

SEC Changes Policy on Admitting Guilt in Settlements of Enforcement Actions

*January 11, 2012 by **Bob Rose***

On January 6, 2012, the **Securities and Exchange Commission (“SEC”)** announced that it has modified its settlement policy for enforcement actions that also involve a criminal conviction or admissions by a defendant of criminal violations. Under its new policy, the traditional “neither admit nor deny” language will be deleted from its settlement documents. Instead, the SEC will recite the facts and nature of the related criminal proceeding. Enforcement staff will have the discretion to incorporate into SEC settlement documents any relevant facts admitted by the defendant in the criminal proceedings.

This new policy applies only to cases where there have been parallel criminal convictions (including guilty pleas), to non-prosecution agreements and to deferred-prosecution agreements between the defendants and the Justice Department that include “admissions or acknowledgements” of criminal wrongdoing. The SEC will continue to use the “neither admit nor deny” language when it settles with a company in the absence of any criminal proceedings.

The SEC’s announcement stated that this new policy involves only a “minority” of its enforcement actions, and is “separate from and unrelated” to the recent rejection by the United States District Court for the Southern District of New York of its proposed \$285 million settlement with Citigroup Global Markets Inc. arising from the bank’s lucrative short trading bets against a billion dollar collateralized debt obligation (CDO) composed of home loans, while it was selling the same CDO to investors as a good investment.

While the “neither admit nor deny” practice has been followed for many years, its application has attracted negative attention recently, particularly in cases arising from the 2008 financial crisis. The SEC has defended the practice because it saves considerable expense and avoids potential failures by settling with companies rather than fighting them in court. And it claims that it can recover just as much money in settling as in litigating, thereby enabling investors to recover sooner.

In the end, a company that has admitted its liability in a criminal case has little to gain for its defense of shareholder suits by insisting that it not admit the same facts a second time in settling the SEC's enforcement action.

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