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## **Admissions in SEC Enforcement Cases: The Revolution That Wasn't**

David Rosenfeld

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# Admissions in SEC Enforcement Cases: The Revolution That Wasn't

David Rosenfeld\*

*ABSTRACT: In 2013, the SEC departed from its long-standing policy of settling enforcement matters on a no-admit/no-deny basis, and for the first time began to require admissions when settling certain cases. The new admissions policy was greeted with considerable concern by many who thought it would lead to fewer settlements, more litigation, and a decline in the effectiveness of SEC enforcement. After more than four years, a full assessment of the policy is in order. The SEC continues to report record enforcement numbers and has touted the admissions policy as a great success. However, this Article empirically demonstrates that the SEC has obtained admissions in a very small number of cases since adopting the new policy, and on only a few occasions in cases involving the most serious charges, namely scienter-based fraud. Moreover, it shows that the SEC has applied the new policy inconsistently and haphazardly, treating like cases differently—a problem that is compounded by a complete lack of transparency in the process. This Article contends that these trends reveal a deliberate strategy of accommodation on the part of the SEC, through which the agency has trumpeted a message of tough enforcement and public accountability, while in reality continuing business as usual. In light of these issues, this Article concludes that the admissions policy should be reconsidered or abandoned altogether.*

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\* Assistant Professor, Northern Illinois University College of Law. I would like to thank Megan Yentes and Ryan Lowe for their excellent research assistance.

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## I. INTRODUCTION

In June 2013, the Securities and Exchange Commission (“SEC”) made a major change to its policy regarding settlements: Instead of routinely settling matters on a no-admit/no-deny basis, the SEC began to require admissions from settling respondents and defendants in certain cases.<sup>1</sup> The change was a reaction to stinging criticism that the agency was willing to sweep wrongdoing under the rug, or even worse, that it was acting collusively with wrongdoers, allowing them to escape responsibility for their actions by paying a fine—to companies, a mere cost of doing business—without ever having to own up to the wrongfulness of their acts.<sup>2</sup> Former Chair Mary Jo White described the new policy as a recognition that sometimes “monetary penalties and

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1. See *infra* Part I.C.2.

2. See *infra* Part I.B.

compliance enhancements are not enough. An added measure of public accountability is necessary.”<sup>3</sup>

The new policy marked a radical departure from the way the agency had traditionally done business, and it was met with considerable consternation from the defense bar and others who were concerned over its potentially deleterious consequences. Although Chair White and SEC enforcement staff insisted that admissions would only be required in egregious cases—and no-admit/no-deny would otherwise continue to be the norm—many voiced their concerns over the collateral consequences that admissions could have in private securities actions, particularly for large, deep-pocketed institutions.<sup>4</sup> Such critics predicted that these large institutions would be unwilling to settle if settling required admissions.<sup>5</sup> The result would be an increase in litigation which could cripple the SEC’s enforcement program.<sup>6</sup> When the policy was first disclosed, one prominent law professor told the *Wall Street Journal* that the change “would be immense” because admissions could be used in class-action lawsuits and “[t]he Goldman Sachs and Morgan Stanleys of this world . . . do not want to admit guilt.”<sup>7</sup> A defense lawyer, and former SEC enforcement attorney, told the same publication that the cost of follow-on securities litigation could be so large that companies might decide to take their chances battling the SEC in court rather than settling.<sup>8</sup> The former director of the SEC’s San Francisco office, now a defense lawyer, called the new policy “troubling,” and predicted that in the face of potentially massive collateral damages, “companies and their officers will be incentivized to take more cases to trial,” straining the SEC’s “already limited enforcement resources further” and leaving “less time to pursue new investigations and shut down ongoing frauds, with any incremental benefit from seeing bad actors admit their wrongdoing offset by a delay in any financial recovery for investors (if such recovery can be had at all).”<sup>9</sup> He concluded that “the SEC has unfortunately moved in a dangerous direction that could have monumental implications for the agency’s ability to fulfill its core mission of protecting investors.”<sup>10</sup>

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3. Mary Jo White, Chair, SEC, Speech at the Council of Institutional Investors Fall Conference: Deploying the Full Enforcement Arsenal (Sept. 26, 2013) (transcript available at <https://www.sec.gov/news/speech/spchog2613mjw>).

4. See *infra* Part I.D.

5. See *infra* Part I.D.

6. See *infra* Part I.D.

7. Jean Eaglesham & Andrew Ackerman, *SEC Seeks Admissions of Fault*, WALL ST. J., (June 18, 2013, 8:51 PM) (quoting Professor James Cox), <https://www.wsj.com/articles/SB10001424127887324021104578553931876196990>.

8. *Id.* (quoting attorney Stephen Crimmins); see also Daniel Fisher, *Why Settling with the SEC Can Be Worse Than Losing at Trial*, FORBES (Jan. 29, 2014, 8:13 AM), <https://www.forbes.com/sites/danielfisher/2014/01/29/why-settling-with-the-sec-can-be-worse-than-losing-at-trial/#6d1f834e14b5>.

9. Marc Fagel, *The SEC’s Troubling New Policy Requiring Admissions*, 45 SEC. REG. & L. REP. (BNA) 1172, 1173 (2013).

10. *Id.* at 1175.

Now, more than four years on, it is clear that the sky has not fallen. The SEC's enforcement program remains robust, as the agency continues to report record numbers of enforcement actions.<sup>11</sup> Over the years, the new admissions policy has been repeatedly touted by SEC staff as a great success,<sup>12</sup> and upon Chair White's departure the agency singled out the policy as one of the signature achievements of her tenure.<sup>13</sup> For her part, Chair White has lauded the admissions policy as "transformative."<sup>14</sup>

While the worst fears of the policy's critics have failed to materialize, the overall success of the policy is open to question, and largely for the same reason: Consistent with what the SEC stated at the outset, the policy of requiring admissions has been used sparingly. Since the inception of the policy, admissions have been obtained in settlements with well under two percent of the individuals and entities charged over that time period.<sup>15</sup> Most SEC cases continue to settle (rather than go to trial), and the overwhelming majority of those cases are still settled on a no-admit/no-deny basis.<sup>16</sup> Because the policy has been used sparingly—some might say judiciously—and because most defendants and respondents are still allowed to settle without having to admit wrongdoing, the feared collateral consequences have largely been avoided.<sup>17</sup> At the same time, because there have been so few admissions, the goal of public accountability has often remained unmet. More pointedly, while the SEC stated that the policy was aimed at, and would be used in, the most egregious cases—presumably those most in need of public accountability—that has rarely been the case: With a few notable exceptions, the SEC has not often obtained admissions in cases involving scienter-based

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11. The SEC reported that it brought a record 868 enforcement actions during the 2016 fiscal year, including 548 new standalone actions, and obtained more than \$4 billion in disgorgement and penalties. *See* Press Release, SEC, SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016) [hereinafter Press Release, Enforcement Results FY 2016], <https://www.sec.gov/news/pressrelease/2016-212.html>.

12. *See, e.g.*, Andrew Ceresney, Dir. of the Div. of Enf't, SEC, Keynote Address at Compliance Week 2014 (May 20, 2014) [hereinafter Ceresney, Compliance Week] (transcript available at <https://www.sec.gov/news/speech/2014-spcho52014ajc>); Andrew Ceresney, Dir. of the Div. of Enf't, SEC, Keynote Speech at New York City Bar 4th Annual White Collar Institute (May 12, 2015) [hereinafter Ceresney, White Collar Institute] (transcript available at <https://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html>).

13. *See* Press Release, SEC, SEC Chair Mary Jo White Announces Departure Plans (Nov. 14, 2016) [hereinafter Press Release, White Departure], <https://www.sec.gov/news/pressrelease/2016-238.html> ("To enhance accountability of those who violate the securities laws, Chair White implemented the Commission's first-ever policy to require admissions of wrongdoing in certain cases where heightened accountability and acceptance of responsibility is appropriate.").

14. Mary Jo White, SEC, A New Model for SEC Enforcement: Producing Bold and Unrelenting Results (Nov. 18, 2016) (transcript available at <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html>).

15. *See infra* Part III.B.1.

16. *See infra* Part III.B.1.

17. *See infra* Part III.A.

fraud, particularly with respect to entities.<sup>18</sup> This may simply be a reflection of what critics of the new policy said at the outset: that the fear of collateral consequences would lead more companies to tell the SEC that they would rather fight than settle. But it strongly suggests that faced with the prospect of going to trial or settling without an admission, the SEC has caved.

Even more troubling is the inconsistent application of the admissions policy. The SEC has given little guidance as to when admissions will be required, and what little guidance there is provides almost no clue as to why the SEC has obtained admissions in some cases and not others.<sup>19</sup> Cases that appear on their face to be extremely similar have yielded vastly different results.<sup>20</sup> An analysis of the relevant settlements, and a comparison with cases where admissions were not obtained, yields no discernable pattern.<sup>21</sup> The problem is compounded by the fact that the SEC has largely failed to explain why it deemed admissions necessary in certain cases but unnecessary in others.<sup>22</sup> The lack of clear standards, consistency, and transparency has undermined the fairness and effectiveness of the policy, and has bred cynicism that the SEC may be using the threat of a required admission to extract higher penalties in settlements.<sup>23</sup>

Moreover, the one trend that has emerged is unsettling. It appears that the SEC is typically seeking admissions from large financial institutions in cases where no individuals are being charged and where there is no realistic possibility of collateral consequences such as criminal charges, private class actions, or regulatory sanctions.<sup>24</sup> The lack of individual charges is particularly jarring, given that the entity that is making the admission can only act through the individuals that comprise it. If accountability is the goal, it would seem to require some measure of individual accountability. At the same time, requiring admissions only in cases where collateral consequences are remote or non-existent leads to an odd result: Either admissions are not being sought with respect to the most egregious misconduct, or cases of egregious misconduct are being settled with an admission to a less serious charge.

In Part II of this Article, I briefly trace the evolution of the SEC's policy concerning admissions in settlements, the genesis of the adoption of the current policy, the stated scope and application of the policy, and the critical reaction to the policy. In Part III of this Article, I provide some analysis of the cases to date where admissions have been obtained, including a breakdown of the types of cases and charges. In Part IV of this Article, I offer an

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18. See *infra* Parts III.B.2, IV.A.

19. See *infra* Part IV.B.

20. See *infra* Part IV.C.

21. See *infra* Part IV.C.

22. See *infra* Part IV.D.

23. See, e.g., Bradley J. Bondi, *An Evaluation of the SEC's Admissions Policy*, CTR. FOR FIN. STABILITY (July 7, 2016), [http://www.centerforfinancialstability.org/research/Bondi\\_070716.pdf](http://www.centerforfinancialstability.org/research/Bondi_070716.pdf).

24. See *infra* Part IV.C.

assessment and critique of the admissions policy, focusing in particular on the dearth of serious charges, and the lack of clear standards, consistency, and transparency. I conclude that the while the new admissions policy has not caused the harm that critics originally feared, it has failed to deliver any noticeable benefits, while breeding cynicism of the agency's methods. I suggest that the SEC should provide clear guidance and greater transparency to explain its use in particular cases, and needs to apply the policy more consistently. Failing that, the policy should be reconsidered or abandoned altogether.

## II. THE GENESIS OF THE ADMISSIONS POLICY

When the admissions policy was announced in 2013, it upended over 40 years of SEC practice whereby defendants and respondents were allowed (and for all intents and purposes, required) to settle enforcement actions on a neither admit nor deny basis. The change in policy was rooted in widespread public criticism—in particular, judicial criticism—of the agency in the wake of the financial crisis of 2008.<sup>25</sup> Critics voiced concerns that the SEC may have been acting collusively with the financial services industry it was supposed to regulate.<sup>26</sup> Specifically, critics accused the agency of deliberately sweeping serious wrongdoing under the rug by allowing large financial institutions to settle matters by paying relatively small fines and never admitting liability or owning up to their misdeeds.<sup>27</sup> Before describing the genesis of the policy switch, it is worth recalling the circumstances behind the adoption of the no-admit/no-deny policy, which were similarly rooted in public criticism of the agency, albeit of a quite different sort.

