THE SEC ADDS A NEW WEAPON: HOW DOES THE NEW ADMISSION REQUIREMENT CHANGE THE LANDSCAPE?

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I. Introduction

Over the past several years, the Securities and Exchange Commission (the "SEC") has settled the vast majority of the cases it has brought.[1] By settling cases, the SEC is able to obtain enhanced cooperation from defendants, maximize its resources, and avoid the risks associated with taking a case to trial.[2] Defendants benefit from settlement as well, because they can limit litigation risks and "mitigate[e] . . . any real reputational harm for either the corporations or individuals involved."[3] Before 2013, the SEC had a "longstanding policy" of settling cases without requiring admissions or permitting defendants to deny the allegations brought by the SEC,[4] and an "overwhelming majority of courts . . . approv[ed] SEC settlements rather routinely," without thoroughly examining their factual underpinnings or making substantive changes.[5]

Some people have suggested, however, that settlements by public agencies such as the SEC should be scrutinized more closely. For instance, in a series of recent opinions, Judge Jed S. Rakoff of the Southern District of New York has "question[ed] the wisdom" of the SEC's well-established practice of permitting defendants to enter into consent judgments while neither admitting nor denying

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1 Ross MacDonald, *Setting Examples, Not Settling: Toward a New SEC Enforcement Paradigm*, 91 Tex. L. Rev. 419, 421 (2012) (stating that in recent years, the Commission has settled approximately 98 percent of its cases).

2 *Id.* at 426–27.

3 *Id.*

4 SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 308 (S.D.N.Y. 2011).

5 Michael C. Macchiarola, *"Hallowed By History, But Not By Reason": Judge Rakoff's Critique Of The Securities And Exchange Commission's Consent Judgment Practice*, 16 CUNY L. Rev. 51, 69 (2012).

the allegations.[6] This "sparked a new trend of judicial scrutiny for securities settlements" as other judges have begun to follow Judge Rakoff's lead in breaking with the tradition of deferring to the SEC.[7]

During the past two years, the SEC has implemented new policies that have altered its established settlement practices.[8] On January 6, 2012, the SEC's then-Director of Enforcement, Robert Khuzami, announced that defendants who are found guilty or admit to wrongdoing in criminal cases may only settle parallel civil cases with the SEC if they agree to admit to the allegations in the charge.[9] More significantly, on June 18, 2013, SEC Chair Mary Jo White announced a further alteration to the SEC's settlement policy, stating that the SEC will require admissions in particularly severe cases in which a large number of investors had been defrauded and the fraud was egregious.[10]

In the aftermath of the policy changes, some felt that requiring an admission of guilt would lead to fewer settlements.[11] Several commentators predicted that defendants would likely refuse to admit wrongdoing, instead opting to litigate the dispute because they would be concerned that an admission would be used against them in subsequent proceedings.[12] In recent months, however, the SEC has proven that its new settlement policy has "teeth," extracting admissions of wrongdoing from large companies such as JPMorgan, and individuals such as Philip Falcone.[13]

This Article will examine the SEC's revised settlement policy in the aftermath of Judge Rakoff's concerns about the SEC's longstanding "no admit, no deny" policy. In order to determine the import of the SEC's new settlement policy on the conduct of companies, as well as ongoing investigations and cases, this Article will also include analysis from lawyers who have advised their clients on the SEC's policy change.

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6 *Id.* at 51.

7 Samantha Dreilinger, *Is Three a Crowd? The Role of the Courts in SEC Settlements* 5–6 (2010), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=samantha_dreilinger.

8 For an overview of the SEC's policy changes, *see infra* Parts IV.A and IV.B.

9 *See infra* notes 169–176 and accompanying text.

10 For a discussion of Chair White's policy change, *see infra* Part IV.B.

11 Amanda S. Naoufal, *Is Judge Rakoff Asking for Too Much? The New Standard for Consent Judgment Settlements with the SEC*, 2 AM. U. BUS. L. REV. 183, 204 (2012).

12 *See infra* notes 251–55 and accompanying text.

13 For an overview of the JPMorgan and Falcone admissions, *see infra* Parts IV.C.1–IV.C.2.

Part II provides an overview of the SEC and its Enforcement Division, and describes the SEC's prosecutorial discretion. Part III examines Judge Rakoff's decisions in *SEC v. Bank of Am. Corp.*[14] and *SEC v. Citigroup Global Markets, Inc*.[15] Part IV analyzes the policy changes announced by Mr. Khuzami and Chair White, as well as the recent settlement agreements in which the SEC has required defendants to admit wrongdoing. Part V considers the likely effects that might result from the SEC's revised approach.

II. The Securities and Exchange Commission's Enforcement Powers

A. *The Establishment of the Securities and Exchange Commission*

The securities markets are essential to the financial and economic health of our nation.[16] Many people invest in stocks, bonds, and other securities in order to save money and earn a return on their investments to help prepare for retirement and meet other financial objectives.[17] Securities are a primary means through which businesses raise capital and promote economic growth.[18] Thus, the securities laws that regulate the capital markets are very important to the strength of our nation's economy.

Before the securities market crash of 1929, public support for the governmental regulation of the United States securities markets was scarce.[19] In 1933, Congress passed our nation's first federal securities laws: the Securities Act of 1933 (the "1933 Act") and, during the following year, the Securities Exchange Act of 1934 (the "Exchange Act"). The securities acts were a response to the growing public perception that stock market activity and the prices prevailing in the market profoundly affected the welfare of the country.[20]

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14 653 F. Supp. 2d 507 (S.D.N.Y. 2009).

15 *See* SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

16 *See* James D. Gordon III, *Defining A Common Enterprise in Investment Contracts*, 72 Ohio St. L.J. 59, 63 (2011).

17 *See id.*

18 *See id.*

19 Uma V. Sridharan et al., *The Social Impact of Business Failure: Enron*, 17 Am. J. Bus. (2002) *available at* http://www.bsu.edu/mcobwin/ajb/?p=199.

20 Steve Thel, *Regulation of Manipulation Under Section 10(b): Security Prices and the Text of the Securities Exchange Act of 1934,* 1988 Colum. Bus. L. Rev. 359, 362.

Congress established the SEC with the passage of the Exchange Act[21] to enforce the newly passed securities laws, maintain the integrity of the securities markets, and, most importantly, protect investors.[22] Today, the SEC's responsibilities include overseeing the nation's securities markets and certain primary participants, such as broker-dealers, investment companies, investment advisers, clearing agencies, transfer agents, credit rating agencies, and securities exchanges, as well as organizations such as the Financial Industry Regulatory Authority, Municipal Securities Rulemaking Board, and Public Company Accounting Oversight Board.[23] Each year, the SEC brings hundreds of civil enforcement actions against individuals and companies for violations of securities laws.[24]

Arguably the Exchange Act's most important contribution to the capital markets was the creation of the SEC.[25] The act empowered the SEC with broad authority over all aspects of the securities industry,[26] while seeking to protect the integrity of capital markets and investors by arming the SEC with its antifraud and anti-manipulation provisions.[27]

B. *Overview of the SEC Enforcement Division*

Prior to 1972, the SEC's enforcement activities were spread across several operating divisions at the SEC's headquarters in Washington, D.C.[28] In August 1972, the SEC created the Division of Enforcement in order to centralize its enforcement activities.[29] The Enforcement Division's stated mission is to "protect investors and the markets by investigating potential violations of the federal

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21 "There is hereby established a Securities and Exchange Commission to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate." 15 U.S.C.A. § 78d.

22 Sridharan et al., *supra* note 19.

23 U.S. Securities and Exchange Commission: Fiscal Year 2012 Agency Financial Report 2, *available at* http://www.sec.gov/about/secpar/secafr2012.pdf.

24 *Id.*

25 15 U.S.C.A. § 78d.

26 U.S. Securities and Exchange Commission, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/laws.shtml#secexact1934 (last modified Oct. 1, 2013).

27 JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 19 (Vicki Been et al. eds., 7th ed. 2013).

28 *Id.*

29 *About the Division of Enforcement*, U.S. SEC. & EXCH. COMM'N (Aug. 1, 2007), http://www.sec.gov/divisions/enforce/about.htm [hereinafter *About the Division*].

securities laws and litigating the SEC's enforcement actions."[30] In fiscal year 2012,[31] the Enforcement Division filed 734 enforcement actions, which represented the second-largest number of actions filed by the Division in a fiscal year, one fewer than the previous year.[32] In fiscal year 2013, the Division brought 686 enforcement actions.[33] The decline in enforcement actions may be due to a decrease in the number of investigations initiated by the SEC.[34] In 2012, the SEC initiated 806 new investigations, a decline of 14 percent from the previous year.[35] The SEC may have also brought fewer enforcement actions because of a "steep falloff in the number of enforcement actions related to the financial crisis."[36] The SEC, however, obtained a record $3.4 billion in monetary sanctions in fiscal year 2013, which represented a ten percent increase from fiscal year 2012.[37]

During the 2012 fiscal year, the Enforcement Division filed 150 actions as National Priority Cases, which constitute "the Division's most important and complex matters."[38] National Priority Cases,[39] which the SEC expects will lead to "significant corrective

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[30] *Securities and Exchange Commission Division of Enforcement: Enforcement Manual* (2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf; *see also About the Division*, *supra* note 29 ("The Commission's mandate is to protect investors."); Matthew P. Wynne, *Rule 10b-5(B) Enforcement Actions in Light of Janus: Making the Case for Agency Deference*, 81 FORDHAM L. REV. 2111, 2118 (2013) (stating that the SEC, in making enforcement decisions, "must balance the multidimensional nature of the SEC's mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation").

[31] The SEC's fiscal year ends on September 30.

[32] *U.S. Securities and Exchange Commission: Fiscal Year 2012 Agency Financial Report* 13 (2012), *available at* http://www.sec.gov/about/secpar/secafr2012.pdf [hereinafter *SEC 2012 Financial Report*]. The highest number of enforcement actions brought by the Division in a fiscal year was 735, which occurred in the 2011 fiscal year. *Id.*

[33] *SEC Announces Enforcement Results for FY 2013*, (Dec. 17, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540503617#.UrNsW0KhDzI.

[34] *Id.*

[35] *Id.*

[36] Jean Eaglesham, *SEC Pads Enforcement Tally With Easy Prey*, WALL ST. J., *available at* http://online.wsj.com/news/articles/SB10001424052702304384104579141863675545256 (last updated Oct. 17, 2013).

[37] *SEC Announces Enforcement Results for FY 2013*, (Dec. 17, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540503617#.UrNsW0KhDzI.

[38] *SEC 2012 Financial Report*, *supra* note 32.

[39] The determination of whether a case is a National Priority Case is a discretionary matter left to the Director of the Division of Enforcement. *See Securities and Exchange Commission Division of Enforcement: Enforcement Manual* 4 (2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf. The Director may consider several factors, including: (1) whether the matter presents an opportunity to send a strong message of deterrence; (2) whether the matter involves particularly egregious conduct; (3) whether the matter involves widespread harm to investors; (4) whether the matter involves misconduct by fiduciaries or other persons

industry reaction,"[40] have grown in importance at the SEC and represent 20 percent of enforcement actions filed by the SEC in fiscal year 2012.[41]

Most cases brought by the SEC do not proceed to trial as an overwhelming majority of SEC cases that end with sanctions are settled.[42] The SEC settles approximately 98 percent of its cases, totaling between 650 and 700 settlements each year.[43] In the rare instances that SEC cases reach trial, the SEC has had an impressive success rate: in fiscal year 2012, the Enforcement Division prevailed at trial against 95 percent of defendants, losing only one case while winning twenty-one.[44]

The Division of Enforcement has the investigative authority to "administer oaths and affirmations, subpena [sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry."[45] Following an investigation, SEC staff members must receive authorization from the Commission to bring an enforcement action.[46] In order to receive authorization, a trial attorney is required to submit an action memorandum to the SEC containing the Division's recommendation and "a comprehensive explanation of the recommendation's factual and legal foundation."[47] Prior to submitting the action memorandum, the trial attorney must obtain

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with substantial ability to affect the market; (5) whether the matter pertains to a large number of potential victims; and (6) whether the matter affects products, transactions, or practices that the Division has targeted as priority areas. *Id.*

40 David F. Marcus & Sara E. Gilley, *The Future of SEC Enforcement Actions*, LAW 360 (2013), *available at* http://www.cornerstone.com/getattachment/f2d41ac5-e8d7vvvvvv-45e6-a011-7266794fcd27/The-Future-Of-SEC-Enforcement-Actions.aspx.

