cruelly untrue. This scheme ensures that the Commission’s press releases are the final and only public word on every settled case, meaning that enforcement targets cannot defend themselves in the court of public opinion—in perpetuity. SEC well knows that such press releases are also occupational death sentences that often preclude future private employment, even outside the securities industry.

SEC’s letter implies that Congress delegated gag power to the agency. In reality, SEC enacted the 1972 Gag Rule without notice and comment after falsely framing it as an internal “housekeeping” measure that would not affect third parties. The agency never had statutory authority to implement the rule, and it bypassed Administrative Procedure Act requirements to provide notice and allow comment before promulgating a binding rule.

SEC apparently doesn’t like to be criticized. This is a wholly illegitimate interest, and a gag is the most restrictive, least tailored way to achieve it. The denial letter fails to address the problems with prior restraints—or the two federal court of appeals judges who have stated that it is “hard to imagine” a “more effective prior restraint” than “SEC’s longstanding policy that conditions settlement ... on ... giving up First Amendment rights.”

The Gag Rule is punishing current and former NCLA clients Christopher Novinger, Barry Romeril and Ray Lucia. NCLA [represents](#) Mr. Novinger in appealing the gag provisions in his SEC settlement before the Fifth Circuit U.S. Court of Appeals. SEC has silenced Mr. Romeril, who is over 80 years old, with a gag order for more than 20 years. Mr. Lucia settled his case in 2020 after a successful trip to the U.S. Supreme Court, yet two SEC Commissioners said the Commission had made up its rule “out of whole cloth” when targeting him.

SEC Commissioner Hester Peirce issued a stinging [dissent](#) from SEC’s decision today, powerfully arguing that “the American public, not government censors” must be the arbiters of the validity of speech. NCLA looks forward to arguing these points and vindicating our clients’ First Amendment rights before a neutral federal court.

NCLA released the following statements:

“SEC’s refusal to revisit the lifetime gag that it imposes as a non-negotiable condition of settlement demeans the agency and its professed commitment to transparency and disclosure in the financial markets. We have every confidence that a court will untie the gag for them and allow the American public, not SEC censors, to decide the validity of SEC’s suspect enforcement practices.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“SEC’s denial is unsurprising but still disappointing. As Commissioner Peirce’s dissent highlights, SEC’s unceremoniously adopted gag rule is ‘unnecessary,’ ‘imprudent,’ and ‘suboptimal.’ We look forward to challenging it in court.”

— **Kara Rollins, Litigation Counsel, NCLA**

“Today’s decision provides further evidence that SEC’s leadership is off the rails. This Nixon-era gag rule should never have been promulgated, and it needs to be relegated to the dustbin of history as soon as possible. Now that the agency has refused to back down on its own, a federal court will have to force it to do so.”

— **Mark Chenoweth, President and Chief Legal Officer, NCLA**

For more information visit the petition page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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