### A. NO-ADMIT/NO-DENY

The SEC officially adopted the no-admit/no-deny policy in 1972.<sup>28</sup> The policy is not a part of the SEC's formal "Rules of Practice," but is codified among the SEC's "Informal and Other Procedures."<sup>29</sup> It should also be noted that despite the fact that the agency now requires admissions in certain cases, the no-admit/no-deny policy remains in effect.<sup>30</sup> The no-admit/no-deny policy was adopted principally out of concern that defendants and respondents were entering into consent decrees and then publicly denying

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25. See *infra* Part II.B.

26. See *infra* Part II.B.

27. See *infra* Part II.B.

28. See Consent Decrees in Judicial or Administrative Proceedings, Securities Act Release No. 33-5337, 37 Fed. Reg. 25,224 (Nov. 28, 1972).

29. SEC Informal and Other Procedures, 17 C.F.R. § 202.5 (2012). "Informal" procedures are supplements to the "formal" procedures found in statutes, rules, regulations and forms, and are "designed to aid the public and facilitate the execution of the Commission's functions" although they "have not been formalized in rules." *Id.* § 202.1(c).

30. See *id.* § 202.5.

that they had done anything wrong or violated any law or regulation.<sup>31</sup> Defendants and respondents would claim that there was no basis for the enforcement action and that they were settling the matter only to avoid the expense and hassle of litigation brought upon by an over-zealous, over-bearing, and very powerful government agency.<sup>32</sup> The no-admit/no-deny policy reflected a concern that the public might buy in to this narrative and conclude that the SEC was acting arbitrarily, or worse unlawfully, which would undermine the agency's integrity and compromise its ability to protect the investing public.<sup>33</sup> The purpose of the policy, in other words, was to avoid the perception that the SEC had entered into a settlement when there was not in fact a violation.<sup>34</sup>

The policy the SEC adopted provides in relevant part:

[The Commission] hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.<sup>35</sup>

The no-admit/no-deny policy leaves open the possibility that defendants or respondents *might* admit the facts in the complaint or order, but does not require them to do so. On the other hand, it flatly prohibits them from denying the factual allegations in the complaint or order. Since adopting the policy, the Commission has required defendants and respondents to state in the offer of settlement or consent that they are neither admitting nor denying the allegations, and to acknowledge that they understand that the SEC may seek to revoke the settlement if they subsequently fail to abide by its terms through a public denial.<sup>36</sup>

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31. See *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 304, 308–10 (S.D.N.Y. 2010) (describing the origins of the no-admit/no-deny policy).

32. *Id.* at 308–10.

33. *Id.*

34. See 17 C.F.R. § 202.5(e) (“The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur.”).

35. *Id.*

36. The consent will typically include a clause stating that “Defendant agrees . . . not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis” and adding that “[i]f Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket.” See, e.g., *Consent of Goldman, Sachs & Co.* at 8–9, *SEC v. Goldman, Sachs & Co.*, No. 10-CV-3229 (S.D.N.Y. July 14, 2010).



*B. CRITICISM OF NO-ADMIT/NO-DENY*

In the wake of the financial crisis of 2008, the SEC's concern that the public might come to believe that it was being over-zealous and bringing enforcement actions against innocent defendants gave way to a new concern that the public might believe that the agency was acting collusively with wrongdoers and allowing them to escape serious punishment with a slap on the wrist.<sup>37</sup>

Indignation with what were perceived to be weak settlements was particularly acute in cases involving large financial institutions that were thought, rightly or wrongly, to have played a role in the collapse of the financial markets. In one prominent example involving Bank of America's acquisition of Merrill Lynch at the height of the financial crisis, Judge Rakoff, of the Southern District of New York, rebuked the SEC and refused to approve a consent judgment in part because it did not contain any admissions of wrongdoing, and therefore did not get to the "truth."<sup>38</sup> Judge Rakoff set the case for trial.<sup>39</sup> Judge Rakoff's stand, which garnered much public support, started the ball rolling towards a re-evaluation of the no-admit/no-deny policy. The SEC and Bank of America subsequently re-settled the case, and the SEC submitted a consent judgment for court approval that provided for a higher monetary penalty and included a lengthy recitation of facts; notably, Bank of America acknowledged that "there [was] an evidentiary basis" for those facts.<sup>40</sup> Judge Rakoff quite reluctantly approved the consent judgment, in part because it offered a "much better developed statement of facts," although he called the settlement "half-baked justice at best."<sup>41</sup>

Following the Bank of America case, other federal judges began to question no-admit/no-deny settlements. For example, Judge Victor Marrero, of the Southern District of New York, questioned a proposed settlement in a case that the SEC brought against a unit of SAC Capital, the giant hedge fund owned by Steven Cohen, because it allowed the defendant to neither admit

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37. See, e.g., David Callahan, *Crime Pays: The SEC's Slap on the Wrist for Angelo Mozilo*, HUFFINGTON POST: THE BLOG (Oct. 17, 2010, 12:38 AM), [http://www.huffingtonpost.com/david-callahan/crime-pays-the-secs-slap\\_b\\_765526.html](http://www.huffingtonpost.com/david-callahan/crime-pays-the-secs-slap_b_765526.html); John Hudson, *Why Goldman's \$550M Settlement Is Barely a Wrist Slap*, THE ATLANTIC (July 16, 2010), <https://www.theatlantic.com/business/archive/2010/07/why-goldman-s-550m-settlement-is-barely-a-wrist-slap/344856>; Matt Taibbi, *JP Morgan Chase Fine: Another Slap on the Wrist for Wall Street*, ROLLING STONE (July 8, 2011), <http://www.rollingstone.com/politics/news/jp-morgan-chase-fine-another-slap-on-the-wrist-for-wall-street-20110708>.

38. See SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009). Full disclosure: I worked on this matter as a lawyer for the SEC.

39. *Id.*

40. See Final Consent Judgment as to Defendant Bank of America Corp. at 14, SEC v. Bank of Am. Corp., No. 09-CV-6829 & No. 10-CV-0215 (S.D.N.Y. 2010); Statement of Facts, Final Consent Judgment as to Defendant Bank of America Corp., SEC v. Bank of Am. Corp., No. 09-CV-6829 & No. 10-CV-0215 (S.D.N.Y. 2010).

41. See SEC v. Bank of Am. Corp., No. 09-CV-6829, No. 10-CV-0215, 2010 WL 624581, at \*5 (S.D.N.Y. Feb. 22, 2010).

nor deny the charges: “There is something counterintuitive and incongruous about settling for \$600 million if it truly did nothing wrong,” the judge said.<sup>42</sup> Judge Marrero ultimately approved the settlement, while still expressing misgivings about no-admit/no-deny.<sup>43</sup> Other judges also began to question the policy and closely scrutinize SEC consent decrees, sometimes demanding additional factual submissions before approving settlements.<sup>44</sup>

In 2011, Judge Rakoff again rejected an SEC consent judgment. The SEC and Citigroup had reached an agreement to settle a case involving fraudulent conduct with respect to a fund of mortgage-backed securities, with a monetary penalty of \$285 million on a no-admit/no-deny basis.<sup>45</sup> Judge Rakoff refused to approve the settlement, calling the penalty “pocket change to any entity as large as Citigroup,”<sup>46</sup> and again bemoaning the fact that the settlement did not include “any proven or admitted facts upon which to exercise even a modest degree of independent judgment.”<sup>47</sup> Judge Rakoff concluded that if “deployment [of the injunctive power of the judiciary] does not rest on facts—cold, hard, solid facts, established either by admissions or by trials—it serves no lawful or moral purpose and is simply an engine of oppression,” and set the case for trial.<sup>48</sup> This time, however, the SEC appealed Judge Rakoff’s decision, which was ultimately overturned.<sup>49</sup>

### C. THE NEW ADMISSIONS POLICY

#### 1. Convictions, Pleas, and Admissions in Parallel Actions

Change to the SEC’s policy on admissions came piecemeal, starting with two classes of cases where the standard no-admit/no-deny language was dropped from consent judgments. First, in December 2011, the SEC’s Division of Enforcement began to exclude the no-admit/no-deny language from settlements in which there had been a parallel criminal conviction or

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42. See Peter Lattman, *Judge Is Skeptical of S.E.C. Deal with Hedge Fund*, N.Y. TIMES: DEALBOOK (Mar. 28, 2013, 1:26 PM), <https://dealbook.nytimes.com/2013/03/28/judge-questions-s-e-c-settlement-with-steven-cohens-hedge-fund>.

43. SEC v. CR Intrinsic Investors, LLC., 939 F. Supp. 2d 431, 436–37 (S.D.N.Y. 2013).

44. See, e.g., SEC v. Hohol, No. 14-C-41, 2014 WL 1330299 (E.D. Wis. Mar. 31, 2014) (granting motion for entry of final judgment); SEC v. Hohol, No. 14-C-41, 2014 WL 461217 (E.D. Wis. Feb. 5, 2014) (declining to enter proposed judgment as presented and requiring that the SEC supplement its filings); 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, 90–92 (2012) (discussing the copycat effect of Judge Rakoff’s refusal to approve settlements).

45. See Press Release, SEC, Citigroup to Pay \$285 Million to Settle SEC Charges for Misleading Investors About CDO Tied to Housing Market (Oct. 19, 2011), <https://www.sec.gov/news/press/2011/2011-214.htm>.

46. SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328, 334 (S.D.N.Y. 2011).

47. *Id.* at 330.

48. *Id.* at 335.

49. SEC v. Citigroup Glob. Mkts., Inc., 752 F.3d 285, 289–98 (2d Cir. 2014).

guilty plea concerning the same underlying conduct.<sup>50</sup> In July 2012, the Division of Enforcement also began to exclude the no-admit/no-deny language in cases where there was a parallel regulatory settlement in which the defendant or respondent had admitted to liability, or admitted certain significant facts.<sup>51</sup> In settling these cases, the consent or offer made reference to the fact of the parallel criminal conviction or plea, or to the parallel regulatory settlement, and on occasion even recited the relevant facts established by allocution, a trier of fact, or by some other admission or acknowledgment of the defendant or respondent.<sup>52</sup>

Although this constituted a change in approach, it was relatively uncontroversial for a couple of reasons. First, it did not actually require defendants and respondents to make admissions in connection with the SEC settlement.<sup>53</sup> Second, these cases necessarily involved situations where the defendant or respondent had already been found guilty in a criminal case, or had made a public admission of guilt (in the form of an allocution), or had otherwise made a public admission of liability with respect to the same underlying conduct; as such, there was no practical effect with respect to the defendant or respondent. For this same reason, however, the SEC's decision to exclude the no-admit/no-deny language in those cases added nothing in the way of public accountability; the change was strictly about optics and a desire to reconcile the glaring anomaly of having defendants and respondents settling civil and administrative charges on a no-admit/no-deny basis when they had already made admissions concerning the same conduct, including admissions of guilt in criminal cases.

## 2. Admissions in SEC Settlements

In June 2013, then-Chair White announced that going forward the SEC would require admissions as a condition of settlement in certain cases.<sup>54</sup> Chair White explained that while most settlements would continue to be done on a no-admit/no-deny basis, in certain cases where there was a need for greater public accountability, the SEC would require admissions, even if that made it

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50. Robert Khuzami, Dir. of the SEC's Div. of Enf't, SEC, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), <https://www.sec.gov/news/public-statement/2012-spcho10712rskhtm>.

51. See Andrew Ceresney, Co-Director of the Div. of Enf't, SEC, Speech at the American Law Institute Continuing Legal Education in Washington, D.C.: Financial Reporting and Accounting Fraud (Sept. 19, 2013) (transcript available at <https://www.sec.gov/news/speech/spcho91913ac>) ("We recently modified our traditional approach in cases where there has been a criminal or regulatory settlement with admissions. In such cases, we have eliminated the no admit/no deny language and referenced the admissions.").

52. See Khuzami, *supra* note 50 (outlining facts concerning prior conviction or regulatory settlement to be included in SEC settlement).

53. Even where facts that had previously been adjudged or admitted were specifically recited, the offer or consent simply stated that in a separate proceeding the defendant or respondent had admitted certain things.