41 *Id.* The Division saw a 30 percent increase in the number of National Priority Cases filed in comparison to 2011. *See SEC 2012 Financial Report*, *supra* note 32.

42 David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 TEX. L. REV. 1849, 1849 (2012).

43 MacDonald, *supra* note 1, at 421; *see also* Elaine Buckberg et al., *NERA Econ. Consulting*, *SEC Settlement Trends: 2H11 Update* 5 (2012), *available at* http://www.nera.com/nera-files/PUB_SEC_Trends_2H11_0612.pdf. In 2011, the SEC settled 682 cases. *Id.*

44 *SEC's Enforcement Program Continues to Show Strong Results in Safeguarding Investors and Markets* (Nov. 14, 2012), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171485830#.UkXQ30KhDzI.

45 Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 371 (2008).

46 *Securities and Exchange Commission, Division of Enforcement: Enforcement Manual*, Office of Chief Counsel § 2.5.1 (Oct. 9, 2013), *available at http://www.sec.gov/divisions/enforce/enforcementmanual.pdf*.

47 *Id.*

the approval of the Director or a Deputy Director of the Division.[48] Once the Commission has received the recommendation, it votes on whether to approve the recommendation.[49] In order to consider the recommendation, a quorum of three Commissioners is needed.[50] If a majority of the Commissioners votes in favor of the recommendation, it is approved.[51] The Commission will usually adopt the course of action recommended by the Division.[52]

If the Enforcement Division receives authorization from the Commission, it may then utilize its significant enforcement powers.[53] If the Division determines that a federal securities law has been violated, it may bring a civil action in federal district court seeking a permanent or temporary injunction against any potential violators.[54] Moreover, the SEC can refer the case to the United States Department of Justice ("DOJ") if it believes that criminal prosecution may be warranted.[55] In civil suits, the SEC may also seek to impose civil monetary sanctions[56] by disgorging illegal profits or by obtaining an order from the court requiring defendants to pay a civil fine.[57] The purpose of disgorgement orders is to strip violators of their unjust enrichment, while civil fines aim to punish or deter violators from committing future acts of misconduct.[58] In addition, the Enforcement Division may request that a court prohibit individuals from serving as officers or directors of registered companies.[59] The SEC itself also possesses the authority to order defendants to pay a fine[60] and may request equitable relief, such as

48 *Id.*

49 *Id.* at § 2.5.2.

50 *Id.*

51 *Id.*

52 George E. Greer, *SEC Investigations and Enforcement Actions* 16–17, ORRICK (2001), *available at* http://www.orrick.com/Events-and-Publications/Documents/4085.pdf.

53 Brad Begin, *A Proposed Blueprint for Achieving Cooperation in Policing Transborder Securities Fraud*, 27 VA. J. INT'L L. 65, 75 (1986) (noting that the Division is "charged with far-reaching enforcement responsibilities").

54 15 U.S.C. § 78u(d)(1); *About the Division*, *supra* note 29 ("The Commission's enforcement staff conducts investigations into possible violations of the federal securities laws, and prosecutes the Commission's civil suits in the federal courts . . . .").

55 Wynne, *supra* note 30, at 2119.

56 15 U.S.C. § 78u(d)(3).

57 Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 690 (2012).

58 *Id.*

59 15 U.S.C. § 78u(d)(2); *see also About the Division*, *supra* note 29.

60 *About the Division*, *supra* note 29.

a requirement that the defendants reform their compliance procedures.[61]

The Enforcement Division also possesses the exclusive power to suspend or bar broker-dealers or individuals from the industry.[62] The Exchange Act permits the SEC to suspend the registration of a broker-dealer for no more than twelve months, or bar the broker-dealer or firm from the industry.[63] Expelling a broker-dealer from the industry represents "the harshest penalty available to the Commission."[64] The formal authority to expel registered broker-dealers rests entirely with the SEC; a district court, therefore, cannot issue an order banning or suspending a broker-dealer from the industry itself.[65] Nor can the broker-dealer appeal such a ban to the district court.[66] In practice, though, the SEC will often impose a ban only after it has procured an injunction from the district court, because an injunction permits the SEC to initiate administrative proceedings to determine whether a ban will be in the public interest.[67]

The Enforcement Division can bring several different types of administrative proceedings against alleged violators of the SEC's rules and regulations.[68] The SEC can issue cease and desist orders in administrative proceedings directing defendants to refrain from misconduct.[69] These orders are "largely a public reprimand of the defendant's conduct."[70] Administrative proceedings may result in a hearing before an Administrative Law Judge ("ALJ"), but, in practice, these disputes are usually settled with the SEC prior to a

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61 15 U.S.C. § 78u(d)(5); *see also* Gadinis, *supra* note 57, at 690.

62 Gadinis, *supra* note 57, at 690. For the most part, the SEC has delegated this power to the Financial Industry Regulatory Authority ("FINRA").

63 *See* Securities Exchange Act of 1934 § 15(b)(4), 15 U.S.C. § 78o(b)(4) (2006 & Supp. IV 2010).

64 Gadinis, *supra* note 57, at 690–91 (stating that expulsion from the industry forces defendants to cease their current business activities and enter a new profession, which will often be "substantially less lucrative").

65 *Id.*

66 *See* Altman v. United States SEC, 768 F. Supp. 2d 554, 558 (S.D.N.Y. 2011) (holding that under § 25 of the Exchange Act, an aggrieved party may challenge a sanction only in the Court of Appeals).

67 Gadinis, *supra* note 57, at 690–91

68 15 U.S.C. § 78u-2.

69 *Id.* at § 78u-3; Becker, *supra* note 42, at 1852; Andrew M. Smith, *SEC Cease-And-Desist Orders*, 51 ADMIN. L. REV. 1197, 1198 (1999) (noting that cease-and-desist orders "have become one of the SEC's most used remedies").

70 Gadinis, *supra* note 57, at 690.

hearing.[71] The Dodd-Frank Wall Street Reform and Consumer Protection Act now provides that the SEC also has the power to impose civil penalties in administrative proceedings.[72] Defendants often prefer administrative proceedings to actions in district courts because the public's access to information about the defendant's alleged misconduct is limited in administrative proceedings.[73] In administrative proceedings, the SEC can "avoid juries, most discovery, delays, and strict application of the rules of evidence."[74] The SEC benefits from initiating an administrative proceeding because it can settle the matter quickly "without the need to obtain an ALJ's approval," while the SEC must receive a judge's approval to settle a civil action brought in federal court.[75]

There are several advantages for the SEC when it settles cases rather than trying them. By settling with defendants, the SEC is able to conserve its limited resources instead of expending large amounts of time and resources on litigation.[76] It also benefits from settling cases because it avoids the risk of taking a case to trial and losing.[77] If the SEC loses a case it could have otherwise settled, it could lead to public embarrassment and lower recovery for victims.[78]

Defendants also benefit from settling cases. Settlement limits litigation risks for defendants as well, allowing them to avoid the potential of being responsible for even larger penalties at trial.[79] By settling, defendants also avoid the time and expense associated with going to trial.[80] In addition, settling permits companies to

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71 *Id.* at 688; *see also* Morell E. Mullins, *Manual For Administrative Law Judges*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES i, 35 (2004) (stating that a case may settle at a variety of different times, including "as soon as [it is] assigned to an ALJ"); Susan P. Shapiro, *The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders*, 19 LAW & SOC'Y REV. 179, 187 (1985) (stating that administrative proceedings "occasionally involve hearings," but that charges are usually settled).

72 Dodd-Frank Wall Street Reform and Consumer Act, Pub. L. No. 111-203, § 929P (2010).

73 Gadinis, *supra* note 57, at 688.

74 Victor L. Hayslip & Kip A. Nesmith, *Recent Cases and Decisions in Securities Law*, 2011 WL 1574311, at *7 (Apr. 2011).

75 William O. Reckler and Blake T. Denton, *Understanding Recent Changes to the SEC's "Neither Admit Nor Deny" Settlement Policy*, CORPORATE GOVERNANCE ADVISOR (Mar. 2012) ("While the SEC can settle administrative actions brought internally without review by an administrative law judge, it must obtain a federal judge's approval to settle an action brought in district court.").

76 MacDonald, *supra* note 1, at 428.

77 *Id.* at 429.

78 *Id.*

79 *Id.* at 432.

80 *Id.*

"avoid potentially devastating negative publicity," which is important in maintaining credibility with investors.[81] Consent judgments are usually announced on the same day that the complaint is filed, which may allow defendants to lessen any negative publicity.[82]

C. *The SEC's Prosecutorial Discretion*

The SEC's public reputation is derived largely from its responsibilities as a "prosecutorial agency—the policeman of Wall Street."[83] The SEC has a "vast and varied arsenal of prosecutorial weapons" at its disposal.[84] As mentioned above, among other powers, it can issue cease-and-desist orders,[85] stop order registration statements,[86] revoke or suspend the registration of broker-dealers,[87] and issue fines.[88]

Since the SEC often works in tandem with the DOJ to fight financial crime, parallel proceedings often occur. Parallel proceedings involve multiple investigations or actions arising out of the same or substantially the same set of facts, "proceed[ing] simultaneously or successively against the same or related parties."[89] The SEC possesses the authority to conduct both civil and criminal investigations of violations of the federal securities laws, but it lacks independent prosecutorial power.[90] The DOJ has exclusive jurisdiction over criminal proceedings.[91]

In 2006, the SEC issued its Statement Concerning Financial Penalties to clarify the Commission's official policy regarding the extent to which it should impose civil penalties against corpora-

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81 *Id.* at 433 & n.100.

82 *See* Roger Parloff, *The Judge Who Slapped Citi*, CNNMoney (Nov. 30, 2011, 11:43 AM), http://finance.fortune.cnn.com/2011/11/30/judge-jed-rakoff-citigroup-sec/.

83 Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer As Prosecutor*, 61 Law and Contemp. Probs. 33 (1998).

84 *Id.*

85 15 U.S.C. § 77h-1, 77(h)(d)(3) (2006).

86 *Id.* at § 77(h)(d)(3).

87 *Id.* at § 78l(k).

88 *Id.* at § 78u-2.

89 Jody M. Arogeti, *How Much Cooperation Between Government Agencies Is Too Much?: Reconciling* United States v. Scrushy*, The Corporate Fraud Task Force, And The Nature Of Parallel Proceedings*, 23 Ga. St. U. L. Rev. 427, 428 (2006) (internal quotation marks omitted).

90 *Id.* at 428–29.

91 Mark D. Hunter, *SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends*, 68 Mo. L. Rev. 149, 160 (2003).

tions.[92] Noting that recent cases have not presented a "clear public view of when and how the Commission will use corporate penalties," the SEC stated that "[w]here shareholders have been victimized by the violative conduct, or by the resulting negative effect on the entity following its discovery, the Commission is expected to seek penalties from culpable individual offenders acting for the corporation."[93] In determining the appropriateness of seeking penalties against a corporation, the SEC further explained that it would consider whether the corporation received a direct benefit as a result of the violation and the extent to which the penalty will benefit or further harm the victims of the misconduct.[94] By seeking such penalties, the Commission aims to increase its ability to "achieve an appropriate level of deterrence."[95]

In determining whether to refer a case to the DOJ for criminal prosecution, the SEC typically focuses on violations involving corruption of SEC staff or other government officials, as well as violations committed by a repeat violator or posing a substantial threat to investors.[96] In 2013, the SEC released further guidelines regarding referrals for criminal prosecution, stating that SEC staff members may consider "the egregiousness of the conduct, whether recidivism is a factor, and whether the involvement of criminal authorities will provide additional meaningful protection to investors."[97] Local United States Attorneys have the discretion to accept or reject cases referred by the SEC.[98] If they choose to accept a case, they retain "full responsibility for the [cases'] conduct and outcome."[99] Between 1992 and 2001, the SEC referred 609 cases to the DOJ and the DOJ acted on 525 of these cases.[100]

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92 *Statement of the Securities and Exchange Commission Concerning Financial Penalties*, U.S. SECURITIES AND EXCHANGE COMM'N (Jan. 4, 2006), http://www.sec.gov/news/press/2006-4.htm.

