

# THE WALL STREET JOURNAL.

## Shut Up, the SEC Explained

Editorial Board

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Strip away the legalese, and the order goes something like this: Shut up, if you know what's good for you. Such terms have been a typical part of the Securities and Exchange Commission's settlement agreements since 1972. For people facing an SEC action, signing a deal can make it all go away. But first they have to promise never to deny the accusations.

This is a violation of the First Amendment, according to a federal lawsuit brought last week by the Cato Institute and the Institute for Justice. As the complaint explains, the gag clause has effectively blocked Cato from publishing a book it has acquired. The unnamed author was accused by the SEC of "substantial wrongdoing." He characterizes the allegations as "unfounded and unfair," but he settled the case "to avoid crippling litigation expenses." Now he has written an exposé.

But his settlement agreement contained the usual gag provision, laying out that he is "not to take any action or to make or cause to be made any public statement denying, directly or indirectly, any allegation in the complaint." If he denounces the SEC's claims against him, the commission could ask a court to void the deal and restore the original case.

Elon Musk's settlement last year contained nearly identical language, which is one reason Tesla investors may hold their breath whenever he starts taunting the SEC online.

Cato says the SEC is using its leverage to extract from defendants "a promise to never tell their side of the story, no matter how outrageous the government's conduct may have been and no matter how strong the public's interest may be in knowing how the government conducts itself." Even if a defendant settles, if he thinks he is being railroaded, that ought to be of public concern.

Cato is asking the court to throw out the gag clause as unconstitutional—and to declare it void in every settlement where it has appeared for nearly 50 years. A critical book from a think tank, in that case, would only start the long airing of SEC grievances. Mr. Musk alone might provide enough to crash [Twitter](#).

By all means, let the Festivus begin. The First Amendment says that even convicted murderers are free to complain that the justice system treated them unfairly. New evidence sometimes proves them right.

So why should a person accused of, say, insider trading lose the ability to defend his name? Since most SEC cases are settled—in 2013 one commissioner put the figure at "approximately 98%"—a huge majority of enforcement targets aren't allowed to speak freely. Let's hear what they have to say.