54. Eaglesham & Ackerman, *supra* note 7.

more difficult or impossible to achieve a negotiated resolution.<sup>55</sup> In a speech in September 2013, Chair White specified that the new approach would apply in cases “where there is a special need for public accountability and acceptance of responsibility.”<sup>56</sup> As Chair White explained, in the ordinary case, the no-admit/no-deny policy made sense because it allowed the SEC to obtain relief within the range of what the agency could hope to obtain at trial, while avoiding the risks, allowing the agency to conserve resources and obtain a speedier resolution that could benefit harmed investors.<sup>57</sup> In certain cases, however, Chair White noted that “more may be required for a resolution to be, and to be viewed as, a sufficient punishment and strong deterrent message.”<sup>58</sup> In the same speech, Chair White broadly outlined four categories of cases where admissions might be required: (1) “Cases where a large number of investors have been harmed or the conduct was otherwise egregious”; (2) “Cases where the conduct posed a significant risk to the market or investors”; (3) “Cases where admissions would aid investors deciding whether to deal with a particular party in the future”; and (4) “Cases where reciting unambiguous facts would send an important message to the market about a particular case.”<sup>59</sup> Chair White reiterated that “no-admit-no-deny settlements are a very important tool” that the SEC would “continue to use when we believe it is in public interest to do so. In other cases, we will be requiring admissions.”<sup>60</sup>

The decision to require admissions in certain cases was undoubtedly propelled by judicial and other public criticism of the no-admit/no-deny policy.<sup>61</sup> The decision was also likely motivated by a fear of a judicial takeover

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55. *Where the SEC Action Will Be*, WALL ST. J., (June 24, 2013, 4:03 PM), <https://www.wsj.com/articles/SB10001424127887323893504578555990184592624> (In an interview, Chair White said: “[W]e are going to in certain cases be seeking admissions going forward. Public accountability in particular kinds of cases can be quite important, and if you don’t get them, you litigate them.”).

56. White, *supra* note 3; see also Ceresney, *supra* note 51 (“But there also is a group of cases where a public airing of unambiguous facts—whether through admissions or a trial—serve such an important public interest that we will demand admissions, and if the defendant is not prepared to admit the conduct, litigate the case at trial. I analogize it to a guilty plea in a criminal case—there is a certain amount of accountability that comes from a defendant admitting to unambiguous, uncontested facts. It is in many respects a cathartic moment. And there can be no denying the facts under those circumstances.”).

57. White, *supra* note 3.

58. *Id.*

59. *Id.*

60. *Id.*

61. In an interview, Chair White denied that Judge Rakoff had been the motivating factor: “Judge Rakoff and other judges put this issue more in the public eye, but it wasn’t his comments that precipitated the change.” See James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES (June 21, 2013), <http://www.nytimes.com/2013/06/22/business/secs-new-chief-promises-tougher-line-on-cases.html>. Nonetheless, it is fairly clear that Judge Rakoff’s criticism set the ball rolling and that combined with other public criticism it was the impetus behind the adoption of the policy. See, e.g., Paul Radvany, *The SEC Adds a New Weapon: How Does the New Admission Requirement Change the Landscape?*, 15 CARDOZO J. CONFLICT RESOL. 665, 676–88 (2014) (describing

of the SEC settlement process.<sup>62</sup> The SEC may have viewed its approach of only sometimes requiring admissions as a way to mollify critics while retaining control and flexibility. As Chair White insisted when she formally announced the policy, “[t]hese decisions are for [the SEC] to make within our discretion, not decisions for a court to make.”<sup>63</sup>

Finally, it should be noted that while the decision to sometimes require admissions is typically referred to as SEC “policy,” including in SEC communications<sup>64</sup> (and herein), the Commission never formally adopted such a policy. Unlike the no-admit/no-deny policy, which was approved by the Commission as a whole, and is in the Code of Federal Regulations (albeit as an “Informal Procedure” rather than a “Rule of Practice”),<sup>65</sup> the admissions “policy” was never voted on or otherwise formally approved by the whole Commission,<sup>66</sup> nor has it been codified or otherwise made an official part of either the SEC’s Rules of Practice or its “Informal and Other Procedures.” Strictly speaking, it is not, and never was, SEC “policy.” Nevertheless, the SEC refers to it as agency policy, and this Article treats it as such.

#### D. CRITICISM AND CONCERNS ABOUT THE ADMISSIONS POLICY

The new admissions policy was greeted with considerable skepticism by the industry, the defense bar, and even academics. The announcement was described as a “bombshell,” and the policy as “troubling.”<sup>67</sup> Many predicted

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the origin of the admissions policy shift); Jason E. Siegel, *Admit It! Corporate Admissions of Wrongdoing in SEC Settlements: Evaluating Collateral Estoppel Effects*, 103 GEO. L.J. 433, 438–42 (2015) (same).

62. See Jean Eaglesham & Chad Bray, *Citi Ruling Could Chill SEC, Street Legal Facts*, WALL ST. J. (Nov. 29, 2011), <https://www.wsj.com/news/articles/SB10001424052970203935604577066242448635560> (discussing possibility of losing control of the settlement process).

63. White, *supra* note 3.

64. See, e.g., Press Release, White Departure, *supra* note 13 (“Chair White implemented the Commission’s first-ever policy to require admissions of wrongdoing in certain cases . . .”).

65. 17 C.F.R. § 202.5 (2016). The no-admit/no-deny policy is really a no-deny policy: there is nothing in the regulation that prohibits admissions, and indeed the regulation specifically contemplates the possibility of admissions. *Id.* § 202.5(e) The no-admit part comes in because the Commission considers that “a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.” *Id.* This remains the official policy of the Commission.

66. Individual settlements which include admissions have, of course, been voted on and approved by the Commission. It’s just that the “policy” of sometimes requiring admissions has never been formally voted on or approved by the Commission as a whole, and it has never been codified. In addition to Chair White, some individual commissioners have expressed approval of the admissions requirement. See, e.g., Luis A. Aguilar, Comm’r, SEC, Speech at the 20th Annual Securities Litigation and Regulatory Enforcement Seminar, Atlanta, Georgia: A Stronger Enforcement Program to Enhance Investor Protection (Oct. 25, 2013) (transcript available at <https://www.sec.gov/news/speech/2013-spch102513laa>).

67. Fagel, *supra* note 9, at 1173.

that requiring admissions would be “costly” for the agency.<sup>68</sup> The principal concern was over the possible collateral consequences of admissions in connection with SEC actions. Defense lawyers warned that admissions could be used to establish liability in private class actions.<sup>69</sup> Plaintiff class action lawyers relished the thought, and were reportedly “optimistic” about the new policy.<sup>70</sup> Some lawyers worried about whether admissions could give rise to potential criminal liability.<sup>71</sup> Many predicted that the result would be that entities in particular would be extremely reluctant to make admissions in connection with settlements, even if it meant enduring the risks and expense of going to trial.<sup>72</sup> In the end, many predicted that the natural consequence of the new policy would be fewer negotiated resolutions and more trials.<sup>73</sup> Increased litigation, they warned, would not only be harmful and inefficient from the industry perspective, but it would also gobble up the Commission’s scarce resources.<sup>74</sup> The SEC’s Division of Enforcement would be particularly hard hit because it would have to shift its focus to trial work, leaving it unable to properly investigate new legal violations.<sup>75</sup>

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68. See David Zaring, *Requiring Defendants To Admit Guilt Will Be Costly for S.E.C.*, N.Y. TIMES: DEALBOOK (July 2, 2013, 1:27 PM), <https://dealbook.nytimes.com/2013/07/02/requiring-defendants-to-admit-guilt-will-be-costly-for-s-e-c>.

69. See Marc H. Axelbaum et al., *Admit It! SEC May Seek Admissions of Wrongdoing in Settlements*, PILLSBURY WINTHROP SHAW PITTMAN LLP (June 25, 2013), <https://www.pillsburylaw.com/en/news-and-insights/admit-it-sec-may-seek-admissions-of-wrongdoing-in-settlements.html>.

70. See Alison Frankel, *Should Defendants Fear New SEC Policy on Admissions in Settlements?*, REUTERS (June 19, 2013, 6:01 PM), <http://www.reuters.com/article/idUS249721228120130619> (noting that securities lawyers seemed “optimistic about the impact of the new policy on their cases”); see also Matthew G. Neumann, Note, *Neither Admit Nor Deny: Recent Changes to the Securities and Exchange Commission’s Longstanding Settlement Policy*, 40 J. CORP. L. 793, 808 (2015) (“Even if private litigants are unable . . . to assert collateral estoppel, an admission in a previous SEC settlement may increase the likelihood of success at trial, or make it less likely that a judge will dismiss a lawsuit prior to adjudication.”).

71. See Kurt Orzech, *SEC To Seek More Admissions of Guilt in Settlements*, LAW360 (June 18, 2013, 11:41 PM), <https://www.law360.com/articles/451302/sec-to-seek-more-admissions-of-guilt-in-settlements>.

72. See, e.g., Michael Mugmon & Chris Johnstone, *Some Prefer Litigation When the SEC Calls*, DAILYJOURNAL (Apr. 4, 2014), [https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/daily-journal-some-prefer-litigation-wher-SEC-calls.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/daily-journal-some-prefer-litigation-wher-SEC-calls.pdf) (“The adverse and unpredictable consequences of an admission will mean many clients will be forced to choose litigation over settlement.”); Stewart, *supra* note 61 (“Any admission is likely to be seized upon by private litigants in civil lawsuits, including class actions, with potentially devastating financial consequences.”).

73. See Radvany, *supra* note 61, at 701–03.

74. See Fagel, *supra* note 9, at 1174 (suggesting that the new policy would divert resources from opening new investigations into funding litigation).

75. See, e.g., John C. Coffee, Jr., *‘Neither Admit Nor Deny’: Practical Implications of SEC’s New Policy*, COLUM. L. SCH.: THE CLS BLUE SKY BLOG (July 22, 2013), <http://clsbluesky.law.columbia.edu/2013/07/22/neither-admit-nor-deny-practical-implications-of-secs-new-policy>; Thomas A. Zaccaro, *SEC’s Guilt Admission Policy May Bring Pricey Trials*, LAW360 (July 3, 2013, 1:40 PM), <https://www.law360.com/articles/454587/sec-s-guilt-admission-policy-may-bring-pricey-trials> (“Given the SEC’s

The SEC's admissions policy was particularly troubling to those who viewed it in combination with the judiciary's increasingly activist review of consent decrees.<sup>76</sup> Some voiced concern that they would be forced into making admissions in SEC settlements because even if they managed to settle on a no-admit/no-deny basis, a court could refuse to approve the consent judgment and force the case to trial.<sup>77</sup>

### E. THE JUDICIAL AFTERMATH

Ironically, shortly after the SEC announced the new admissions policy, the Second Circuit decided the SEC's appeal of Judge Rakoff's refusal to approve the consent judgment in the Citigroup case. The Second Circuit made clear that courts cannot require admissions in order to approve SEC consent judgments, and found that Judge Rakoff had "abused [his] discretion by applying an incorrect legal standard in assessing the consent decree and setting a date for trial."<sup>78</sup> The Second Circuit held

that the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the "public interest would not be disserved," in the event that the consent decree includes injunctive relief.<sup>79</sup>

The court went on to say that "[a]bsent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order."<sup>80</sup> In determining whether a proposed consent decree is "fair and reasonable" the district court should focus on the procedural adequacy of the settlement, "taking care not to infringe on the SEC's discretionary authority to settle on a

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finite resources, the possibility of more trials resulting from application of the new policy could significantly limit the number of enforcement actions that the SEC pursues each year.").

76. See, e.g., Ben Protess, *Judge Rakoff Says 2011 S.E.C. Deal with Citigroup Can Close*, NYTIMES: DEALBOOK (Aug. 5, 2014, 12:01 PM), <https://dealbook.nytimes.com/2014/08/05/after-long-fight-judge-rakoff-reluctantly-approves-citigroup-deal> ("The [SEC policy] shift alarmed Wall Street and the white-collar bar. At oral arguments before the appeals court in the Citigroup case . . . a lawyer for the bank . . . warned that admissions could open the floodgates to shareholder lawsuits. 'The federal regulatory enforcement regime would screech to a grinding halt,' [the lawyer] remarked.").