93 *Id.*

94 *Id.*

95 *Id.*

96 Hunter, *supra* note 91; Steven Amchem et al., *Securities Fraud*, 39 AM. CRIM. L. REV. 1037, 1093 (2002).

97 *Securities and Exchange Commission, Division of Enforcement: Enforcement Manual*, Office of Chief Counsel § 5.6.1 (Oct. 9, 2013), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

98 Susan P. Shapiro, *The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders,* 19 LAW & SOC'Y REV. 179, 187 (1985).

99 *Id.*

100 Clifton Leaf et al., *White-Collar Criminals: Enough is Enough,* FORTUNE, Mar. 18, 2002, at 60.

III. Judicial Scrutiny of the SEC's Settlement Practices

A. *Judge Rakoff's Critique of the SEC's Settlement Practices*

In *SEC v. Bank of America Corp.*, Judge Jed Rakoff, United States District Court Judge for the Southern District of New York, initially rejected a proposed consent judgment between the SEC and Bank of America Corp. ("Bank of America").[101] Prior to this case, the SEC "was not used to close scrutiny of its settlements."[102] This appears to be the first time that a district court judge had scrutinized a settlement between the SEC and a defendant so closely.[103]

1. SEC v. Bank of America Corp.

In 2009, Judge Rakoff rejected a proposed settlement in a case brought by the SEC. In *SEC v. Bank of America Corp.*,[104] the SEC alleged that the defendant, Bank of America, materially misled its shareholders in connection with a proxy statement soliciting shareholder approval for a $50 billion acquisition of Merrill Lynch & Co ("Merrill Lynch").[105] According to the SEC, the proxy statement informed shareholders that Merrill Lynch had agreed to refrain from paying discretionary incentive compensation to executives prior to the merger without the consent of Bank of America.[106] In fact, Bank of America had already agreed to permit Merrill Lynch to pay large discretionary bonuses to executives before the closing of the merger.[107] Prior to trial, Bank of America, without admitting or denying the allegations set forth in the complaint, entered into a consent judgment with the SEC.[108]

While acknowledging that "considerable deference" should be shown to the parties' agreement, Judge Rakoff, the District Court Judge presiding over the case, refused to approve the proposed

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101 653 F. Supp. 2d 507 (S.D.N.Y. 2009).

102 Peter J. Henning, *Can the S.E.C. Avoid Scrutiny of Its Settlements?*, N.Y. Times (Aug. 17, 2010), *available at* http://dealbook.nytimes.com/2010/08/17/can-the-s-e-c-avoid-scrutiny-of-its-settlements/?_php=true&_type=blogs&_r=0.

103 *See* Macchiarola, *supra* note 5, at 53.

104 653 F. Supp. 2d 507 (S.D.N.Y. 2009).

105 *Id.* at 508.

106 *Id.*

107 *Id.*

108 *Id.* Under the terms of the proposed settlement, Bank of America was enjoined from making future misstatements in its proxy solicitations and agreed to pay a fine of $33 million to the SEC. *Id.*

consent judgment, concluding that it was "neither fair, nor reasonable, nor adequate."[109] Noting that the agreement did "not comport with the most elementary notions of justice and morality," Judge Rakoff stated that the consent judgment was unfair because it would force innocent shareholders, who were victims of Bank of America's alleged wrongdoing, to pay a fine for the misconduct.[110] Left with the impression that the agreement proposed by the parties "was a contrivance designed to provide the S.E.C. with the facade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry—all at the expense of the sole alleged victims, the shareholders," Judge Rakoff determined that the parties' proposal "cannot remotely be called fair."[111]

Judge Rakoff also concluded that the proposed consent judgment was unreasonable, stating that approval of the agreement would effectively end the case without an adequate explanation from the SEC regarding why, in violation of its own policy,[112] it failed to pursue charges against those who were truly responsible for the misconduct—the Bank of America's executives and lawyers who allegedly made the false and misleading statements.[113]

In addition, Judge Rakoff felt that the proposed consent judgment was unreasonable because it was imprecise in providing for injunctive relief.[114] Although the proposed injunction sought to prohibit the bank from issuing any false or misleading statements in the future, Judge Rakoff decided that it was "too nebulous" because Bank of America refused to acknowledge that it made any false or misleading statements in the past or in connection with the case.[115] Because the bank did not admit to making any materially misleading statements, the court questioned how it could impose injunctive relief under Federal Rule of Civil Procedure 65(d) in the absence of a sufficiently detailed description of the acts to be restrained.[116]

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109 *Id.* at 508–9.

110 *Id.* at 509.

111 *Id.* at 510.

112 *See supra* note 93 and accompanying text.

113 *Bank of Amer.*, 653 F. Supp. 2d at 510–11.

114 *Id.* at 511.

115 *Id.*

116 *Id.* Rule 65(d) states that when a court enters an order granting an injunction, the order must "state the reasons why it issued, . . . its terms specifically, and describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d).

The judge determined that the injunctive relief served no purpose and that the $33 million fine was "a trivial penalty" to pay for a false statement that materially affected such a large-scale merger.[117] He explained that the proposed agreement "suggest[ed] a rather cynical relationship between the parties," in which the SEC could expose Bank of America's misconduct in a high-profile merger, while the bank's management would be able to assert that they were pressured into accepting a burdensome settlement by overzealous regulators.[118] Judge Rakoff concluded by noting that he believed that the parties had entered into the proposed agreement "at the expense . . . of the truth."[119]

Following Judge Rakoff's decision, the parties renegotiated, and the SEC filed a motion on February 4, 2010 seeking approval of a revised proposed consent judgment.[120] The new proposed settlement consisted of a package of prophylactic measures that aimed to prevent future nondisclosures[121] and a penalty provision that was meant to partially compensate the victims.[122] Judge Rakoff noted that the measures were an improvement that might help foster an environment in which public disclosure is more likely, because the measures might help eliminate Bank of America's piecemeal approach to providing disclosure to the public.[123]

However, the court had "great[ ] difficulty" approving the penalty provision because the provision effectively provided for a $150 million fine to be collected from all shareholders and distributed to current shareholders who were victims of the misconduct.[124] Although Judge Rakoff determined that the fine was very small in comparison to the size of the controversy[125] and that the

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117 *Id.* at 512.

118 *Id.*

119 *Id.*

120 SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829(JSR), 10 Civ. 0215(JSR), 2010 WL 624581, at *1 (S.D.N.Y. Feb. 22, 2010).

121 The package of prophylactic measures consisted of Bank of America: (1) engaging an independent auditor to assess the adequacy of the Bank's accounting controls and disclosure policy; (2) hiring independent disclosure counsel to assess the adequacy of the Bank's public disclosures; (3) engaging an outside compensation consultant to advise an independent compensation committee regarding executive compensation; and (4) agreeing to submit executive compensation proposals to shareholders for approval. *Id.* at *3.

122 *Id.* at *3.

123 *Id.* at *4.

124 *Id.* at *4–5. The SEC estimated that the group of current shareholders who were harmed by the nondisclosures comprises approximately 50 percent of all current shareholders. *Id.* at *5.

125 *Id.* at *4.

proposed settlement was "far from ideal,"[126] he "reluctantly" granted the SEC's motion seeking approval of the consent judgment.[127]

2. SEC v. Citigroup Global Markets, Inc.

On November 28, 2011, almost two years after his decision in *SEC v. Bank of America Corp.*, Judge Rakoff again rejected a proposed settlement in an enforcement action involving the SEC.[128] In *SEC v. Citigroup Global Markets, Inc.*, the SEC had charged Citigroup with securities fraud stemming from Citigroup's creation of a billion-dollar fund that permitted it to "dump some dubious assets on misinformed investors."[129] Citigroup allegedly perpetrated the fraud by misrepresenting to investors that the assets in the fund were attractive assets, even though Citigroup in fact had chosen to include a large percentage of negatively projected assets in the portfolio.[130]

In addition to filing the complaint, the SEC simultaneously presented a proposed consent judgment to the court.[131] The consent judgment required Citigroup to pay the $160 million profit it made from the alleged scheme to the SEC, plus $30 million in interest and $95 million as a civil penalty.[132]

The court stated that it "regretfully" could not approve the consent judgment, concluding that the proposed settlement was "neither fair, nor reasonable, nor adequate, nor in the public interest."[133] Judge Rakoff explained that the court could not approve the settlement without knowledge of the underlying facts because, otherwise, "the court becomes a mere handmaiden" to a settlement negotiated based on unknown facts, while the public is unable to learn the truth about the matter.[134] In effect, the SEC's policy of entering into consent judgments while allowing defendants to "neither admit nor deny" the allegations did not allow the

126 *Id.* at *6.

127 *Id.* at *1.

128 *See* SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

129 *Id.* at 329.

130 *Id.* By structuring the fund in this manner, Citigroup allegedly gained profits of approximately $160 million, while investors lost in excess of $700 million. *Id.*

131 *Id.* at 330.

132 *Id.*

133 *Id.* at 330, 332.

134 *Id.* at 332.

court to have any confidence that the injunctive relief sought by the SEC had any factual support.[135]

Judge Rakoff further noted that the proposed consent judgment, while serving to provide the SEC with a "quick headline," did not commit the SEC to returning any of the recovered money to investors who were hoping to recoup a portion of their losses.[136] He also noted that the $95 million civil penalty was "pocket change" for a company as large as Citigroup.[137] The court concluded by rejecting the proposed settlement and directing the parties to be ready for trial.[138]

The SEC and Citibank appealed Judge Rakoff's denial of the proposed consent judgment to the United States Court of Appeals for the Second Circuit.[139] The Second Circuit granted the parties' motion to stay the proceedings in the district court pending appeal,[140] stating that the parties demonstrated a "strong likelihood of success" on the merits in their attempt to reverse the lower court's decision.[141]

In granting the parties' motion to stay proceedings in the district court, the Second Circuit stated that the district court did "not appear to have given deference to the S.E.C.'s judgment on wholly discretionary matters of policy."[142] Noting that federal judges must respect the legitimate policy choices of agencies, the Second Circuit explained that "[i]t is not . . . the proper function of federal courts to dictate policy to executive administrative agencies."[143] The Second Circuit has yet to render a decision regarding whether Judge Rakoff properly rejected the proposed consent judgment, so it is unclear whether the decision will stand.

3. The Aftermath of Judge Rakoff's Decisions

In response to the *Citigroup* decision, the SEC Director of Enforcement, Robert Khuzami, argued that Judge Rakoff's ruling "disregards the fact that obtaining disgorgement, monetary penalties, and mandatory business reforms may significantly outweigh the absence of an admission when that relief is obtained without

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135 *Id.*
136 *Id.* at 333–34.
137 *Id.* at 334.
138 *Id.* at 335.
139 SEC v. Citigroup Global Markets Inc., 673 F.3d 158, 160 (2d Cir. 2012).
140 *Id.* at 161.
141 *Id.* at 166.
142 *Id.* at 163.
143 *Id.*

the risks, delay, and resources required at trial."[144] Mr. Khuzami also noted that "[r]efusing an otherwise advantageous settlement solely because of the absence of an admission also would divert resources away from the investigation of other frauds and the recovery of losses suffered by other investors not before the court."[145]

Mr. Khuzami explained that if companies are required to make admissions in order to settle cases with the SEC, they might also face more suits from private litigants, thus prompting companies to settle fewer cases.[146] A drop-off in settlements may not necessarily lead to more just resolutions of disputes.[147] Although settlements may not be perfect resolutions in many cases, "it is not at all clear that litigating or forcing defendants to 'admit' the SEC's charges would in any fashion provide a better, much less a more just, outcome," because it is possible that the SEC could reach a similar outcome without the time and expense associated with going to trial.[148]

Judge Rakoff's decisions may also have an impact on the public's perception that the public interest is being adequately protected.[149] In *Citigroup*, the SEC asserted that "the detailed allegations of the Complaint, the substantial payment by Citigroup, the company's lack of a denial of the allegations, and Citigroup's public statement regarding the matter have put the public on no-

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[144] Robert Khuzami, *Public Statement by SEC Staff: Recent Policy Change* (Jan. 7, 2012), *available at* http://www.sec.gov/news/speech/2011/spch112811rk.htm.

