



Raising the Bar on "Willful" Securities Law Violations

The D.C. Circuit's decision is significant because certain SEC statutes require a finding of willfulness.

The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is raising the bar on "willful" violations under the federal securities laws. In *The Robare Group, Ltd v. SEC*, the D.C. Circuit held that an investment adviser and its principals could not have "willfully" omitted a material fact when the conduct involved was merely negligent.

The U.S. Securities and Exchange Commission ("SEC") alleged that the defendants failed to disclose financial conflicts of interest in their investment adviser registration application (Form ADV). The SEC held that for purposes of the Investment Advisers Act's ("IAA") antifraud rules governing disclosures to clients (section 206), defendants were negligent but did not commit intentional fraud; but for purposes of disclosure to the SEC (section 207), based on the same conduct, defendants committed a "willful" violation.

The D.C. Circuit reversed. Traditionally, the SEC has relied on *Wonsover v. SEC*, 205 F.3d 408 (D.C. Cir. 2000), which noted that "willfully" means intentionally committing an act, regardless of whether the person is aware that they are violating the law. In *Robare*, the D.C. Circuit ruled that the statute at issue (section 207) makes it unlawful "willfully to omit ... any material fact" from Form ADV, and as a result a person must at least intend to omit material information in order to violate the provision. If the evidence supports only negligence, the conduct cannot also be the basis for a willful violation.

The court's finding is significant because statutes allowing the SEC to censure, suspend, and bar regulated entities, or associated persons, generally require a finding of "willfulness." The SEC has often sought these sanctions in matters based on negligent conduct and in some cases even based on strict liability.

Key Points

- It is an open issue as to whether this ruling will be limited to the specific language in section 207 of the IAA, or will be extended to other provisions in the securities laws that require "willfulness."
- To avoid a heightened standard for willfulness, the SEC may increasingly shift toward settling or litigating in the cease-and-desist context, where there is often no statutory requirement to show "willfulness." This may be beneficial to defendants, especially where the SEC's allegations are based only on negligence or strict liability.
- This decision may create a less favorable environment for settlements that involve a statutory requirement to show "willfulness" as the SEC may be less likely to agree to negligence-based charges.



Joan E.
McKown
Washington



Sarah L.
Levine
Washington



Laura S. Pruitt
Washington



Harold K.
Gordon
New York

[All Contacts >>>](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. One Firm WorldwideSM

Disclaimer: Jones Day's publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2019 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113