77. Doug Greene, *SEC's Shift in No-Admit-or-Deny Policy Would Create Dilemma for Defendants if Applied in Close Cases*, LANE POWELL (June 25, 2013), <http://www.dandodiscourse.com/2013/06/25/secs-shift-in-no-admit-or-deny-policy-would-create-dilemma-for-defendants-if-applied-in-close-cases> ("The uncertainty surrounding judicial review of no-admit-or-deny settlements is a wild card—increased judicial insistence on admissions likely would prompt the SEC to apply its [new admissions] policy to more cases than it otherwise would.").

78. SEC v. Citigroup Glob. Mkts., 752 F.3d 285, 289 (2d Cir. 2014).

79. *Id.* at 294 (citation omitted).

80. *Id.*

particular set of terms.”<sup>81</sup> When the agency is seeking injunctive relief as part of a settlement, courts should also assess whether the settlement is in “the public interest,” but “[t]he job of determining whether the proposed SEC consent decree best serves the public interest, however, rests squarely with the SEC, and its decision merits significant deference.”<sup>82</sup>

Most important, the Second Circuit held “[i]t is an abuse of discretion to require, as the district court did here, that the SEC establish the ‘truth’ of the allegations against a settling party as a condition for approving the consent decrees. Trials are primarily about the truth. Consent decrees are primarily about pragmatism.”<sup>83</sup> The court went on to say that “[i]t is not within the district court’s purview to demand ‘cold, hard, solid facts, established either by admissions or by trials,’ as to the truth of the allegations in the complaint as a condition for approving a consent decree.”<sup>84</sup> On remand, Judge Rakoff, again quite reluctantly, approved the original settlement.<sup>85</sup>

### III. ANALYSIS

#### A. SEC ENFORCEMENT BY THE NUMBERS

Despite fears that the new admissions policy could compromise the effectiveness of the SEC’s enforcement program, the agency has continued to bring enforcement actions at a record pace. In fiscal 2016, the SEC brought a total of 868 enforcement actions, described as a “new single year high,”<sup>86</sup> against 1,700 defendants and respondents.<sup>87</sup> This includes a “record 548 standalone or independent enforcement actions.”<sup>88</sup> The 2016 numbers followed two similarly productive years, and showed steady growth: In fiscal 2015, the agency brought a total of 807 enforcement actions, and in fiscal 2014, the agency brought a total of 755 enforcement actions.<sup>89</sup> Enforcement actions for the past three fiscal years are detailed in the following chart, which lists new civil matters, new or standalone administrative proceedings

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81. *Id.* at 295.

82. *Id.* at 296.

83. *Id.* at 295 (citation omitted).

84. *Id.* (citation omitted).

85. *SEC v. Citigroup Glob. Mkts.*, 34 F. Supp. 3d 379, 380 (S.D.N.Y. 2014).

86. Press Release, Enforcement Results FY 2016, *supra* note 11.

87. SEC. & EXCH. COMM’N., SELECT SEC AND MARKET DATA FISCAL 2016, at 3 (2017) [hereinafter SELECT SEC DATA 2016], <https://www.sec.gov/files/2017-03/secstats2016.pdf>.

88. Press Release, Enforcement Results for FY 2016, *supra* note 11.

89. SEC. & EXCH. COMM’N., SELECT SEC AND MARKET DATA FISCAL 2014, at 3 (2015) [hereinafter SELECT SEC DATA 2014], <https://www.sec.gov/files/secstats2014.pdf>; SEC. & EXCH. COMM’N., SELECT SEC AND MARKET DATA FISCAL 2015, at 3 (2016) [hereinafter SELECT SEC DATA 2015], <https://www.sec.gov/files/secstats2015.pdf>.



(excluding delinquent filing cases), follow-on administrative proceedings, delinquent filing cases, and totals.<sup>90</sup>

Table 1. SEC Enforcement Actions FY 2014–2016

	Year	2014	2015	2016	2014– 2016
New Civil	Cases	145	162	176	483
	Def.	476	672	595	1743
New AP w/o Del. Fil.	Cases	268	345	372	985
	Res.	390	530	536	1456
Total New	Cases	413	507	548	1468
	D&R	866	1202	1131	3199
Follow-on AP	Cases	232	168	195	595
	Res.	242	173	203	618
Delinquent Filing AP	Cases	110	132	125	367
	Res.	453	455	366	1274
Total	Cases	755	807	868	2430
	D&R	1561	1830	1700	5091

The number of enforcement matters the SEC brought during the last three fiscal years reflects a net increase over the numbers for the three fiscal years prior to the adoption of the admissions policy, and those three years were themselves record setting. In fiscal 2010, the SEC brought a total of 681 matters; in fiscal 2011, the SEC brought a total of 735 matters; and in fiscal 2012, the SEC brought a total of 734 matters.<sup>91</sup>

90. Except as noted below, the data in the chart comes from: SELECT SEC DATA 2014; SELECT SEC DATA 2015; SELECT SEC DATA 2016. The number for follow-on administrative proceedings for fiscal 2014 is found in Press Release, Enforcement Results for FY 2016, *supra* note 11. The total number of respondents in follow-on and standalone administrative proceedings for fiscal 2014 (632) is derived from SELECT SEC DATA 2014 and is accurate; however, the break-down of respondents as between follow-on and standalone administrative proceedings for that year is an estimate.

91. SEC. & EXCH. COMM'N., SELECT SEC AND MARKET DATA FISCAL 2010, at 3 (2011), <https://www.sec.gov/about/secstats2010.pdf>; SEC. & EXCH. COMM'N., SELECT SEC AND MARKET DATA FISCAL 2011, at 3 (2012), <https://www.sec.gov/about/secstats2011.pdf>; SEC. & EXCH. COMM'N., SELECT SEC AND MARKET DATA FISCAL 2012, at 3 (2013), <https://www.sec.gov/about/secstats2012.pdf>.

Oddly, the numbers for fiscal 2013, the year the admissions policy was adopted, show a slight dip: That year the SEC brought a total of 676 matters.<sup>92</sup> It is unclear whether this slowdown was connected in any way to the announcement of the new policy: The policy was first disclosed in late June of 2013, three-quarters of the way through the fiscal year, and there were only two admissions cases brought during that fiscal year. It is possible, of course, that the new policy created uncertainty among defendants and the defense bar, which may have contributed to a more cautious approach to settlements. In any event, the agency quickly rebounded in fiscal 2014 with an 11.7% increase in total enforcement matters brought.

Looking at the numbers alone, it seems fairly clear then that the new admissions policy has had no noticeable adverse effects on the agency's ability to bring enforcement actions.<sup>93</sup> The SEC continues to aggressively investigate and prosecute violations of the federal securities laws and has not been slowed down by requiring admissions as the price of settlement in certain cases.

### B. THE ADMISSIONS CASES

#### 1. The Admissions Cases by the Numbers

The SEC's admissions policy has now been in place for over four years, and it may be said to have achieved a level of maturity that makes numerical assessments meaningful. Since the new policy was put in place and through February 15, 2017, the SEC obtained admissions from 49 legally distinct

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92. SEC. & EXCH. COMM'N., SELECT SEC AND MARKET DATA FISCAL 2013, at 3 (2014), <https://www.sec.gov/about/secstats2013.pdf>.

93. The SEC's method of calculating enforcement numbers has been severely criticized for including such things as follow-on proceedings, contempt proceedings, and delinquent filings cases, and for double-counting defendants and respondents. Thus, whether the SEC is continuing to set new records with respect to enforcement matters is, at the very least, a matter of some debate. See Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 932-47 (2016). My only point here is that looking at the numbers year-over-year it does not appear that requiring admissions has had any impact on the agency's ability to bring enforcement actions.

entities<sup>94</sup> and 30 individuals, in connection with 57 separately filed enforcement actions.<sup>95</sup>

As low as these numbers are, they may overstate the real extent of admissions. First, for a variety of reasons, the SEC sometimes brings multiple enforcement “actions” with respect to the same underlying misconduct. When these actions are consolidated, the total number of actual cases where there was some kind of admission is more accurately described as 52.<sup>96</sup> Second, in several instances, a single enforcement “action” included two or more clearly related, although legally distinct, settling entities that made admissions.<sup>97</sup> When multiple related entities that made admissions in connection with the same filing are counted as one, the number of admitting entities is more realistically viewed as being approximately 39.<sup>98</sup>

Attached as an Appendix hereto is a chart listing all of the enforcement actions through February 15, 2017, that resulted in one or more settlements

94. Three entities made admissions with respect to more than one matter: Merrill Lynch, Pierce, Fenner & Smith Inc., and Merrill Lynch Professional Clearing Corp. each made admissions. Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 78,141, 2016 WL 4363431, at \*3 (June 23, 2016); Merrill Lynch, Pierce, Fenner & Smith Inc., and Merrill Lynch Prof'l Clearing Corp., Exchange Act Release No. 75,083, 2015 WL 3452968 (June 1, 2015). Credit Suisse AG made two admissions. Credit Suisse AG, Securities Act Release No. 10,299, Exchange Act Release No. 79,044, 2016 WL 5800369 (Oct. 5, 2016); Credit Suisse Grp. AG, Exchange Act Release No. 71,593, 108 SEC Docket 1233 (Feb. 21, 2014). One entity, Orthofix, made admissions in two separate orders that were issued on the same day. Orthofix Int'l, N.V., Securities Act Release No. 10,281, Exchange Act Release No. 79,815, 2017 WL 192377 (Jan. 18, 2017); Orthofix Int'l, N.V., Exchange Act Release No. 79,828, 2017 WL 192393 (Jan. 18, 2017). These four entities have been counted only once each in the total. However, for this total, I have counted legally distinct, but clearly related entities, twice (e.g., Credit Suisse Securities (USA) is a subsidiary of Credit Suisse Group AG, but is counted separately here).

95. See *infra* Appendix.

96. There were two filings with respect to the Falcone/Harbinger matter. Complaint, SEC v. Falcone, No. 12-CV-5027 (S.D.N.Y. June 27, 2013) [hereinafter Falcone Complaint]; Complaint, SEC v. Harbinger Capital Partners LLC, No. 12-CV-5028 (S.D.N.Y. June 27, 2012) [hereinafter Harbinger Complaint]. The filings were in fact later consolidated and settled together. Similarly, there were three separate matters brought against individuals relating to the same misconduct involved in the separately filed ConvergeX matter. See Lax, Exchange Release No. 74,582, 2015 WL 1324391, at \*1 (Mar. 11, 2015); G-Trade Servs. LLC, Exchange Act Release No. 71,128, 107 SEC Docket 5418, 5418 (Dec. 18, 2013); Lekargeren, Exchange Act Release No. 71,127, Investment Company Act Release No. 30,839, 117 SEC Docket 5414, 5415 (Dec. 18, 2013); Daspin, Exchange Act Release No. 71,126, Investment Company Act Release No. 30,838, 117 SEC Docket 5409, 5410 (Dec. 18, 2013). There were also two filings in the Orthofix matter. Orthofix Int'l, N.V., 2017 WL 192377, at \*1; Orthofix Int'l, N.V., 2017 WL 192393, at \*1.

97. For example, there were three legally distinct, but clearly connected, entities in the Bank Leumi case, all of which settled at one time using the same consent involving the same admissions. See Bank Leumi le-Israel B.M., Exchange Act Release No. 79,113, 2016 WL 6081797, at \*3 (Oct. 18, 2016). The same is true with respect to several other settlements (e.g., the three Harbinger entities; the three ConvergeX entities; the two Merrill Lynch entities, etc.).

98. This number still counts legally distinct entities that made admissions in separate enforcement actions twice.

that included some form of admission, with the names of the admitting individual and entity defendants and respondents.

The most important thing to note at the outset is how infrequently the SEC has obtained admissions. There are various metrics that can be used as points of comparison—described below—but even using the most generous measure, the SEC has obtained admissions in roughly 2.7% of the new standalone matters it has brought in the three full years that the policy has been in place, from less than 2% of the defendants and respondents it sued in those cases. Using the narrower measure, the number is less than 2% of all matters and 1.25% of all defendants and respondents.