[145] *Id.*

[146] *See* Robert Khuzami, *Remarks Before the Consumer Federation of America's Financial Services Conference* (Dec. 1, 2011), *available at* http://www.sec.gov/news/speech/2011/spch120111rk.htm (stating that companies might avoid settlements if forced to make admissions to the SEC "because that might expose them to additional lawsuits by litigants seeking damages"); *see also* Marc Fagel, *The SEC's Troubling New Policy Requiring Admissions* 2, BLOOMBERG BNA: SECURITIES REG. & LAW REP. (2013) ("Admitting liability would subject the defendant to tremendous exposure in private litigation."); McLucas, et al., *Public Interests And 'Neither Admit Nor Deny' Settlements* (2012), LAW 360, *available at* http://www.law360.com/articles/321782/public-interests-and-neither-admit-nor-deny-settlements (discussing that requiring a defendant to admit to misconduct may increase the risks of liability for defendants, "likely forcing many to meaningfully consider choosing a path of litigation rather than resolution").

[147] McLucas, et al., *supra* note 146.

[148] *See id.*

[149] While the exact effect of Judge Rakoff's rulings on the public's perception remains to be seen, it has been suggested that Judge Rakoff's *Bank of America* opinion "[g]ave voice to the anger and frustration of many ordinary Americans." Zachery Kouwe, *Judge Rejects Settlement Over Merrill Bonuses*, N.Y. TIMES, Sept. 14, 2009, at B15.

tice as to Citigroup's conduct."[150] While contending that the proposed consent judgment was in the public interest, the SEC maintained that the public interest was "not part of [the] applicable standard of judicial review" and that a consent judgment should be approved if it is fair, reasonable and adequate.[151] The SEC further asserted that "[t]he initial determination whether a consent decree is in the public interest is best left to the SEC."[152] Thus, the SEC argued that if it initially determines that a consent judgment is in the public interest, the court should defer to this decision.[153]

Judge Rakoff's scrutiny of SEC settlement practices may have also led other federal court judges to "employ similarly-cautious reviews" of proposed consent judgments that lack party admissions.[154] For example, on December 20, 2012, Judge Leon of the District of Columbia District Court ordered IBM and the SEC to produce more data in support of their settlement, stating that "[t]his is not a rubber stamp court."[155] Judge Leon further stated, "I'm not interested in summary conclusive statements by lawyers, I'm interested in data."[156] He declared that he is "part of a growing number of District Court judges in the country who have grown

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150 SEC Memorandum of Law in Response to Questions Posed by the Court Regarding Proposed Settlement, *SEC v. Citigroup Global Mkts., Inc.*, No. 11 Civ. 07387 (JSR), 2011 WL 5307417, at *4 (S.D.N.Y. Nov. 7, 2011).

151 *Id.* at *4 n.1.

152 *Id.* at *9 (quoting SEC v. Randolph, 736 F.2d 525, 530 (9th Cir. 1984).

153 *Id.*

154 Sarah L. Cave, *Developments in 2011 Reflect Uncertainty and Change in Securities Litigation and Regulatory Enforcement Proceedings*, 2012 WL 1197183, at *14; *see also Another Judge Questions SEC Settlement Practices*, SEC ENFORCEMENT QUARTERLY 6, *available at* http://www.sidley.com/files/News/5892a2c3-d558-4104-a54a-faff23f26fb8/Presentation/NewsAttachment/cd78beeb-5a42-41b8-bf13-772647e047e6/SEC%20Enforcement%20Quarterly%20-%201st%20Quarter%202013.pdf (stating that Judge Rakoff "may have started a trend of federal judges scrutinizing SEC settlements"); Macchiarola, *supra* note 5, at 89 (2012) ("Other judges have shown various degrees of support for [Judge Rakoff's] line of thought, as the Commission is being asked to satisfy specific court-directed inquiries like no time in recent memory."); Naoufal, *supra* note 11, at 206 (stating that other district courts are already citing to Judge Rakoff's opinion); Eric Rieder et al., *Shifting Tides for SEC Settlements: A Sea Change in the Making?*, BUS. L. TODAY 1 (Mar. 2012), *available at* http://www.americanbar.org/content/dam/aba/publications/blt/2012/03/shifting-tides-sec-201203.authcheckdam.pdf (noting that at least two federal judges have "echoed Judge Rakoff's concerns regarding no-admit/deny settlements between the SEC and private parties").

155 *Another Judge Questions SEC Settlement Practices*, *supra* note 154.

156 Christopher M. Matthews, *Judge Blasts IBM, SEC Bribery Settlement*, WALL ST. J. (Dec. 20, 2012), *available at* http://online.wsj.com/news/articles/SB10001424127887323777204578192040347143214.

increasingly concerned about . . . just simply signing off on consent decrees."[157]

In addition, Judge Rudolph T. Randa of the United States District Court for the Eastern District of Wisconsin expressed similar concerns in determining whether to approve a settlement between the SEC, Koss Corp., and its CEO, Michael Koss.[158] On December 20, 2011, Judge Randa initially refused to approve the settlement, requiring the SEC to submit a "written factual predicate for why it believes the Court should find that the proposed final judgments are fair, reasonable, and in the public interest."[159] Judge Randa stated that the court was unable to assess the "fairness and the extent to which [the proposed settlement] serve[s] the purpose of disgorgement" in the absence of further information from the parties.[160] Ultimately, Judge Randa approved the settlement between the parties on the condition that the SEC agreed to submit a revised proposed consent judgment providing greater specificity.[161]

If courts begin to require the SEC to obtain an admission from defendants in order to impose penalties or enjoin defendants in federal court, then the SEC might "enter into settlements outside of the judiciary's purview," thereby avoiding the need for judicial approval of the settlements.[162] While the SEC can settle only actions brought in federal district court if it receives judicial approval, the SEC can settle a dispute without approval from a judge in certain proceedings outside of the court system, such as administrative proceedings.[163] The SEC, however, may be reluctant to bring more cases before an ALJ because the SEC employs the judges that preside over the administrative proceedings, thus causing some to question whether the proceedings "suffer from potential bias."[164]

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157 *Another Judge Questions SEC Settlement Practices*, *supra* note 154.

158 Rieder et al., *supra* note 154.

159 *Id.*

160 Evan Weinberger, *Judge in Koss Suit the Latest to Challenge SEC Deals*, LAW 360 (Dec. 22, 2011), http://www.law360.com/articles/295866/judge-in-koss-suit-the-latest-to-challenge-sec-deals.

161 Rieder et al., *supra* note 154.

162 *See* Bradley Bondi & Douglas Fischer, *Citigroup Ruling Has Serious Implications for SEC Settlements*, JURIST-SIDEBAR (Jan. 16, 2012), http://jurist.org/sidebar/2012/01/bondifischer-sec-citigroup.php.

163 *See supra* notes 68–75.

164 *See* Gretchen Morgenson, *At the SEC, a Question of Home-Court Edge*, N.Y. TIMES, Oct. 6, 2013, at BU1; *see also* Jason D. Vendel, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 770 (2005) (stating that "few will deny that bias inevitably seeps into [the] decisionmaking process[es] of [ALJs]").

Thus, in certain cases, if the SEC brings an action in federal district court, its remaining options may be to either "obtain admissions of wrongdoing from defendants or . . . prove its allegations at trial."[165]

Although perhaps one cannot read too much into the Second Circuit's language in staying Judge Rakoff's decision in *Citigroup*, the appellate court did give some indication that it would overturn the decision. The court stated that the district court did not appear to give the proper amount of deference to the SEC's judgment.[166] Moreover, attorneys have advised their clients that "parties should take comfort in the fact" that the decision by the Second Circuit to stay proceedings in the district court pending appeal strongly suggests that district court judges should defer to the SEC when analyzing SEC settlement decisions.[167] If the Second Circuit overturns the decision,[168] then district court judges will be required, to defer to the SEC's judgment and not question the SEC's decisions.

IV. The Recent Changes in Commission Policy

A. *The SEC's First Step in Seeking More Admissions*

On January 6, 2012, the SEC Director of Enforcement, Robert Khuzami, announced that a defendant who has been found guilty of or who has admitted to misconduct in a criminal case may not settle a parallel civil case without admitting the allegations set forth in the SEC's charge.[169] Previously, the SEC had permitted defendants to enter into settlement agreements in such cases with defendants without admitting or denying the SEC's allegations.[170] The

165 *See* Bondi & Fischer, *supra* note 162.

166 *See* SEC v. Citigroup Global Markets Inc., 673 F.3d 158, 160, 163 (2d Cir. 2012).

167 *See* Douglas J. Davison et al., *The SEC's Longstanding "Neither Admit Nor Deny" Settlement Policy is Supported by Second Circuit Decision Granting Stay* (2012), *available at* http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=92292.

168 At the time this piece was written, the Second Circuit had not yet issued an opinion.

169 Macchiarola, *supra* note 5, at 93–94; Public Statement by SEC Staff: Recent Policy Change, Securities & Exchange Comm'n (Jan. 7, 2012), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1365171489600#.UrjmY0KhDzI.

170 *SEC Changes Policy On Settlement Language; "Neither Admit Nor Deny" Approach Narrowed*, Debevoise & Plimpton (Jan. 9, 2012), http://www.debevoise.com/files/Publication/db4cee50-3dcd-4332-b6cb-a073cef22937/Presentation/PublicationAttachment/3ae5e662-8d35-40ff-a9c9-b3d264071b68/SEC%20Changes%20Policy%20on%20Settlement%20Language%20"Neither%20Admit%20nor%20Deny"%20Approach.pdf.

Commission has "expressly denied" any connection between Judge Rakoff's decisions and the policy change.[171]

The new policy dictates that if a defendant admits or acknowledges criminal conduct in a parallel criminal conviction, non-prosecution agreement ("NPA"), or deferred prosecution agreement ("DPA"), the defendant will be prohibited from settling parallel SEC charges using the "neither admit nor deny language."[172] In place of this language, SEC settlement documents will include the nature of the criminal conviction and relevant facts that the defendant admitted during a plea allocution or in the NPA or DPA.[173]

This new policy, however, will apply to only a handful of SEC proceedings.[174] Unless the defendant is a party to parallel criminal proceedings and the defendant has "admitted or acknowledged criminal conduct," the new policy will not apply to the enforcement proceedings.[175] The policy will also not apply to pending matters in which settlement discussions had already begun prior to the announcement of the policy change.[176] Thus, the policy change has no effect for "the vast majority of settling parties."[177] As a result of the policy change, many lawyers advised their clients that, until more courts become critical of settlements that lack admissions, the SEC can be expected to continue its practice of entering into settlements that include the "neither admit nor deny" language in cases that do not involve admissions in parallel criminal proceedings.[178]

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171 Macchiarola, *supra* note 5, at 94.

172 *Id.*

173 *Id.*

174 *See* Rieder et al., *supra* note 154.

