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Signing Consent Orders in Regulatory Disputes

For financial institutions, signing a Consent Order is often the most efficient way to resolve a supervisory dispute with regulators. Many banks are successful in negotiating language in the Order clarifying that the institution is "neither admitting nor denying" the allegations which form the basis for the Order. Although this language provides some protection to an institution going forward, there may yet be consequences:

• Depending on their primary regulator, financial institutions that sign a Consent Order may be unable to utilize the intra-agency appeals process to appeal examination findings that form the basis of the order. This principle may in certain circumstances be applied broadly to preclude appeal of large sections of an institution's report of examination.

• Federal banking agencies disagree over whether determinations of ongoing compliance with an Order are appealable material supervisory determinations. Thus, the presence of a Consent Order – even one which contains the "neither admitting nor denying" language – may make it difficult for an institution to appeal supervisory determinations for many examination cycles going forward.

• Certain institutions may be precluded from offering securities through private placements otherwise exempt from SEC registration requirements. The Regulation D safe harbor for private offerings is not available to issuers subject to a final order based on a violation of law or regulation that prohibits fraudulent, manipulative, or deceptive conduct.

Signing an Order which lacks the qualification that the institution is "neither admitting nor denying" the underlying allegations may constitute an admission of misconduct, and could provide ammunition for subsequent civil litigants. Pryor Cashman Partner Jeffrey Alberts, head of Pryor Cashman's White Collar Defense and Investigations practice, was recently quoted in Law360 regarding this issue, as it relates to Barclay's recent Consent Order with the New York State Department of Financial Services:

> *If not for the NYDFS fine, Axiom may have had a harder time making their case, Jeffrey Alberts, head of Pryor Cashman LLP's white collar defense and investigations practice, who isn't involved in the case, told Law360 Thursday.*
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> *Because the bank signed off on the department's consent order, which included factual allegations of wrongdoing involving the Last Look system, it opened itself up for subsequent lawsuits brought by private parties, Alberts said.*
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> *Having spent six years as a prosecutor with the U.S. Attorney's Office for the Southern District of New York, Alberts said he understands the government's desire for justice and the need to wrap up the case with an appropriate penalty and by getting a defendant to admit that what they did was wrong.*
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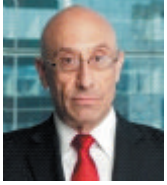
> *"But for the bank, that very often doesn't wrap things up," Alberts said.*

In light of the foregoing, it is important for financial institutions facing the prospect of a Consent Order to work closely with counsel in negotiating the exact phrasing of the Order. The language of the Order may have consequences, including relating to how the institution is regulated, for years to come.

For more information, please contact a member of Pryor Cashman's Financial Institutions Group.



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