The time frame in which the admissions policy has been in place encompasses four full fiscal years (FY2014, FY2015, FY2016, FY2017), and part of one other (FY2013).<sup>99</sup> Fiscal 2013 can safely be ignored: The policy was introduced late in the fiscal year and there were only two cases involving admissions that fall within that period. Fiscal 2017 has just concluded, but there is as yet no data set with overall numbers for comparison purposes. The three complete fiscal years for which comparative data exists (the “Relevant Period”), however, provide a very good basis for measuring how often the SEC has obtained admissions. It is also a large enough period to include most of the admissions cases that have been brought to date, including several cases in which the action was brought during one of the fiscal years in the Relevant Period but admissions were obtained during a different fiscal year in the Relevant Period.

There are a few different data points that can be used for comparison, ranging from all matters the SEC brought during this time frame, at one extreme, to subsets that include only new standalone matters, excluding follow-on proceedings and matters pertaining to delinquent filings, at the other extreme. We will examine each in turn, along with some possible intermediate points.

During the Relevant Period, the SEC brought a total of 2,430 matters against a total of 5,091 defendants and respondents.<sup>100</sup> During the Relevant Period, the SEC obtained admissions in 44 matters<sup>101</sup> that were brought

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99. The SEC’s fiscal year runs from October 1st to September 30th of the following calendar year. Fiscal 2014, for example, runs from October 1, 2013, to September 30, 2014. 7 C.F.R. § 986.15 (2016).

100. See *supra* Table 1.

101. This number exaggerates the actual total because on a few occasions the SEC brought separate actions against several persons connected to the same underlying misconduct. Specifically, during the Relevant Period, the SEC brought an action against three ConvergeEx subsidiaries. See *G-Trade Servs. LLC*, Exchange Act Release No. 71,128, 107 SEC Docket 5418, 5418 (Dec. 18, 2013). On the same day, the SEC brought separate actions against Jonathan Daspin and Thomas Lekargeren for their roles in the ConvergeEx fraud. See *Lekargeren*, Exchange Act Release No. 71,127, Investment Company Act Release No. 30,839, 117 SEC Docket 5414, 5415–16 (Dec. 18, 2013); *Daspin*, Exchange Act Release No. 71,126, Investment Company Act Release No. 30,838, 117 SEC Docket 5409, 5410 (Dec. 18, 2013). In 2015, the SEC brought

during the Relevant Period or for which an SEC Order was entered during the Relevant Period,<sup>102</sup> from 64 defendants and respondents. Thus, using “total matters brought” as the basis for comparison, the SEC obtained admissions in 1.81% of the matters it brought during the Relevant Period, from 1.25% of the overall defendants and respondents it sued during the Relevant Period.

It might be argued, however, that the proper denominator should be a subset of the total matters brought, because the overall number includes delinquent filings cases and follow-on administrative proceedings, both of which are summary proceedings that might not lend themselves to admissions. Follow-on administrative proceedings are typically brought to bar individuals from association with various registered entities, such as broker-dealers, investment advisers and others,<sup>103</sup> or to bar individuals from appearing or practicing before the Commission.<sup>104</sup> The proceedings are summary in that the predicate is simply the entry of an anti-fraud injunction or cease-and-desist order against the individual in an underlying SEC enforcement action, or a criminal conviction against the individual relating to certain securities law violations, or in some cases the entry of an order in a matter brought by another regulatory agency.<sup>105</sup> Follow-on administrative proceedings can be litigated, but they are subject to summary disposition,<sup>106</sup> and the only thing that needs to be established is the fact of the predicate order or conviction. The vast majority of follow-on orders are resolved without

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another separate action against Craig Lax for his role in that case. Lax, Exchange Release No. 74,582, 2015 WL 1324391, at \*1 (Mar. 11, 2015). The SEC treats these four actions as separate matters, although they are clearly linked. The SEC also brought two separate actions with respect to the Falcone/Harbinger matter (one of which produced a settlement during the Relevant Period), although again they are clearly linked, and indeed were later consolidated.

102. During the Relevant Period, the SEC also (1) obtained admissions in a settlement with Sidney M. Field in connection with the *SEC v. Medical Capital Holdings* matter which was filed in 2009, Final Judgment as to Defendant Sidney M. Field, *SEC v. Medical Capital Holdings*, No. 09-CV-818 (C.D. Cal. Feb. 23, 2016), outside the Relevant Period; (2) obtained admissions in a settlement with Sage Advisory Group in connection with the *SEC v. Grant* matter that was filed in 2011, Grant, Investment Advisers Act Release No. 4100, 2015 WL 3452970 (June 1, 2015), outside the Relevant Period (the matter *SEC v. Grant* is included in the numbers because of a follow-on AP as to Benjamin Lee Grant (also included in the numbers) but the Sage settlement is not included); and (3) reached a settlement with State Street Bank and Trust which included admissions, but the Order containing the admissions was issued on December 12, 2016, *State Street Bank & Trust Co., Investment Company Act Release No. 32,390*, 2016 WL 7210099 (Dec. 12, 2016), outside the Relevant Period.

103. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78o-4(b)(4) (2012); Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f) (2012).

104. See Rules of Practice, 17 C.F.R. § 201.102(e) (2016).

105. See, e.g., 15 U.S.C. § 78o-4(b)(4).

106. See Rules of Practice, 17 C.F.R. § 201.250(b).

a hearing<sup>107</sup> and are typically considered “pro forma proceedings.”<sup>108</sup> Delinquent filings cases are matters brought to revoke the registration of companies that fail to make required filings with the Commission.<sup>109</sup> Typically, the reason companies fail to make required filings is because they are defunct or no longer operational, or simply lack the funds necessary to make the required filing.<sup>110</sup> For the same reason, the companies do not usually contest the delisting action; indeed, a large number of delinquent filing orders are entered on default.<sup>111</sup>

Removing the delinquent filings cases yields the following. During the Relevant Period, the SEC brought a total of 2,063 non-delinquent filing matters against a total of 3,817 defendants and respondents.<sup>112</sup> Using the same admissions numbers as above, the SEC obtained admissions in 2.13% of non-delinquent filings cases it brought during the Relevant Period, from 1.67% of the non-delinquent filing defendants and respondents it sued during that period.

Removing the follow-on administrative proceedings, but keeping the delinquent filings cases, yields the following. During the Relevant Period, the SEC brought 1,835 matters, excluding follow-on administrative proceedings (but including delinquent filings), against a total of approximately 4,473 defendants and respondents.<sup>113</sup> Adjusting the admissions numbers to remove those matters that had been included only because a follow-on administrative order was entered during the Relevant Period,<sup>114</sup> the SEC obtained

107. See Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 J. CONST. L. 45, 56 (2016).

108. CTR. FOR CAPITAL MKTS. COMPETITIVENESS, U.S. CHAMBER OF COMMERCE, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES 13 (2015), [http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882\\_SEC\\_Reform\\_FIN1.pdf](http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf).

109. See Securities Exchange Act of 1934, 15 U.S.C. § 781(j) (2012).

110. See Velikonja, *supra* note 93, at 942–43 (noting that delinquent filers are usually “empty shells” that “fail to respond to the SEC’s order instituting proceedings”).

111. A study found that in 2014, ALJs issued 119 orders delisting public companies; 113 of these were entered on default. See CTR. FOR CAPITAL MKTS. COMPETITIVENESS, *supra* note 108, at 13.

112. See *infra* Table 2.

113. *Id.* The numbers for defendants and respondents are an approximation because the SEC has not broken out the number of respondents as between standalone and follow-on APs. However, follow-on APs typically have only one respondent, but on a few occasions, have more. For example, in fiscal 2015 there were 168 follow-on APs with a total of 173 respondents; in fiscal 2016 there were 195 follow-on APs with a total of 195 respondents. See *supra* Table 1. The number of follow-on APs for fiscal 2014 was 232. *Id.* Using the same ratio, we can estimate that the number of respondents in follow-on APs in fiscal 2014 was approximately 242.

114. There are four matters, involving four respondents, that the SEC brought before the Relevant Period, but that were previously included in the totals because a follow-on AP was brought during the Relevant Period: (1) SEC v. Wyly, French, Exchange Act Release No. 72,414, 109 SEC Docket 429 (June 17, 2014); Complaint, SEC v. Wyly, No. 10-CV-5760 (S.D.N.Y. July 29, 2010), a case brought in 2010 with an admissions settlement with Michael C. French and follow-on AP in March 2014; (2) SEC v. Harbinger Capital Partners, Jensen, Exchange Act Release No. 73,294, 2014 WL 4960759 (Oct. 3, 2014); Harbinger Complaint, *supra* note 96, at 1, a case

admissions in 40 matters that it brought during the Relevant Period, excluding follow-on administrative proceedings (but including delinquent filings), from 60 defendants and respondents.<sup>115</sup> Thus, the SEC obtained admissions in 2.17% of these cases, from approximately 1.34% of the defendants and respondents in these cases.

Excluding both follow-on administrative proceedings and delinquent filings cases yields the smallest denominator, and consequently the highest possible percentages with respect to admissions cases. Focusing on the number of admissions obtained with respect to new civil matters and standalone administrative proceedings (and excluding delinquent filings) is arguably the most accurate measure of how often admissions are required as a price of settlement because it eliminates summary and often duplicative proceedings.<sup>116</sup> It is also based on the number of “new enforcement cases” the SEC now routinely trumpets when it announces its yearly achievements.<sup>117</sup> During the Relevant Period the SEC brought a total of 1,468 new civil and standalone administrative proceedings (excluding delinquent filings), with a total of approximately 3,199 defendants and respondents.<sup>118</sup> Using the same numbers for admissions, as in the paragraph above, during the Relevant Period the SEC obtained admissions with respect to 2.72% of the new civil and standalone administrative proceedings (excluding delinquent filings) it brought during the Relevant Period, and with respect to approximately 1.87%

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brought in 2012 with an admissions settlement with Peter Jenson and follow-on AP in July 2014; (3) SEC v. Heinz, Heinz, Exchange Act Release No. 72,209, 108 SEC Docket 4243 (May 21, 2014); Complaint, SEC v. Heinz, No. 13-CV-00753 (D. Utah Apr. 28, 2014), a case brought in August 2013 with admissions settlement with Steven B. Heinz and follow-on AP in April 2014; and (4) SEC v. Grant, Grant, Investment Advisers Act Release No. 4100, 2015 WL 3452970 (June 1, 2015); Complaint for Injunctive and Other Relief, SEC v. Grant, No. 11-11538-GAO (D. Mass. 2013), a case brought in 2011 with admissions settlement with Benjamin Lee Grant and follow-on AP in June 2015.

115. See *infra* Table 2.

116. It should be noted, however, that the SEC has obtained admissions in connection with follow-on administrative proceedings. See, e.g., Pensley, Exchange Act Release No. 79,202, 115 SEC Docket 7 (Oct. 31, 2016) (acknowledging that conduct violated the law, although those admissions are duplicative of admissions obtained in the settlement of the underlying action that the follow-on proceeding is based on); Jenson, Exchange Act Release No. 73,294, 2014 WL 4960759, at \*3-4 (Oct. 3, 2014) (admitting facts set forth in Annex to Order and acknowledging that conduct violated the law).

117. The SEC now breaks out enforcement numbers by separately reporting the number of new civil matters and administrative proceedings (excluding delinquent filings), follow-on administrative proceedings, and delinquent filings. See, e.g., Press Release, Enforcement Results FY 2016, *supra* note 11. The SEC began reporting enforcement numbers this way after the agency was taken to task for artificially inflating the reported numbers by including routine matters. See Joshua Gallu, *SEC Boosts Tally of Enforcement Successes with Routine Actions*, BLOOMBERG (Feb. 22, 2013, 4:00 AM), <https://www.bloomberg.com/news/articles/2013-02-22/sec-boosts-tally-of-enforcement-successes-with-routine-actions>.

118. See *infra* Table 2.

of defendants and respondents it sued during the Relevant Period in those cases.

Finally, the SEC includes “relief defendants” in its totals for defendants and respondents. Relief defendants are individuals or entities who have not been accused of violating the law, but who are being sued because they are alleged to be in possession of proceeds of the unlawful conduct.<sup>119</sup> The SEC will sue these persons in order to assert a legal claim to the funds. Because they are not accused of violating the law, they are, in most cases, unlikely candidates for admissions.<sup>120</sup> During fiscal 2016, the SEC sued a total of approximately 86 relief defendants.<sup>121</sup> If the relief defendants are removed from the total number of defendants and respondents, the percentage of defendants and respondents making admissions rises marginally. The admissions numbers are detailed in the table below.