175 *Id.*

176 Harry S. David et al., *SEC Update: Enforcement Program Taking Shape Under New Leadership*, SCHULTE, ROTH & ZABEL (June 24, 2013), http://www.srz.com/files/News/5852f231-62a7-43c0-adc2-116a7b9fde58/Presentation/NewsAttachment/af6433ed-d31b-4187-b588-1cc51622f42b/062413_SEC_Update_Enforcement_Program_Taking_Shape_Under_New_Leadership.pdf

177 Macchiarola, *supra* note 5, at 94.

178 William O. Reckler & Blake T. Denton, *Client Alert: Understanding Recent Changes to the SEC's "Neither Admit Nor Deny" Settlement Policy*, LATHAM & WATKINS (2012), *available at* http://www.google.com/url?sa= t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.lw.com%2FthoughtLeadership%2Fsec-eliminates-denial-option-for-settling-defendants&ei=a3NHUtPJE_i44APc74G4BA&usg=AFQjCNHfvCjuz5hc_HLHSP3vnwGH_gmWHQ&sig2=glZ9_Ak4SitVWMfQNLx-QQ&bvm=bv.53217764,d.dmg.

B. *Chair White's Policy Change: Seeking Admissions in Egregious Cases*

On June 18, 2013, Chair White announced a larger shift in the SEC's settlement policy.[179] She explained that the SEC planned to require admissions in certain cases and would base its decision on the egregiousness of the fraud and the amount of harm done to investors.[180] Thus, for the first time in the Enforcement Division's history, it planned to require admissions in particularly egregious cases.[181]

During the same week, SEC co-directors of enforcement, Andrew J. Ceresney and George S. Canellos, sent an internal memorandum to the SEC's enforcement team that provided details regarding the types of conduct that would lead the SEC to seek an admission: "misconduct that harmed large numbers of investors or placed investors or the market at risk of potentially serious harm; where admissions might safeguard against risks posed by the defendant to the investing public . . . or when the defendant engaged in unlawful obstruction of the Commission's investigative processes."[182] The memo further noted that "no-admit-no-deny settlements will continue to serve an important role in our mission and most cases will continue to be resolved on that basis."[183]

Andrew Ceresney explained that the SEC planned to settle a case "only when in our informed judgment the settlement is within a range that we could reasonably expect if we litigate through trial."[184] He also confirmed that it still would be important for the SEC to continue to have the ability to enter into "neither admit nor deny" settlements because these settlements achieve the SEC's goals of providing quick relief to investors, conserving SEC resources, and limiting litigation risks.[185] Lastly, Mr. Ceresney declared that "neither admit nor deny" settlements remain important

179 Dave Michaels, *SEC Says It Will Seek Admissions of Wrongdoing More Often*, BLOOMBERG (June 19, 2013), http://www.bloomberg.com/news/2013-06-18/sec-to-seek-guilt-admissions-in-more-cases-chairman-white-says.html.

180 *Id.*

181 *Id.*

182 Kara Scannell, *SEC Considers Policy Shift on Admissions of Wrongdoing*, June 19, 2013, FINANCIAL TIMES, http://www.ft.com/intl/cms/s/0/7a93d5dc-d882-11e2-b4a4-00144feab7de.html#axzz2oPnQOZkB.

183 Michaels, *supra* note 179.

184 *SEC's Andrew Ceresney Defends Neither Admit Nor Deny Settlements*, CORP. CRIME REP. (June 6, 2013), http://www.corporatecrimereporter.com/news/200/secceresneyneitheradmitnordeny06062013/.

185 *Id.*

because "[t]he facts are aired in detail in our orders. The defendant doesn't have any ability to deny those facts. We have accountability. We have deterrence."[186]

In a speech on September 26, 2013, SEC Chair Mary Jo White clarified that the SEC will likely seek admissions in cases where: (1) harm to a large number investors or particularly egregious conduct has occurred; (2) there is conduct that poses a significant risk to the market or investors; (3) admissions would help investors determine whether to deal with the party again in the future; and (4) an admission would send a crucial message to the market about the case.[187]

Recently, Chair White indicated that the SEC plans to seek more admissions of guilt in 2014 following its policy changes.[188] She stated that "[t]he coming year promises to be an incredibly active year in enforcement, as we continue to vigorously pursue wrongdoers and bring enforcement actions across the entire industry spectrum."[189]

According to Chair White, her review of the SEC's "no admit, no deny" settlement practices began after she had observed the policy as a federal prosecutor prior to joining the SEC.[190] In the 1990s, she served as United States Attorney in Manhattan, "pioneer[ing] the use of corporate probation" in white collar crime.[191] Chair White explained that the decision to make the policy change stemmed from her experience as United States Attorney, in which "defendants in criminal cases are almost always required either to enter a guilty plea or go to trial."[192] Chair White noted that although Judge Rakoff and other federal judges put the issue of the

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186 *Id.*

187 Mary Jo White, *Deploying the Full Enforcement Arsenal* U.S. SEC. & EXCH. COMM'N (Sept. 26, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539841202#.Ukd93kKhDzI.

188 Kurt Orzeck, *SEC to Seek Even More Admissions of Guilt in 2014,* LAW 360 (Jan. 27, 2014), http://www.law360.com/banking/articles/504480/sec-to-seek-even-more-admissions-of-guilt-in-2014.

189 *Id.*

190 Michaels, *supra* note 179.

191 *Id.*

192 James B. Stewart, *The SEC Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES, June 22, 2013, at B1 (internal quotation marks omitted). The Department of Justice, "except in the most unusual circumstances," does not permit defendants to enter pleas of *nolo contendere*, in which defendants plead guilty to criminal charges while neither admitting nor denying the factual allegations. SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 310 (S.D.N.Y. 2011); *see also* U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-16.010 (2008) ("United States Attorneys may not consent to a plea of *nolo contendere* except in the most unusual circumstances and only after a recommendation for doing so has been approved by the

SEC's "no admit, no deny" settlement practices "more in the public eye, . . . it wasn't his comments that precipitated the change."[193] She had "lived with this issue for a very long time" and was therefore prompted to review the SEC's settlement practices in order to strengthen the agency's enforcement program.[194]

Immediately following the policy change, some felt that defendants might be reluctant to make admissions due to the fear that plaintiffs in class actions or other private actions would use the admissions against them.[195] Defendants may face large costs due to subsequent litigation, which may influence them to choose to take the case to trial rather than settle.[196] Although an admission in an SEC consent judgment may ultimately be inadmissible in a subsequent civil trial, as Professor Coffee of Columbia Law School noted, the admission may still have an impact because plaintiffs in a class action might refer to the admission in briefs or pleadings, thus influencing the court not to dismiss the class action.[197] James Cox, a law professor at Duke University, predicted that the SEC might be able to identify a limited number of cases in which companies are more willing to admitting liability because they will not face the threat of private litigation.[198]

Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, Deputy Attorney General or the Attorney General.").

193 *Id.*

194 *Id.*

195 *See* Jean Eaglesham & Chad Bray, *Citi Ruling Could Chill SEC, Street Legal Pacts*, WALL ST. J. (Nov. 29, 2011), *available at* http://online.wsj.com/article/SB10001424052970203935604577066242448635560.html; *see also* Harry S. David et al., *SEC Update: Enforcement Program Taking Shape Under New Leadership*, SCHULTE, ROTH & ZABEL (June 24, 2013), http://www.srz.com/files/News/5852f231-62a7-43c0-adc2-116a7b9fde58/Presentation/NewsAttachment/af6433ed-d31b-4187-b588-1cc51622f42b/062413_SEC_Update_Enforcement_Program_Taking_Shape_Under_New_Leadership.pdf (noting that party admissions "may undercut the ability to defend companion private securities litigation, including shareholder class action suits").

196 Jean Eaglesham & Andrew Ackerman, *SEC Seeks Admissions of Fault*, WALL. ST. J. (June 18, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887324021104578553931876196990.

197 *See* John C. Coffee, Jr., *"Neither Admit Nor Deny": Practical Implications of SEC's New Policy*, N.Y.L.J. (July 18, 2013) ("In the Southern District of New York, the majority of securities class actions are not dismissed on a motion to dismiss, and the chances of a dismissal on either a motion to dismiss or for summary judgment will predictably decline markedly when the defendant admits misconduct to the SEC in a prior proceeding.").

198 Eaglesham & Ackerman, *supra* note 196.

C. *Settlement Agreements in the Aftermath of the SEC Policy Change: Admissions of Wrongdoing*

1. Philip Falcone's Admission

The SEC's first application of its new settlement policy occurred in connection with the misconduct of an individual and his company.[199] On June 27, 2012, the SEC filed charges against Harbinger Capital Partners ("Harbinger"), as well as the Chairman and CEO of the company, Philip Falcone.[200] The settlement resolved two civil lawsuits filed by the SEC against Falcone and Harbinger,[201] which alleged that Falcone had "fraudulent[ly] . . . misappropriate[d] $113.2 million from a Harbinger fund in order to pay a personal tax obligation," and that Falcone and Harbinger had "engaged in a scheme to grant certain large investors favorable redemption and liquidity terms."[202] The SEC had also alleged that Harbinger had manipulated the bond prices of MAAX Holdings, Inc.[203]

On August 19, 2013, the SEC entered into a settlement with Falcone and Harbinger.[204] As part of the settlement, Falcone agreed to pay $6,507,574 in disgorgement, $1,013,140 in prejudgment interest, and a $4 million penalty, while Harbinger was required to pay a penalty of $6.5 million.[205] In addition, the agreement barred Falcone from the securities industry for a minimum of five years and required him to admit to acts of misconduct that had harmed investors and the market.[206]

Specifically, Falcone admitted that he had improperly taken out the $113 million loan from Harbinger to pay his own taxes at a

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199 *See* Diana K. Lloyd & Jared M. Barnes, *SEC Admissions Policy After Falcone—Proceed With Caution*, LAW 360 (Sept. 19, 2013), http://www.law360.com/articles/473581/sec-admissions-policy-after-falcone-proceed-with-caution. For an overview of the SEC's new policy, *see supra* Part IV.B.

200 *Our Team*, HARBINGER GROUP, INC., *available at* http://www.harbingergroupinc.com/phoenix.zhtml?c=118763&p=irol-investmentteam.

201 Juliet Chung, *Falcone Admits Wrongdoing, Agrees to Five-Year Ban*, WALL ST. J., Aug. 19, 2013.

202 SEC v. Harbinger Capital Partners LLC, No. 12 Civ. 5028, 2012 WL 2402857 (S.D.N.Y. June 27, 2012).

203 SEC v. Philip A. Falcone, No. 12 Civ. 5027 (S.D.N.Y. June 27, 2012).

204 *Philip Falcone and Harbinger Capital Agree to Settlement*, SEC. & EXCH. COMM'N (Aug. 19, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539780222#.Ukd8JEKhDzI.

205 *Id.*

206 *Id.* For a discussion of the SEC's power to bar individuals from the securities industry, *see supra* notes 62–67 and accompanying text.

lower interest rate than Harbinger's Special Situations Fund paid to borrow money;[207] that he had not informed investors about the loan for approximately five months;[208] and that he and Harbinger had granted favorable redemption and liquidity terms to large investors without disclosing the arrangements to the board of directors and other investors.[209] Falcone also admitted to purchasing all outstanding bonds issued by a Canadian manufacturing company, thus retaliating against a financial services firm after hearing rumors that the firm was shorting the Canadian manufacturers' bonds and urging its customers to do the same.[210] As a result of the improper "short squeeze," Falcone admitted that the bonds "more than doubled in price."[211]

On September 16, 2013, Judge Paul A. Crotty in the United States District Court for the Southern District of New York approved the settlement, calling it "a fair and appropriate resolution of the[ ] two matters."[212]

2. JPMorgan Chase "London Whale" Admission

In the second application of its new policy, the SEC secured an admission from JPMorgan in connection with charges it filed against the company for misstating its financial results and lacking adequate internal controls over its trading activity.[213]

On April 6, 2012, the *Wall Street Journal* reported that a London-based trader, nicknamed the "London Whale," had amassed an enormous position in a credit market on behalf of JPMorgan's New York-based chief investment office ("CIO").[214] One week later, JPMorgan's chief executive officer, Jamie Dimon, defended the CIO's activity, calling concerns about the trading ac-

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207 *Philip Falcone and Harbinger Capital Agree to Settlement*, *supra* note 204.