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119. See, e.g., *SEC v. World Capital Mkt., Inc.*, 864 F.3d 996, 2017 U.S. App. LEXIS 4998, at \*14 (9th Cir. 2017) (“Courts may also exercise their broad equitable powers to order disgorgement from non-violating third parties who have received proceeds of others’ violations to which the third parties have no legitimate claim. In such circumstances, these non-violating third parties are referred to as ‘relief defendants’ or ‘nominal defendants.’” (citing *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998))).

120. The SEC could seek an admission from a settling relief defendant to the effect that the relief defendant has no lawful claim to the funds, perhaps as part of an effort to establish their case against the actual violator, although I am unaware of any case where the SEC has done so. The SEC, however, is not above suing relief defendants under questionable circumstances, perhaps to bolster their case-in-chief. See David Rosenfeld, *Phil Mickelson and the SEC’s Legal Bogey*, WALL ST. J. (June 16, 2016, 9:52 AM), <https://www.wsj.com/articles/phil-mickelson-and-the-secs-legal-bogey-1466029762>.

121. This number is based on a review of all litigation releases during fiscal 2016. Of course, the number of relief defendants can vary considerably from year to year. See Velikonja, *supra* note 93, at 947. But in fiscal 2014, the total was 71, see *id.* at 947 n.249, so the total for the Relevant Period is very likely to be under 250.



Table 2. Admissions in SEC Enforcement Actions FY 2014–2016

	All Matters	All Matters Except Delinquent Filings	All Matters Except Follow-on APs	New Civil Actions & Standalone APs (Excluding Del. Fil.)
Total Cases	2430	2063	1835	1468
Admissions Cases	44	44	40	40
Percent	1.81%	2.13%	2.17%	2.72%
Total D&R	5091	3817	4473	3199
Admissions D&R	64	64	60	60
Percent	1.25%	1.67%	1.34%	1.87%

Another useful means of assessing how frequently (or infrequently) admissions are obtained is to compare the number of settled actions that include admissions to the overall number of *settled* actions filed in a given time frame (as opposed to the total number of actions filed, litigated and settled). This provides a direct point of comparison and is indicative of how often the SEC makes an admission the price of a settlement. Looking at the numbers for fiscal 2016 is illustrative of several points. First, despite the new admissions policy, the SEC continues to settle, rather than litigate, a large majority of its cases. That is, a large majority of the cases the SEC brings are filed as settled rather than contested actions. During fiscal 2016, the SEC brought a total of 868 actions.<sup>122</sup> Of these, 526 were settled actions, and 332 were contested actions.<sup>123</sup> Another ten cases were hybrids, with some parties settling and others litigating.<sup>124</sup> The numbers are even starker when delinquent filing cases are removed, because almost all delinquent filings cases are brought as contested actions, even though they are rarely contested in fact. In fiscal 2016, there were 125 delinquent filings cases, 116 of which were contested, while

122. See *supra* note 87 and accompanying text.

123. The numbers are taken from SELECT SEC DATA 2016, *supra* note 87. To determine whether cases were settled or litigated I looked to the relevant litigation releases.

124. *Id.*

nine were settled.<sup>125</sup> Removing the delinquent filings cases (and omitting the ten hybrid cases), the SEC brought 517 settled actions and 216 contested actions during fiscal 2016. During fiscal 2016, the SEC obtained admissions in connection with 12 matters brought in that time frame.<sup>126</sup> Thus, it obtained admissions in 2.32% of the settled actions filed in fiscal 2016, while 97.67% of settled actions were done on a no-admit/no-denial basis.

In addition, during fiscal 2016, the SEC sued a total of 1,700 defendants and respondents (including those in the ten hybrid cases). Leaving out relief defendants, there were 706 settling defendants and respondents and 856 litigating defendants and respondents. However, over 40% of those defendants and respondents were litigating in connection with delinquent filings cases. When the delinquent filing defendants are removed, there were 696 settling defendants and respondents and 501 litigating defendants and respondents. During fiscal 2016, the SEC obtained admissions from 16 defendants and respondents who were charged during that time frame.<sup>127</sup> Thus, excluding relief defendants and delinquent filings cases, the SEC obtained admissions with respect to approximately 2.3% of the defendants and respondents it settled with. At the same time, 97.7% of the defendants and respondents who settled with the SEC did so on a no-admit/no-denial basis.

Finally, the SEC does not break out whether defendants and respondents in its data sets are individuals or entities, but information contained in an SEC press release announcing Chair White's departure (the "White Release") gives a rough approximation and also provides another window into the admissions numbers.<sup>128</sup> The White Release singled out the new admissions policy as a signature achievement of Chair White's tenure at the agency and observed, as of that date, that "the Commission ha[d] required admissions from more than 70 defendants, including 44 entities and 29 individuals."<sup>129</sup>

The White Release also pointed out that during Chair White's tenure—a period that exceeds by a couple of months the time the admissions policy was

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125. *Id.*

126. During fiscal 2016, the SEC also obtained admissions in connection with four matters that were filed in prior fiscal years. See generally *SEC v. Tropikgadget FZE*, 146 F. Supp. 3d 270 (D. Mass. 2015); Final Judgment as to Defendant Sidney M. Field, *supra* note 102; *SEC v. Spongetech Delivery Systems*, No. 10-CV-2031 (DLI) (RML) (E.D.N.Y. Aug. 4, 2016); Consent to Entry of Final Judgment, *SEC v. Mata*, No. 5:15-cv-01792-VAP-KK (C.D. Cal. June 16, 2016).

127. See *infra* Appendix.

128. Press Release, White Departure, *supra* note 13.

129. *Id.* The chart in Appendix, *infra*, lists 29 individual defendants and 47 entities (rather than 44), during that time frame. The discrepancy is likely due to the fact that three entities (Merrill Lynch, Pierce, Fenner & Smith Incorporated; Merrill Lynch Professional Clearing Corporation; and Credit Suisse Group AG) each settled two matters with admissions during that time frame. The SEC likely counted them only once when compiling their totals (as I did, see *supra* text accompanying note 91), both with respect to the number of entities that settled with admissions and the total number of entities that were subject to an enforcement action during Chair White's tenure.

in effect<sup>130</sup>—the agency brought enforcement actions against more than 2,700 individuals and 3,300 companies.<sup>131</sup> This means that admissions were obtained with respect to approximately 1.074% of individual defendants and respondents, and approximately 1.33% of entity defendants and respondents during this time period (through November 14, 2016).

The admissions numbers are similarly small when compared to the overall number of enforcement “actions” filed during this time frame, as reported in the White Release. As of November 14, 2016, the SEC had obtained admissions in connection with some 50 enforcement “actions” (the number is lower than the number of defendants who made admissions in settlements because several enforcement actions had more than one settling defendant).<sup>132</sup> According to the White Release, “during Chair White’s tenure the [agency] brought more than 2,850 enforcement actions.”<sup>133</sup> This means that the SEC obtained admissions with respect to one or more individuals or entities in connection with roughly 1.75% of the enforcement “actions” that it brought during this time period (through November 14, 2016).

## 2. The Charges

### i. Fraud

When the SEC adopted the new admissions policy, then-Chair White stated that cases potentially requiring admissions included “[c]ases where a large number of investors have been harmed or the conduct was otherwise egregious” and “[c]ases where the conduct posed a significant risk to the market or investors.”<sup>134</sup> It stands to reason that the most egregious cases would be the ones where admissions are necessary for proper accountability and to promote public trust. As it turns out, however, since the new policy was first announced, many of the most egregious cases—typically those involving some kind of fraudulent conduct—have continued to be settled on a no-admit/no-deny basis. While the number of fraud cases where admissions were obtained is a substantial portion of the total admissions cases, overall the number of admissions cases involving fraud is fairly small, and the number involving scienter-based fraud—presumably the most egregious kind—is smaller still.<sup>135</sup>

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130. Chair White was sworn in on April 10, 2013, and the new policy on admissions was publicly announced on June 18, 2013, so there is a nine-week disparity. Eaglesham & Ackerman, *supra* note 7; Press Release, SEC, Mary Jo White Sworn in as Chair of SEC (Apr. 10, 2013), <https://www.sec.gov/news/press-release/2013-2013-56.htm>.

131. Press Release, White Departure, *supra* note 13. The numbers do not line up perfectly: in a few cases (e.g., Falcone/Harbinger) the case was filed before Chair White’s tenure, although the settlement and the admissions were obtained during her tenure. *See, e.g.*, Falcone Complaint, *supra* note 96; Harbinger Complaint, *supra* note 96.

132. *See infra* Appendix.

133. Press Release, White Departure, *supra* note 13.

134. White, *supra* note 3.

135. *See infra* Part III.B.2.a.i–ii.

There are numerous anti-fraud provisions under the federal securities laws, and the state of mind required to show a violation differs, not only between the various provisions, but also within particular provisions. Some violations require a showing of scienter, which has been defined as “a mental state embracing intent to deceive, manipulate, or defraud.”<sup>136</sup> Recklessness meets the scienter requirement, although courts differ on the degree of recklessness required.<sup>137</sup> Other violations are non-scienter based, meaning that a showing of intentionality or recklessness is not required: Negligence is sufficient. Anti-fraud provisions that are scienter-based include section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and rule 10b-5 thereunder;<sup>138</sup> section 17(a)(1) of the Securities Act of 1933 (“Securities Act”);<sup>139</sup> section 15(c)(1) of the Exchange Act;<sup>140</sup> and section 206(1) of the Investment Advisers Act of 1940 (“Advisers Act”).<sup>141</sup> Anti-fraud provisions that are non-scienter based include sections 17(a)(2) and (3) of the Securities Act;<sup>142</sup> section 14(a) of the Exchange Act and rule 14a-9 thereunder;<sup>143</sup> sections 206(2)<sup>144</sup> and 206(4) of the Advisers Act;<sup>145</sup> and section 34(b) of Investment Company Act of 1940 (“Company Act”).<sup>146</sup>

To properly analyze the data, it is best to separate out entities and individuals.

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136. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

137. *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007) (“Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required.” (citing *Ottmann v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338, 343 (4th Cir. 2003))).

138. *Ernst & Ernst*, 425 U.S. at 197–212.

139. *Aaron v. SEC*, 446 U.S. 680, 695–96 (1980).

140. *See* *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1244 (11th Cir. 2012) (“The elements of a § 15(c)(1) claim are the same as a § 10(b) claim.”); *SEC v. George*, 426 F.3d 786, 792 (6th Cir. 2005) (“The elements of a § 15(c)(1) violation are the same as those for a violation of the anti-fraud provisions described above, with a similar scienter requirement . . .”).

141. *See* *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992).

142. *Aaron*, 446 U.S. at 697.

143. *SEC v. Das*, 723 F.3d 943, 953–54 (8th Cir. 2013); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1302 (2d Cir. 1973). The Supreme Court has not ruled on whether scienter is required under section 14(a). *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090 n.5 (1991); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 444 n.7 (1976).

144. *See* *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

145. *Steadman*, 967 F.2d at 647.

146. *See id.* at 643 n.5 (applying a negligence standard with respect to section 34(b) of the Company Act); Blair, Investment Advisers Act Release No. 4695, Investment Company Act Release No. 32,621, 2017 WL 1629240, at \*1, \*8 (May 1, 2017) (“Proof of scienter is not required to establish a violation of Section 34(b) of the Investment Company Act.”).

## a. Entities

From inception through February 15, 2017, 22 entities have made some kind of admission<sup>147</sup> in cases involving some kind of fraud charge. (At the time of the White Release, 19 of the 44 referenced entities (or about 40%) made admissions in fraud cases.) Of the 22, 12 entities have made admissions in cases involving scienter-based fraud:

- (1) Three entities have made admissions in cases involving violations of section 10(b) of the Exchange Act, and rule 10b-5 thereunder.<sup>148</sup>
- (2) Three entities made admissions in cases involving violations of section 10(b) of the Exchange Act (and rule 10b-5 thereunder), and section 17(a)(1) of the Securities Act.<sup>149</sup>
- (3) One entity made admissions in a case involving violations of section 10(b) of the Exchange Act (and rule 10b-5 thereunder), section 17(a)(1) of the Securities Act, and section 206(1) of the Advisers Act.<sup>150</sup>
- (4) Two entities made admissions in a case involving violations of sections 10(b) and 15(c)(1) of the Exchange Act, and rule 10b-5 thereunder.<sup>151</sup>

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147. As discussed below, the form of admissions is not consistent: in some cases, there are admissions of facts only; in other cases, there have been admissions of fact and also an admission that the conduct violated the law. See *infra* notes 143–52 and accompanying text.

148. See Muehler, Exchange Act Release No. 78,118, 2016 WL 4363425, at \*1 (June 21, 2016) (obtaining admissions from Alternative Securities Markets Group Corp. and Blue Coast Securities Corp.); G-Trade Servs. LLC, Exchange Act Release No. 71,128, 107 SEC Docket 5418, 5418 (Dec. 18, 2013) (obtaining admissions from Convergenx Global Markets Limited).

149. See Final Judgment of Permanent Injunction as to Defendants Aquaphex Total Water Solutions, LLC & Gregory Jones at 1, SEC v. Aquaphex Total Water Sols., LLC, 15-CV-00438 (N.D. Tex. June 10, 2015) [hereinafter Final Judgment Aquaphex] (obtaining admission from Aquaphex Total Water Solutions); Final Consent Judgment as to Defendants Philip A. Falcone; Harbinger Capital Partners LLC; Harbinger Capital Partners Offshore Manager, L.L.C.; & Harbinger Capital Partners Special Situations GP, L.L.C. at 2, SEC v. Falcone, No. 12-CV-5027 (S.D.N.Y. Sept. 16, 2013) [hereinafter Final Consent Judgment Falcone] (obtaining admissions from Harbinger Capital Partners Offshore Manager, L.L.C. and Harbinger Capital Partners Special Situations GP, L.L.C.).

150. See Final Consent Judgment as to Defendants Philip A. Falcone; Harbinger Capital Partners LLC; Harbinger Capital Partners Offshore Manager, L.L.C.; & Harbinger Capital Partners Special Situations GP, L.L.C. at 3, SEC v. Harbinger Capital Partners LLC, 12-CV-5028 (S.D.N.Y. Sept. 16, 2013) [hereinafter Final Consent Judgment Harbinger] (obtaining admissions from Harbinger Capital Partners LLC).

151. See *G-Trade Servs. LLC*, 107 SEC Docket at 5418–19 (obtaining admissions from G-Trade Services LLC and Convergenx Execution Solutions LLC).

- (5) One entity made admissions in a case involving violations of section 17(a)(1) of the Securities Act.<sup>152</sup>
- (6) Two entities made admissions in cases involving violations of section 206(1) of the Advisers Act.<sup>153</sup>

The other ten entities made admissions in cases involving non-scienter-based charges: Seven entities made admissions in cases involving violations of sections 17(a)(2) and/or 17(a)(3) of the Securities Act;<sup>154</sup> one entity made admissions in a case involving violations of sections 206(2) and 206(4) of the Advisers Act;<sup>155</sup> one entity made admissions in a case involving violations of section 206(4) of the Advisers Act;<sup>156</sup> and one entity made admissions in a case involving violations of section 34(b) of the Company Act.<sup>157</sup>

While the number of entities that have made admissions in scienter-based fraud cases is small to start with, it is still something of an exaggeration because several of these entities were related and the admissions were part of a single settlement: Three of the entities were Harbinger-related entities involved in the same misconduct;<sup>158</sup> three were related entities involved in the

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152. See Standard & Poor's Ratings Servs., Securities Act Release No. 9705, Exchange Act Release No. 74,104, 110 SEC Docket 3793, 3793 (Jan. 21, 2015) (obtaining admissions from Standard & Poor's Ratings Services).

153. See Grant, Investment Advisers Act Release No. 4100, 2015 WL 3452970 (May 27, 2015) (obtaining admissions from Sage Advisory Group, LLC); F-Squared Investments, Inc., Investment Advisers Act Release No. 3988, Investment Company Act Release No. 31,393, 110 SEC Docket 2953, 2953 (Dec. 22, 2014) (obtaining admissions from F-Squared Investments, Inc.).

154. See Orthofix Int'l, N.V., Securities Act Release No. 10,281, Exchange Act Release No. 79,815, 2017 WL 192377 (Jan. 18, 2017) (obtaining admissions from Orthofix International, N.V.); JPMorgan Chase Bank, N.A., Securities Act Release No. 9992, Exchange Act Release No. 76,694, 2015 WL 9256635 (Dec. 18, 2015) (obtaining admissions from both JPMorgan Chase Bank, N.A. and J.P. Morgan Securities LLC); Deutsche Bank Sec. Inc., Securities Act Release No. 10,272, Exchange Act Release No. 79,576, 2016 WL 7324405 (Dec. 16, 2016) (obtaining admissions from Deutsche Bank Securities, Inc.); Credit Suisse AG, Securities Act Release No. 10,299, Exchange Act Release No. 79,044, 2016 WL 5800369 (Oct. 5, 2016) (obtaining admissions from Credit Suisse AG); ITG Inc., Securities Act Release No. 9887, Exchange Act Release No. 75,672, 2015 WL 4748216 (Aug. 12, 2015) (obtaining admissions from ITG Inc. and Altnet Securities, Inc.); Barclays Capital Inc., Securities Act Release No. 10,010, Exchange Act Release No. 77,001, 2016 WL 369813 (Jan. 31, 2016) (obtaining admissions from Barclays Capital Inc.).

155. See *JPMorgan Chase Bank, N.A.*, 2015 WL 9256635, at \*1 (obtaining admissions from J.P. Morgan Securities LLC and JPMorgan Chase Bank, N.A.).

156. See *Morgan Stanley Smith Barney, LLC*, Investment Advisers Act Release No. 4649, 2017 WL 587246, at \*1 (Feb. 14, 2017) (obtaining admissions from Morgan Stanley Smith Barney, LLC).

157. See *Bank of N.Y. Mellon*, Investment Company Act Release No. 32,151, 2016 WL 3345651, at \*1 (June 13, 2016) (obtaining admissions from Bank of New York Mellon).

158. See *Final Consent Judgment Falcone*, *supra* note 149, at 3 (obtaining admissions from Harbinger Capital Partners Offshore Manager, L.L.C. and Harbinger Capital Partners Special Situations GP, L.L.C.); *Final Consent Judgment Harbinger*, *supra* note 150, at 3 (obtaining admissions from Harbinger Capital Partners LLC).

ConvergEx matter;<sup>159</sup> and two were related entities in the Alternative Securities/Blue Coast matter.<sup>160</sup> (These cases also had individual defendants or respondents, which will be discussed below.)

When account is taken of the related entities and multiple filings relating to the same case, it would be more accurate to say that the SEC obtained admissions with respect to seven matters involving scienter-based fraud, a very small number overall: (1) Falcone/Harbinger (10(b)); (2) ConvergEx (10(b)); (3) Alternative Securities/Blue Coast (10(b)); (4) Aquaphex (10(b)); (5) Standard & Poor's Ratings Services; (6) F-Squared Investments; and (7) Sage Advisory. Additionally, only four of those matters involved violations of section 10(b) of the Exchange Act (and rule 10b-5 thereunder), the only one of these anti-fraud provisions that has a private right of action.<sup>161</sup>

Moreover, two of these cases involved unusual circumstances which may affect the value of the admissions. The ConvergEx matter involved a widespread fraudulent scheme to obtain excess undisclosed commissions for the execution of trading orders.<sup>162</sup> The SEC charged three brokerage subsidiaries of ConvergEx Group, a global trading services provider, and two of its former employees, who together paid more than \$107 million in disgorgement and penalties to resolve the matter.<sup>163</sup> The respondents also admitted certain facts, and admitted that their conduct violated the federal securities laws.<sup>164</sup> At the same time, one of the ConvergEx brokerage

159. See G-Trade Servs. LLC, Exchange Act Release No. 71,128, 107 SEC Docket 5418, 5419–20 (Dec. 18, 2013) (obtaining admissions from G-Trade Services LLC; Convergex Global Markets Limited; and Convergex Execution Solutions LLC).

160. See Muehler, Exchange Act Release No. 78,118, 2016 WL 4363425, at \*1 (June 21, 2016) (obtaining admissions from Alternative Securities Markets Group Corp. and Blue Coast Securities Corp.).

161. The Supreme Court has never specifically addressed whether there is a private right of action under section 17(a) of the Securities Act. See, e.g., *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 304 n.9 (1985) (“We express no view as to whether a private right of action exists under §17(a).”). However, almost all circuits have now held that there is no private right of action under that section. See *Maldonado v. Dominguez*, 137 F.3d 1, 6–8 (1st Cir. 1998); *Finkel v. Stratton Corp.*, 962 F.2d 169, 174–75 (2d Cir. 1992); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 819–20 (10th Cir. 1990), *abrogated on other grounds by Rotella v. Wood*, 528 U.S. 549 (2000); *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990); *Currie v. Cayman Res. Corp.*, 835 F.2d 780, 784–85 (11th Cir. 1988); *Newcome v. Esrey*, 862 F.2d 1099, 1107 (4th Cir. 1988) (*en banc*); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349, 1350–58 (9th Cir. 1987); *Corwin v. Marney, Orton Invs.*, 788 F.2d 1063, 1066 (5th Cir. 1986); *Deviries v. Prudential-Bache Sec., Inc.*, 805 F.2d 326, 328 (8th Cir. 1986). There is no private right of action under section 206 of the Advisers Act. See *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19–25 (1979). There is also no private right of action under section 34 of the Company Act. See *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116–17 (2d Cir. 2007).

162. See Press Release, SEC, SEC Charges ConvergEx Subsidiaries with Fraud for Deceiving Customers About Commissions (Dec. 18, 2013), <https://www.sec.gov/news/press-release/2013-266>.

163. See *id.*

164. See G-Trade Servs. LLC, Exchange Act Release No. 71,128, 2013 WL 6665240, at \*1 (Dec. 18, 2013) (obtaining admission from G-Trade Services LLC); *Lekargerren*, Exchange Act Release No. 71,127, Investment Company Act Release No. 30,839, 117 SEC Docket 5414, 5415

subsidiaries and the two individuals pled guilty to parallel criminal charges involving the same conduct.<sup>165</sup> The admissions, therefore, were largely duplicative of the criminal pleas.<sup>166</sup>

The Sage Advisory case is also a bit of an oddity: The SEC filed two cases in federal district court against Sage and its principal Benjamin Grant, about a year apart. The first case went to trial, and the SEC prevailed.<sup>167</sup> After that case was decided, Sage and Grant settled the second case, with admissions.<sup>168</sup> The admissions, in other words, only came after a jury finding of liability.

Finally, the cases involving scienter-based fraud have very rarely involved large, well-known entities. Indeed, only one of those cases, an action against Standard & Poor's Ratings Services which involved violations of section 17(a)(1) of the Securities Act,<sup>169</sup> involved what might be termed a household name in the financial services industry.

In fact, Harbinger stands out as the only admissions case against what might be termed a big financial player where there were allegations of section 10(b) fraud and no parallel criminal charges. I use the word "allegations" here because even in that case there may be less than meets the eye when it comes to the actual admissions. The case against Philip Falcone and the Harbinger entities was the first case the SEC settled in which admissions were obtained. When the SEC filed the case in 2012, the complaints (there were two filings) alleged that the conduct at issue violated, among other things, section 10(b) of the Exchange Act, section 17(a) of the Securities Act, and section 206(1) of the Advisers Act (different parties were charged with different violations).<sup>170</sup> Among other things, the SEC sought as relief the entry

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(Dec. 18, 2013); Daspin, Exchange Act Release No. 71,126, Investment Company Act Release No. 30,838, 117 SEC Docket 5409, 5410 (Dec. 18, 2013).

165. Press Release, Dep't of Justice, Convergenx Group Subsidiary and Two Employees Plead Guilty to Securities and Wire Fraud Charges (Dec. 18, 2013), <https://www.justice.gov/opa/pr/convergenx-group-subsidiary-and-two-employees-plead-guilty-securities-and-wire-fraud-charges>.