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 SEC v. Falcone, 12 Civ. 5027 (PAC), 2013 U.S. Dist. LEXIS 132300 (S.D.N.Y. Sept. 16, 2013).

213 *JPMorgan Chase Agrees to Pay $200 Million and Admits Wrongdoing to Settle SEC Charges*, U.S. SEC. & EXCH. COMM'N (Sept. 19, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539819965#.UlLN8EKhDzI.

214 Gregory Zuckerman & Katy Burn, *"London Whale" Rattles Debt Market*, WALL ST. J. (Aug. 6, 2012), *available at* http://online.wsj.com/news/articles/SB10001424052702303299604577326031119412436; *see also* Justin O'Brien & Olivia Dixon, *The Common Link in Failures and Scandals at the World's Leading Banks,* 36 SEATTLE U. L. REV. 941, 946 (2013).

tivity a "complete tempest in a teapot."[215] By May 10, 2012, however, total losses had exceeded $2 billion,[216] and by July 13, 2012, JPMorgan had lost more than $6 billion.[217]

On September 19, 2013, the SEC charged JPMorgan with improperly stating its financial results and failing to implement effective internal controls to guard against the fraudulent overvaluing of investments, in violation of sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act.[218] The SEC also announced that JPMorgan had agreed to settle the dispute by paying a $200 million penalty to the SEC.[219]

Significantly, as part of the settlement, JPMorgan was required to admit the facts accompanying the SEC's charges and to publicly acknowledge that it had violated the federal securities laws.[220] JPMorgan admitted several facts, including that: (1) trading losses occurred amidst "woefully deficient accounting controls" in the CIO; (2) senior management at JPMorgan had altered the CIO's policies for valuation control prior to the company's filing its first quarter report with the SEC in 2012 to remedy existing issues with its policies; (3) JPMorgan senior management knew that the Investment Banking unit used much more conservative prices in valuing certain derivatives held in the CIO portfolio, and that if the Investment Banking valuations were used, approximately $750 million of additional losses would have occurred for the CIO in the first quarter of 2012; (4) external traders with the CIO valued several of the CIO's positions in the CIO book at $500 million less than CIO traders valued them, leading to "large collateral calls against JPMorgan; (5) findings of internal reviews of the CIO caused some executives to question whether they should sign subcertifications in support of certifications required under the Sarbanes-Oxley Act; and (6) senior management provided inadequate updates to the audit committee on important facts regarding

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215 David Benoit, *The London Whale: J.P. Morgan's Statements through the Scandal*, WALL ST. J. (Sept. 19, 2013), http://blogs.wsj.com/moneybeat/2013/09/19/the-london-whale-j-p-morgans-statements-through-the-scandal/.

216 *Id.*

217 O'Brien & Dixon, *supra* note 214, at 946.

218 *JPMorgan Chase Agrees to Pay $200 Million and Admits Wrongdoing to Settle SEC Charges*, U.S. SEC. & EXCH. COMM'N (Sept. 19, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539819965#.UlLN8EKhDzI.

219 *Id.*

220 *Id.* As part of the global settlement, JPMorgan also reached settlement agreements with the Federal Reserve, the Office of the Comptroller of the Currency, and the U.K. Financial Conduct Authority. *Id.* In all, JPMorgan agreed to pay approximately $920 million in penalties to the SEC and the other agencies.

the CIO prior to filing the first quarter report, thus hindering the ability of the committee to protect shareholders and ensure that the firm's financial statements were accurate.[221]

JPMorgan issued a press release on the day of the settlement, stating that it had "cooperated extensively" with all inquiries.[222] In the press release, Mr. Dimon explained that JPMorgan has "accepted responsibility and acknowledged [its] mistakes from the start," although the press release did not contain JPMorgan's specific admissions.[223] On the day of the announcement, JPMorgan shares closed at $52.75, having fallen 1.2 percent from the previous day.[224]

In a statement released by the SEC, George Canellos, the Co-Director of the SEC's Division of Enforcement, explained that the JPMorgan case was "about transparency and accountability, and JPMorgan's admissions [were] a key component in that message."[225] Canellos noted that although the SEC will not seek admissions in every case, it required an admission in this case because JPMorgan had egregious issues with its internal controls, thus putting its millions of shareholders at risk.[226]

On October 16, 2013, following JPMorgan's settlement with the SEC, the U.S. Commodity Futures Trading Commission ("CFTC") brought and settled charges against JPMorgan in connection with the London Whale incident for improperly trading credit default swaps.[227] In settling with the CFTC, JPMorgan

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221 *Id.*

222 *JPMorgan Chase Reaches Settlements With SEC, FCA, OCC and Federal Reserve on CIO Trading Matter*, JPMORGAN CHASE & CO. (Sept. 19, 2013), http://investor.shareholder.com/jpmorganchase/releasedetail.cfm?ReleaseID=791729.

223 *See id.*

224 Kevin McCoy, *JPMorgan Fined $920 Million for 'London Whale'*, USA TODAY (Sept. 19, 2013), *available at* http://www.usatoday.com/story/money/business/2013/09/19/jpmorgan-chase-fined/2833725/. Unless unexpected circumstances arise from the settlement, a dramatic change in the price of JPMorgan shares is not expected. *See id.* (quoting Dan Marchon, Senior Equity Research Associate at Raymond James & Co.). Moreover, even though JPMorgan lost approximately $6 billion during the London Whale incident and must pay a penalty of approximately $920 million to regulators, these losses "pale[ ]in comparison to J.P. Morgan's profits of US$24 billion in its firm wide trading books"). *See* Claudia Zeisberger, *Perspective: The 'London Whale'*, INSEAD KNOWLEDGE (Oct. 4, 2013), http://knowledge.insead.edu/business-finance/banking-insurance/perspective-the-london-whale-2867.

225 George Canellos, *Statement on SEC Enforcement Action Against JPMorgan*, U.S. SECURITIES & EXCHANGE COMM'N (Sept. 19, 2013), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370539820148#.UlmmWEKhDzI.

226 *Id.*

227 *CFTC Files and Settles Charges Against JPMorgan Chase Bank, N.A., for Violating Prohibition on Manipulative Conduct In Connection with "London Whale" Swaps Trades*, U.S. COM-

agreed to pay a penalty of $100 million, and the bank admitted to engaging in a trading strategy to defend its position in the market "in reckless disregard of the possible consequences of [its] conduct."[228]

Two former JPMorgan CIO traders, Javier Martin-Artajo and Julien Grout, were indicted by a federal grand jury for allegedly manipulating the bank's trading position "in order to hide the true extent of significant losses in that trading portfolio,"[229] but the case is ongoing. Recently, New York Supreme Court Judge Jeffrey K. Oing dismissed a shareholder derivative suit brought against JPMorgan's board of directors alleging a lack of oversight prior to the London Whale $6 billion trading losses.[230] Judge Oing dismissed the action because the plaintiffs did not succeed in showing why they had been unable to voice their concerns to the board of directors prior to filing the action.[231]

V. Lessons Learned In the Aftermath of Judge Rakoff's Decisions and the Falcone and JPMorgan Settlements

A. *The Impact of Judge Rakoff's Decisions*

Judge Rakoff's decisions in *Citigroup* and *Bank of America* appear to have influenced other judges: in following his opinions, a number of other district court judges have rejected or questioned settlements the SEC has proposed. In the event that Judge Rakoff's rulings result in district court judges' employing a stricter standard for approval of consent judgments, the SEC may face substantially greater costs in entering consent judgments with defendants.[232] Some lawyers predicted that if the court's ruling in

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modity Futures Trading Comm'n (Oct. 16, 2013), http://www.cftc.gov/PressRoom/PressReleases/pr6737-13.

228 *Id.*

229 Sindhu Sundar, *'London Whale' Traders Indicted As JPMorgan Inks $800M Deal*, Law 360 (Sept. 16, 2013), http://www.law360.com/articles/473137.

230 Stewart Bishop, *'London Whale' Shareholder Derivative Suit Gets Canned*, Law 360 (Jan. 15, 2014), http://www.law360.com/articles/501559/london-whale-shareholder-derivative-suit-gets-canned.

231 *Id.*

232 *See* M. Todd Henderson, *Impact of the Rakoff Ruling: Was the Judge's Scuttling of the SEC/BofA Settlement Legally Pointless or Incredibly Important—or Both?*, Wall St. Lawyer 8 (Nov. 2009); *see also* Leen Al-Alami, *Business Roundtable v. SEC: Rising Judicial Mistrust and the Onset of a New Era in Judicial Review of Securities Regulation*, 15 U. Pa. J. Bus. L. 541, 544

Citigroup is affirmed by the Second Circuit, it might lead to increased liability for Wall Street firms, higher legal costs for corporations and federal agencies, and lengthier securities cases.[233] However, if district courts were to analyze the SEC's settlement agreements more strictly, it is possible that the SEC will instead bring more of its cases before an ALJ.[234]

There are two reasons that the more likely course that district courts will follow is to give the same deference they have always given to the SEC, except in cases in which it appears that the parties are seeking to enter into a consent decree that seems completely contrary to the facts. First, as mentioned above, the Second Circuit will likely overturn the district court's decision in *Citigroup*, and if it does so, district court judges will be required to defer to the SEC's judgment. Second, since Judge Rakoff issued his opinions the SEC has instituted its new admission policy. Thus, because the SEC has not only adopted a policy whereby it will seek admissions in egregious cases, but has already secured such admissions in two cases, if the SEC chooses not to seek an admission in a specific case, district court judges will be even more likely to defer to the agency's decisions because they will know that there was an internal review process at the SEC and a decision was deliberately made not to seek admissions. Thus, courts will defer to the SEC decisions much as they defer to other decisions by federal agencies and prosecutors that are within their discretion, absent some indication that the decision was made for an improper purpose.[235]

(2013) (noting that Michael McConnell, a former judge on the Tenth Circuit Court of Appeals, projected that Judge Rakoff's decision would "lead[ ] to impossibly costly litigation that would prevent the SEC from pursuing many enforcement actions"); Naoufal, *supra* note 11, at 206 ("The SEC settles most of its cases by consent decrees, and creating a more stringent standard can result in more costs and greater risks."); Timothy P. Crudo & Newton Oldfather, *SEC and Regulatory Settlements: A New Era*, LATHAM & WATKINS (2012), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.lw.com%2FthoughtLeadership%2Fnew-era-of-sec-and-regulatory-settlements&ei=Ay1HUuvDCKvi4APzpIDQAw&usg=AFQjCNH0-yUZzQCoowcsd2CltZk1V8sWZA&bvm=bv.53217764,d.dmg ("If the SEC must spend more resources bringing fewer cases, defendants can expect the price of settlement to rise . . . .").

233 *See* Eaglesham & Bray, *supra* note 195.

234 *See supra* notes 162–164 and accompanying text.

235 Hardwick v. Doolittle, 558 F.2d 292, 301 (1977) (recognizing that there is "a broad ambit to prosecutorial discretion, most of which is not subject to judicial control"); *see also* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984) (stating that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by [agencies]"); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (stating that a court reviewing agency action "is not to substitute its judgment for that of the agency").

B. *The SEC is Willing to Require Admissions from Individuals and Large Corporations*

Although to date the SEC has required admissions in only two instances, these cases shed light on how the SEC might apply its policy in the future. Since Chair White instituted the SEC's new settlement policy on June 18, 2013, the SEC has demonstrated a willingness to seek admissions of wrongdoing from large companies such as the "financial goliath" JPMorgan,[236] rather than demanding accountability solely from smaller corporations. In securing an admission from JPMorgan in connection with the London Whale incident, the SEC achieved several important goals. First, because the admission was made by a high profile defendant, the SEC increased its leverage with future companies in settlement negotiations and "bolster[ed] public confidence for an agency long criticized for being too soft on Wall Street."[237] Second, the admission was a significant "symbolic victory" for Mary Jo White and the SEC that demonstrates that the SEC plans to carry out its promise to seek admissions in particularly egregious cases, even if this practice might jeopardize defendants' willingness to settle.[238] Third, the admission might have an effect on other companies in the industry seeking to benchmark themselves against JPMorgan to ensure that they have sufficient controls in place.[239]

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236 *See supra* Part IV.C.2.

237 Dina ElBoghdady & Danielle Douglas, *JPMorgan's Admission: A Symbolic Victory for the SEC, of Limited Use in Private Lawsuits*, WASH. POST (Sept. 19, 2013); *see also* Ken Sweet & Marcy Gordon, *JPMorgan's $5 Billion Mortgage Deal Will Not End Its Troubles*, HUFFINGTON POST (Oct. 26, 2013), http://www.huffingtonpost.com/2013/10/26/jpmorgan-mortgage-deal-not-end_n_4165936.html (noting that JPMorgan's London Whale admission was "a first for a major company"); Robin Sidel et al., *J.P. Morgan Faces a Hard-Line SEC*, WALL ST. J. (last updated Sept. 19, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887324807704579084912809151456 ("The trading fiasco resulted in a hit to J.P. Morgan's reputation as a stellar risk manager, and gave a black eye to Mr. Dimon, who has been known for close attention to details of the bank's operation. It also triggered the departures of top executives.").

238 *See* ElBoghdady & Douglas, *supra* note 237 ("[The admission] represents a down payment on (SEC Chairman) Mary Jo White's promise to get more admissions." (internal quotation marks omitted)); *see also* Christopher Poe & David Smyth, *JPMorgan Chase Admissions May Be Less Than Meet the Eye*, JDSUPRA (Sept. 23, 2013), http://www.jdsupra.com/legalnews/jpmorgan-chase-admissions-may-be-less-th-46060/ (discussing how the settlement shows the SEC is committed to making this new approach work, and not just with easy cases and hapless defendants").

239 *See* ElBoghdady & Douglas, *supra* note 237.

Philip Falcone's admissions also demonstrate that the SEC has "shift[ed] course" to target individual misconduct.[240] However, it is equally clear that the SEC will not require in all cases that individuals admit wrongdoing even when it requires such admissions by a corporation. Thus, in JPMorgan's London Whale settlement, top banking officials at JPMorgan did not accept responsibility for the harm caused to investors.[241]

Nonetheless, it is clear that the SEC will increasingly target individuals to admit to wrongdoing. Chair White recently stated that the SEC plans to heighten its focus on individual misconduct in seeking admissions. At a speech to the Council of Institutional Investors in Chicago, she explained that she wants to ensure that the SEC is "looking first at the individual conduct and working out to the entity, rather than starting with the entity as a whole and working in."[242] She explained that this is "a subtle shift, but one that could bring more individuals into enforcement cases."[243] Thus, it appears clear that the SEC will increasingly require admissions from individual wrongdoers and not simply the corporations that, often through lax supervision, enabled the individuals to commit the wrongdoing without being discovered until the damage had been done.

C. *Collateral Consequences of Admissions: Will Not Likely be the Deciding Factor for a Defendant in Determining Whether to Admit Wrongdoing in Many Cases*

One likely result of the SEC's new policy is that some defendants will be reluctant to make admissions because investors might use their admissions in private lawsuits.[244] Although an admission in an SEC consent judgment may ultimately be inadmissible in a subsequent civil trial, the admission may still have an impact because plaintiffs in a class action might refer to the admission in

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240 Stuart Pfeifer, *SEC Chief Says Enforcement Will Target Individuals' Misconduct First*, L.A. Times, Sept. 26, 2013, *available at* http://articles.latimes.com/2013/sep/26/business/la-fi-mo-sec-must-target-individuals-as-well-as-companies-white-says-20130926.

241 *See* Ben Weyl, *J.P. Morgan Not Completely Out of the Woods Yet*, 2013 WL 75290063, Cong. Q. Roll Call (Sept. 20, 2013) (stating that "[t]he settlements stopped short of assessing blame against any top executives").

242 *Id.*

243 Max Stendahl, *SEC Head White Warns of Tougher Enforcement*, Law 360 (Sept. 26, 2013), http://www.law360.com/articles/475946/sec-head-white-warns-of-tougher-enforcement.

244 *Id.*

briefs or pleadings, thus influencing the court not to dismiss the class action.[245]

Defendants, therefore, will undoubtedly need to consider whether it is prudent to make admissions to the SEC due to the potential costs resulting from private litigants or regulators who attempt to use admissions from defendants in their own cases.[246] If making admissions proves too costly, defendants may become more inclined to litigate rather than agree to settlements that include admissions, thus "straining S.E.C. resources and imperiling the agency's chance at a victory."[247]

However, defendants who are usually represented by very experienced counsel in these matters will undoubtedly seek to structure their admissions to limit the collateral damage that could arise from subsequent suits. At least at this early stage of the SEC's implementation of its new policy, the SEC appears to be amenable to this practice, as evidenced in the London Whale case. JPMorgan's admission may not be particularly useful for private plaintiffs seeking to capitalize on the admission in subsequent lawsuits.[248] In connection with its admissions to the SEC in the London Whale incident, JPMorgan took particular care to admit only to negligence in its internal controls, and the bank did not admit to any facts that could be used to prove that it intentionally misled its in-

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245 Coffee, Jr., *supra* note 197 ("In the Southern District of New York, the majority of securities class actions are not dismissed on a motion to dismiss, and the chances of a dismissal on either a motion to dismiss or for summary judgment will predictably decline markedly when the defendant admits misconduct to the SEC in a prior proceeding.").

246 *See generally* David Smyth, *SEC Puts Some Color on Its New Admissions Policy*, JDSupra (Aug. 21, 2013), http://www.jdsupra.com/legalnews/sec-puts-some-color-on-its-new-admission-04242/ ("Falcone may have calculated that the follow-on costs from private lawsuits trying to take advantage of the admissions in the filed consent are not high enough to continue litigating this matter with the SEC."); *see also* David et al., *supra* note 81 (stating that defendants may be forced to choose between "accepting the harsh collateral consequences of admitted wrongdoing or confronting the financial and reputational risk of protracted litigation with the SEC"); Max Sendahl, *Plaintiffs Attys Downplay SEC Shift on Settlements*, Law 360 (Aug. 23, 2013), http://www.law360.com/articles/467367/plaintiffs-attys-downplay-sec-shift-on-settlements (stating that defendants who admit wrongdoing "will have a harder time denying liability in the civil context, and may even be prohibited from doing so").

247 Alexandra Stevenson & Ben Protess, *Legal Side Effect in Admission to S.E.C.*, N.Y. Times, Oct. 8, 2013, at B3.

248 ElBoghdady & Douglas, *supra* note 237 (noting that many experts feel that the admission was "a carefully crafted acknowledgment that's unlikely to be used against JPMorgan in private lawsuits or against its senior managers"); Peter J. Henning, *In JPMorgan Settlement, Testing the Lines of Admitting Wrongdoing*, N.Y. Times, Sept. 19, 2013 (stating that the settlement was "carefully structured to limit its potential fallout" and that it "will be of very limited utility to private parties suing the bank for violating the federal securities laws").

vestors.[249] In order to prevail in court, private plaintiffs would likely need to prove fraud, and neither the settlement nor the initial allegations reference any fraud by the bank in misleading investors.[250] Thus, although private plaintiffs would have standing to sue under Rule 10b-5, JPMorgan's admission will not likely advance these claims because the bank did not admit to making any misstatements or omissions.[251]

In reaching a settlement, it is possible that the SEC did not want to force an admission that could be used by subsequent plaintiffs in a 10b-5 action because future defendants would be reluctant to enter into a settlement agreement containing admissions that would hurt them in other lawsuits.[252] In addition, undoubtedly the SEC, in one of its first applications of its new policy, did not want JPMorgan to take the case to trial simply because it refused to admit to certain allegations. Moreover, it is not the SEC's role to attempt to obtain admissions solely to help private litigants in ongoing or subsequent actions.

Another consequence for defendants who admit to wrongdoing may be that they will face additional penalties from other regulatory agencies. After admitting to misconduct, Falcone received additional penalties from the New York Department of Financial Services that resulted in a seven-year ban from exercising control over Fidelity and other licensed insurance firms in New York.[253] Falcone was also barred from serving as a director or officer of Fidelity or a New York-licensed insurance firm during the seven-year period.[254]

Some have speculated that the action by the New York Department of Financial Service might "creat[e] a precedent that un-

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249 *See* ElBoghdady & Douglas, *supra* note 237; Poe & Smyth, *supra* note 238 ("JPMorgan is still admitting only to non-scienter-based charges under Sections 13(a) and 13(b)(2) of the Exchange Act.").

250 Henning, *supra* note 248; *see also* Stephen Gandel, *Did the SEC Let JPMorgan Off the Hook?*, CNNMONEY (Sept. 20, 2013), http://finance.fortune.cnn.com/2013/09/20/sec-jpmorgan-london-whale/ ("JPMorgan doesn't admit it tried to deceive anyone. Just that it missed something it should have. In most civil lawsuits you have to prove fraud. The SEC isn't even alleging fraud here.").

251 Henning, *supra* note 248.

252 *See* Henning, *supra* note 248 and accompanying text.

253 Erik Larson, *Falcone Banned at Fidelity for 7 Years by N.Y.'s Lawsky*, BLOOMBERG (Oct. 8, 2013), http://www.bloomberg.com/news/2013-10-07/falcone-banned-by-n-y-regulator-for-seven-years.html.

254 Leslie Scism, *Harbinger's Philip Falcone Barred From Involvement With NY-licensed Insurers—NY Regulator*, WALL ST. J. (Oct. 13, 2013), *available at* http://online.wsj.com/article/BT-CO-20131007-706758.html.

dermines" the SEC's efforts to extract admissions from wrongdoers following misconduct.[255] If defendants are worried that their admissions will be detrimental to their interests in other proceedings, there may be a chilling effect on the willingness of banks and hedge funds to make admissions to the SEC.[256] However, given the importance of the SEC in the regulatory framework, it seems unlikely that many defendants will refuse to make admissions simply because they fear exposure to additional actions by other regulators.

In fact, in the London Whale case, JPMorgan, in a subsequent settlement with the CFTC, admitted to more egregious conduct than it had in its settlement with the SEC, namely, that it had acted recklessly in its trading strategy.[257] Although such an admission could potentially "carry a large price tag" by leading to increased liability in shareholder litigation or exposure to criminal charges, because "even a vague admission like 'acting recklessly'" may be beneficial to plaintiffs or regulators, JPMorgan was willing to make the admissions.[258]

Moreover, JPMorgan still faces the prospect of more legal actions, including from the DOJ.[259] Due to the uncertainty surrounding the DOJ's response, if any, following admissions in cases in which prior criminal charges had not been filed, attorneys have been cautioned to consider carefully the implications of any admissions to the SEC as part of settlement agreements.[260] Although the

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255 Alexandra Stevenson & Ben Protess, *Legal Side Effect in Admission to S.E.C.*, N.Y. Times, Oct. 8, 2013, at B3 (noting that Lawsky's action "could cause headaches for the SEC").

256 *Id.*

257 *See* text accompanying note 228.

258 Max Stendahl, *CFTC Mimics SEC Policy Shift With JPMorgan "Whale" Pact*, Law 360 (Oct. 16, 2013), http://www.law360.com/articles/480686/cftc-mimics-sec-policy-shift-with-jpmorgan-whale-pact.

259 Evan Weinberger, *JPMorgan Admits Guilt In $920M 'London Whale' Deal*, Law 360 (Sept. 19, 2013), http://www.law360.com/articles/473580/jpmorgan-admits-guilt-in-920m-london-whale-deal. Thus far, JPMorgan has not agreed to make an admission before the Commodity Futures Trading Commission, and it is unclear whether the Trading Commission will push the bank to make an admission similar to the one it made in settling with the SEC. *See* Henning, *supra* note 248. If JPMorgan were to make a similar admission to the Trading Commission, it "could open the bank up to substantial additional liability." *Id.*

260 Lloyd & Barnes, *supra* note 243 (discussing how attorneys may benefit from engaging in continued dialogue with the DOJ "to better calculate the risk involved before admitting to facts that could form the basis of criminal liability"); *see also* Marc D. Powers et al., *Baker & Hostetler Discusses the Philip Falcone & Harbinger Capital Settlement*, The CLS Blue Sky Blog (Sept. 27, 2013), http://clsbluesky.law.columbia.edu/2013/09/27/baker-hostetler-discusses-the-philip-falcone-harbinger-capital-settlement/ (stating that "it should be clear to all regulated entities . . . that SEC enforcement actions come with even greater risk and potential for deeper and more far-reaching exposure"); *Tone at the Top (of the SEC): Tough*, Davis Polk (Oct. 7, 2013), http://

DOJ might ultimately take action if it considers the conduct to be egregious, it is also possible that the DOJ might decide not to because of "the possibility that the public would view a dual prosecution as overly harsh."[261]

In addition, there are many reasons that defendants may not want to take a case to trial. First, if they lose, they may face even larger fines than they would have had they settled. Second, by proceeding to trial they necessarily expose themselves to additional bad press both because the case will take longer to resolve and because the evidence introduced at trial will be public. Because these cases will involve accusations of egregious conduct, defendants will be even more likely to want to resolve the case through settlement and put it behind them.

That being said, as the SEC increasingly seeks to require admissions in more of its cases, there will undoubtedly be defendants who determine that it is in their interests to go to trial rather than admit to wrongdoing. This will more likely be the case with individuals because they will not have quite the same concerns companies will have regarding ongoing bad press which will likely occur in a protracted case. Moreover, individuals do not always analyze the likelihood of success after a trial as rationally as corporations. In some cases, defendants will determine that the proof against them is weak and that they have a good chance at prevailing at trial. In others, defendants may be unwilling to make certain admissions the SEC might require due to the potential collateral consequences. Thus, the policy change will have important effects for defendants and the SEC. If the Commission employs an "overly aggressive" approach to enforcing the policy, disputes may be resolved less efficiently.[262] Defendants will likely have less of an incentive to settle if they cannot include the "neither admit nor deny" language in settlement agreements,[263] which may force the

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www.davispolk.com/sites/default/files/10.07.13.SEC_.pdf ("The SEC's aggressive stance under Chair White's leadership portends a flurry of enforcement activity over the next several years.").

261 Lloyd & Barnes, *supra* note 199. Prior to entering the agreement with the SEC, however, Falcone and Harbinger had not been subject to any criminal charges, and it is unclear whether the DOJ is currently pursuing a criminal investigation of the matter. *Id.* (stating that "risk of prosecution remains and only time will tell whether and how the DOJ will rely on admissions of liability as a shortcut in their own investigations").

262 Dan O'Connor et al., *Admitting Guilt: The SEC's New Settlement Policy*, ROPES & GRAY, *available at* http://www.mondaq.com/unitedstates/x/261598/Securities/Admitting+Guilt+The+SECs+New+Settlement+Policy (last updated Sept. 9, 2013).

263 Bradley Bondi, *The SEC's New Policy on Seeking Admissions in Settlements*, JDSUPRA (July 1, 2013) (Excluding the 'neither admit nor deny' language from settlements will lower

SEC to take these cases to trial.[264] Thus, the SEC risks losing matters at trial that it might have settled prior to the policy change,[265] which would jeopardize any potential recovery by victims of the misconduct.[266]

D. *Long-Term Implications of the New Admission Policy*

The policy change may also result in less thorough, or fewer, investigations as the SEC shifts resources towards preparing for trial.[267] As Professor John Coffee, an expert on securities laws suggests, the SEC may benefit from bringing fewer cases in order to increase its focus on the cases it does bring.[268] Perhaps the SEC's new direction is unsurprising given Mary Jo White's background as a prosecutor. It is interesting to note that none of the previous five Chairs shared Ms. White's prosecutorial background prior to being appointed as Chair.[269] Ms. White has made clear that the SEC

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significantly the incentive of registrants to settle, possibly requiring the SEC to litigate more cases.").

264 O'Connor et al., *supra* note 262.

265 *Id.*; Marc H. Axelbaum, *Admit It! SEC May Seek Admissions of Wrongdoing in Settlements*, PILLSBURY WINTHROP (June 25, 2013), https://www.pillsburylaw.com/siteFiles/Publications/Alert20130625LitigationAdmitItSECMaySeekAdmissionsofWrongdoingInSettlements.pdf (stating that enforcement lawyers may be concerned about "the risk of losing a high-profile trial").

266 Coffee, Jr., *supra* note 197 (noting that settlements allow for victims to be compensated more quickly).

267 *Id.*; *see also* Max Stendahl, *SEC's Courtroom Cred Slips as Trial Losses Mount*, LAW 360 (December 4, 2013), http://www.law360.com/articles/493461/sec-s-courtroom-cred-slips-as-trial-losses-mount (stating that more trials could place the "cash-strapped [SEC] in a bind").

268 John C. Coffee, Jr., *The End of Phony Deterrence? 'SEC v. Bank of America'*, N.Y.L.J. (2009).

269 *See generally SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/sechistoricalsummary.htm (last modified Aug. 15, 2013). Former Chairman Mary L. Shapiro, appointed on January 20, 2009, served as the CEO of FINRA and as Chairman of the CFTC prior to becoming SEC Chairman, but does not have a prosecutorial background. *See SEC Biography: Chairman Mary L. Shapiro*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/commissioner/schapiro.htm (last modified Dec. 11, 2012). Christopher Cox, who was appointed as Chairman on June 2, 2005, worked for Congress, the White House, and in private practice prior to joining the SEC. *See SEC Biography: Chairman Christopher Cox*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/commissioner/cox.htm (last modified Feb. 4, 2009). Former Chairmen William H. Donaldson, who was appointed on February 18, 2003, and Harvey L. Pitt, who was appointed on August 3, 2001, also did not possess prosecutorial backgrounds prior to becoming Chairmen. *See SEC Biography: Chairman William H. Donaldson*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/commissioner/donaldson.htm (last modified Jan. 23, 2009) (noting that Mr. Donaldson "arrived at the Commission with more than 45 years of experience working at the highest levels of business, government

plans to take more of its cases to trial in light of its aggressive enforcement strategy since her appointment.[270] As a result, there will be "greater public accountability."[271]

Moreover, when the SEC's policy change went into effect, several of Mary Jo White's top attorneys at the SEC were former prosecutors from the Southern District of New York who had substantial experience with exercising prosecutorial discretion.[272] Both George Canellos and Andrew Ceresney, co-directors of the SEC's Enforcement Division early on during Chair White's tenure, and Robert Rice, Chief Counsel, served as Assistant U.S. Attorneys in the United States Attorney's Office and held various supervisory positions.[273] Federal prosecutors, especially in New York, have brought securities cases against both individuals and companies and have had a tremendous amount of experience in using their broad discretion to determine what the right outcome should be based on the facts of the case. In addition, they have tried many securities cases, obtaining convictions in most. Now that the SEC has established a new category of admissions, the personnel are in place to ensure that the new policy will be implemented in a careful and deliberate manner. Chair White and the team she has assembled at the SEC have a great deal of experience supervising other lawyers on important trials. This will be important as the SEC

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and academia."); *SEC Biography: Chairman Harvey L. Pitt*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/commissioner/pitt.htm (last modified Jan. 23, 2009) (stating that Mr. Pitt worked in private practice and in various roles with the SEC, such as General Counsel, prior to joining the SEC as Chairman). Arthur Levitt, who served two terms as Chairman, did not obtain a law degree prior to serving as Chairman. *See SEC Biography: Chairman Arthur Levitt*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/commissioner/levitt.htm (last modified Jan. 23, 2009) (stating that Mr. Levitt owned a newspaper, served as Chairman of the New York City Economic Development Corporation, and was Chairman of the American Stock Exchange prior to being appointed as Chairman of the SEC).

270 Daniel Wilson, *SEC's White Says More Trials in Agency's Future*, LAW 360 (Nov. 14, 2013), http://www.law360.com/articles/488532/sec-s-white-says-more-trials-in-agency-s-future.

271 Stendahl, *supra* note 267.

272 *See George Canellos and Andrew Ceresney Named Co-Directors of Enforcement*, U.S. SEC. & EXCH. COMM'N (Apr. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514832#.UtB9YUKhDzI.

273 Both George Canellos and Andrew Ceresney, co-directors of the SEC's Enforcement Division early on during Chair White's tenure, and Robert Rice, Chief Counsel, served as Assistant U.S. Attorneys in the United States Attorney's Office and held various supervisory positions. *George Canellos and Andrew Ceresney Named Co-Directors of Enforcement*, U.S. SEC. & EXCH. COMM'N (Apr. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514832#.UtB9YUKhDzI. *Robert E. Rice Named As Chief Counsel to SEC Chair*, U.S. Sec. & Exch. Comm'n (June 3, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575118#.UtB_KEKhDzI.

transitions to an agency that conducts more trials as a result of its new policy on admissions.

In implementing the new policy, Chair White sought not only to seek a just result against those whose conduct is egregious, but also to deter companies and individuals from committing future acts of misconduct. The policy will likely increase deterrence because there is now a greater "penalty" if the actions rise to the level where the SEC will require an admission of wrongdoing. The new admission policy will likely usher in a new era at the SEC as it will ensure that companies and individuals whose conduct is egregious admit to wrongdoing or take the case to trial. They can no longer simply settle a case, implement some changes and pay a fine without admitting that they did something wrong. This will lead to a more just resolution of cases. This may also help the vast majority of companies and individuals who neither admit nor deny wrongdoing. Because some cases will require admissions, the conduct involved in the other cases may be viewed as purely negligent and therefore the implications for the company or individuals will be that the public will not perceive them as having done anything egregious. The new policy will likely increase deterrence because there is now a greater "penalty" if the company's or individual's actions rise to the level where the SEC will require an admission of wrongdoing.

VI. Conclusion

With the recent policy change altering the SEC's stance toward admissions in settlement agreements, the SEC has sought to send a stronger deterrent message to companies.[274] Some commentators predicted that the SEC's new policy would be used sparingly in cases involving defendants who are nearly bankrupt or had been previous subjects of failed criminal proceedings.[275] However, the admissions by Falcone and JPMorgan suggest that the SEC's new policy requiring defendants to make admissions in particularly egregious cases might be applied more broadly than initially antici-

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274 *See* Michaels, *supra* note 179 (stating that the SEC is "trying to get as strong a deterrent message out there as [possible]" (quoting Chair White)); ("Defendants are going to have to own up to their conduct on the public record[.] . . . This will help with deterrence, and it's a matter of strengthening our hand in terms of enforcement." (quoting Chair White)).

275 *Id.*

pated.[276] Chair White has clearly set the SEC on a path towards holding both individuals and corporations more accountable for their actions. Both through the SEC's actions and her recent statement indicating that the SEC will seek more admissions in the future while focusing increasingly on individuals, Chair White has made clear that the Falcone and JPMorgan cases were not simply an effort to placate judges or elected officials.

In the aftermath of the SEC's policy changes to its "no admit, no deny" settlement practices, the SEC appears to have addressed several of Judge Rakoff's concerns regarding its willingness to demand accountability from defendants when entering into settlements.[277] When the SEC altered its settlement policy, many believed that it would have difficulty securing admissions because defendants can refuse to do so in favor of litigating their disputes at trial.[278] While defendants do retain the option to forego settlement and go to trial, the recent admissions secured by the SEC demonstrate that some defendants are willing to admit wrongdoing as part of settlement agreements in lieu of going to trial, because they have concluded that it is in their interest to do so. The recent changes to the SEC's settlement practices suggest that the SEC has altered its focus in an attempt to strengthen its law enforcement program and provide for increased deterrence of companies and individuals.

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276 *Id.* ("[T]he recent settlement . . . suggests a potentially broader application of the policy.").

277 For an overview of Judge Rakoff's concerns, *see supra* Parts III.A.1 and III.A.2.

278 *See supra* notes 246–247 and accompanying text.