166. The admissions in the Convergenx case could therefore have been obtained under the older policy of departing from no-admit/no-deny where there is a parallel criminal plea. See Lewis D. Lowenfels & Michael J. Sullivan, *SEC Policy Change Re Settlements with Admissions of Wrongdoing*, 68 SMU L. REV. 795, 806 (2015).

167. See SEC, Court Orders Massachusetts Investment Adviser to Pay Over \$1 Million to Conclude Two SEC Fraud Cases, Litigation Release No. 23,273 (June 1, 2015), <https://www.sec.gov/litigation/litreleases/2015/lr23273.htm>.

168. See *id.*

169. See Standard & Poor's Ratings Servs., Securities Act Release No. 9705, Exchange Act Release No. 74,104, 110 SEC Docket 3793 (Jan. 21, 2015). It should be noted that Standard & Poor's made only very limited admissions of fact in that case, and did not acknowledge that its conduct violated the federal securities laws. *Id.* at 3793. It should also be noted that the SEC issued three separate orders at the same time against Standard & Poor's for related misconduct; only the order referenced above contained any sort of factual admissions, while the other two orders were entered on a no-admit/no-deny basis. See *id.*; Standard & Poor's Ratings Servs., Exchange Act Release No. 74,103, 110 SEC Docket 3854, 3854 (Jan. 21, 2015).

170. Falcone Complaint, *supra* note 96, at 5-6; Harbinger Complaint, *supra* note 96, at 2-3.



of an injunction against future violations of those provisions.<sup>171</sup> When the case was settled, however, the consent judgment recited the charges and alleged violations, but the judgment did not include the entry of an injunction against future violations of those provisions.<sup>172</sup> The end result was that Falcone and the Harbinger entities admitted to a set of facts, and admitted that they acted recklessly, but not that their conduct violated the law;<sup>173</sup> there was no actual finding of any sort by the court that the defendants actually violated anti-fraud provisions.<sup>174</sup>

The other fraud admissions cases involving big institutional players (JPMorgan Chase, Barclays, Deutsche Bank, Credit Suisse, and Morgan Stanley Smith Barney) have all involved non-scienter-based fraud charges under sections 17(a)(2) and (3) of the Securities Act or sections 206(2) or 206(4) of the Advisers Act.<sup>175</sup>

#### b. Individuals

With respect to individuals, the number of admissions cases involving scienter-based fraud is considerably higher: 17 of the 30 individuals made admissions in cases where the charges included violations of section 10(b) of the Exchange Act, and half of those individuals were also charged with violations of section 17(a) of the Securities Act.<sup>176</sup> A few were charged with

171. Falcone Complaint, *supra* note 96, at 26; Harbinger Complaint, *supra* note 96, at 27.

172. Final Consent Judgment Falcone, *supra* note 149, at 13; Final Consent Judgment Harbinger, *supra* note 150, at 13.

173. Oddly, Peter Jenson, who was Harbinger's COO, acknowledged in his settlement that his conduct violated the federal securities laws. See Final Consent Judgment as to Defendant Peter A. Jenson at 2, No. 12-CV-5028 (S.D.N.Y. Oct. 1, 2014). This is difficult to explain, given that "Jenson [was] only an aider and abettor while Falcone [was] the prime mover and prime wrongdoer . . ." Lowenfels & Sullivan, *supra* note 166, at 803.

174. Compare this to the other fraud cases where there was an admission not only of the facts, but of a violation of law, and either a finding (if an administrative proceeding) that the anti-fraud provisions had been violated, see Muehler, Exchange Act Release No. 78,118, 2016 WL 4363425, at \*6 (June 21, 2016); G-Trade Servs. LLC, Exchange Act Release No. 71,128, 107 SEC Docket 5418, 5424 (Dec. 18, 2013), or (if a federal court action) the entry of an injunction against future violations of the anti-fraud provisions (which is necessarily predicated on there having been a violation of those provisions), see Final Judgment Aquaphex, *supra* note 149, at 2.

175. Morgan Stanley Smith Barney, LLC, Investment Advisers Act Release No. 4649, 2017 WL 587246, at \*1 (Feb. 14, 2017); Deutsche Bank Sec. Inc., Securities Act Release No. 10,272, Exchange Act Release No. 79,576, 2016 WL 7324405, at \*4 (Dec. 16, 2016). Credit Suisse AG made two admissions. Credit Suisse AG, Securities Act Release No. 10,299, Exchange Act Release No. 79,044, 2016 WL 5800369, at \*11-12 (Oct. 5, 2016); Barclays Capital Inc., Securities Act Release No. 10,010, Exchange Act Release No. 77,001, 2016 WL 369813, at \*10 (Jan. 31, 2016); JPMorgan Chase Bank, N.A., Securities Act Release No. 9992, Exchange Act Release No. 76,694, 2015 WL 9256635, at \*9 (Dec. 18, 2015).

176. Philip Falcone; Jonathan Samuel Daspin; Thomas Lekargeren; Craig S. Lax; Michael C. French; Steven B. Heinz; Michael A. Horowitz; Rayla Melchor Santos; Chih Hsuan "Kiki" Lin; Katsuichi Fusamae; Gregory G. Jones; Steven C. Watson; Sidney M. Field; Steve Pappas; Steven J. Muehler; Paul Mata; and Joel Pensley. See *infra* Appendix.

violations of section 206(1) of the Advisers Act, either in conjunction with those charges or independently.<sup>177</sup>

Two things, however, are worthy of note with respect to individual admissions and the kinds of cases in which they occur. First, in several instances the individuals who made admissions in settlements with the SEC also pled guilty to criminal charges connected to the misconduct, either before or contemporaneously with the SEC settlement. Indeed, in one insider trading case the SEC filed its complaint along with a consent judgment containing admissions only after the defendant had already pled guilty to criminal charges involving the same illegal activity.<sup>178</sup> In the ConvergeEx matter discussed above, two individuals made admissions in settling the SEC matter while simultaneously pleading guilty to criminal charges.<sup>179</sup> Several other individuals who made admissions in SEC settlements also pled guilty to some criminal charge.<sup>180</sup> Requiring admissions in cases where the defendant has pled guilty to criminal charges may resolve the obvious tension that exists when a defendant pleads guilty to criminal charges and then is allowed to settle with the SEC on a no-admit/no-deny basis, but optics aside, the admissions add nothing in those cases because the defendant would typically have already allocuted to the same facts as part of the plea.

Second, in the vast majority of cases where an entity admitted to wrongdoing in settling a case, there were no individuals charged. This is true even though the SEC has been severely criticized for failing to charge individuals in significant cases, particularly those involving major financial institutions, and even though Chair White specifically stated when she announced the admissions policy that going forward the SEC would seek to hold individuals accountable.<sup>181</sup>

This has not proven to be the case: In only six matters where entities made admissions were there also individuals who made admissions, and only five of those cases involved fraud charges.<sup>182</sup> More to the point, only the

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177. Steven B. Heinz; Sean C. Cooper; Reid S. Johnson; and John W. Rafal. *See infra* Appendix.

178. SEC, *SEC Charges Man with Insider Trading on Acquisition of Cooper Tire*, Litigation Release No. 23,408 (Nov. 17, 2015), <https://www.sec.gov/litigation/litreleases/2015/lr23408.htm>.

179. *See supra* notes 162–66 and accompanying text.

180. *See, e.g.*, Consent Order, *USA v. John Rafal*, No. 1:17-CR-10004 (D. Mass. Jan. 20, 2017) (obstruction); Plea Agreement for Defendant Chih Hsuan Lin, *USA v. Chih Hsuan Lin*, No. 15-CR-00475 (C.D. Cal. Dec. 6, 2016) (Chih Hsuan “Kiki” Lin pled guilty to wire fraud); Statement by Defendant in Advance of Plea of Guilty, *USA v. Heinz*, No. 14-CR-00448 (D. Utah Sept. 25, 2014) (receiving stolen money and fraud).

181. *See White, supra* note 3 (“Another core principle of any strong enforcement program is to pursue responsible individuals wherever possible. . . . Companies, after all, act through their people. And when we can identify those people, settling only with the company may not be sufficient. Redress for wrongdoing must never be seen as ‘a cost of doing business’ made good by cutting a corporate check.”).

182. *See Muehler*, Exchange Act Release No. 78,118, 2016 WL 4363425, at \*1 (June 21, 2016); Final Consent Judgment *Falcone*, *supra* note 149, at 1; Final Judgment *Aquaphex*, *supra* note 149, at 1; Grant, Investment Advisers Act Release No. 4100, 2015 WL 3452970 (May 27,

Harbinger/Falcone case and the ConvergeX case involved entities that plausibly could be described as big players, and in the case of ConvergeX two of the individuals pled guilty to parallel criminal charges. Otherwise, the cases against major players in the financial services industry that have resulted in admissions have rarely involved charges against individuals,<sup>183</sup> and in at least one case where an individual was also charged, the SEC allowed the individual to settle on a no-admit/no-deny basis.<sup>184</sup> There have been only a few cases involving admissions by large financial institutions where the SEC also litigated an action against a responsible individual.<sup>185</sup>

## ii. *Non-Fraud Charges*

The non-fraud charges with respect to entities in admissions cases have been a real mixture, including charges of FCPA violations,<sup>186</sup> various books and records provisions,<sup>187</sup> broker-dealer rules,<sup>188</sup> violations of the securities registration provisions,<sup>189</sup> and a smattering of more technical regulatory

2015) (obtaining admissions from Sage Advisory Group, LLC); G-Trade Servs. LLC, Exchange Act Release No. 71,128, 107 SEC Docket 5418, 5419–20 (Dec. 18, 2013). The sixth case was Hous. Am. Energy Corp., Securities Act Release No. 9757, 2015 WL 1843840 (Apr. 23, 2015).

183. See, e.g., Morgan Stanley Smith Barney, LLC, Investment Advisers Act Release No. 4649, 2017 WL 587246, at \*1 (Feb. 14, 2017) (entity made admissions in settlement; no individuals charged); Deutsche Bank Sec. Inc., Securities Act Release No. 10,272, Exchange Act Release No. 79,576, 2016 WL 7324405, at \*4 (Dec. 16, 2016) (same); Bank Leumi le-Israel B.M., Exchange Act Release No. 79,113, 2016 WL 6081797, at \*3 (Oct. 18, 2016) (same); Citigroup Glob. Mkts., Inc., Exchange Act Release No. 78,291, 2016 WL 4363820, at \*2 (July 12, 2016) (same); Barclays Capital Inc., Securities Act Release No. 10,010, Exchange Act Release No. 77,001, 2016 WL 369813, at \*4 (Jan. 31, 2016) (same); JPMorgan Chase Bank, N.A., Securities Act Release No. 9992, Exchange Act Release No. 76,694, 2015 WL 9256635, at \*1 (Dec. 18, 2015) (same); Credit Suisse Securities (USA) LLC, Exchange Act Release No. 75992 (Sept. 28, 2015) (same); Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 75,083, 2015 WL 3452968 (June 1, 2015) (same); Bank of Am. Corp., Exchange Act Release No. 72,888, 109 SEC Docket 3294, 3295 (Aug. 21, 2014) (same); Scottrade, Inc., Exchange Act Release No. 71,435, 108 SEC Docket 571, 571 (Jan. 29, 2014) (same).

184. See Credit Suisse AG, Securities Act Release No. 10,299, Exchange Act Release No. 79,044, 2016 WL 5800369, at \*1 (Oct. 5, 2016) (entity made admissions in settlement; individual charged with causing entity's violation settled on a no-admit/no-deny basis).

185. See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 78,141, 2016 WL 4363431, at \*3 (June 23, 2016) (individual charged in litigated AP); Standard & Poor's Ratings Servs., Securities Act Release No. 9705, Exchange Act Release No. 74,104, 110 SEC Docket 3793, 3794 (Jan. 21, 2015) (individual charged in litigated AP); JPMorgan Chase & Co., Exchange Act Release No. 70,458, 107 SEC Docket 877 (Sept. 19, 2013) (two individuals charged in litigated civil proceeding).

186. See Orthofix Int'l, N.V., Securities Act Release No. 10,281, Exchange Act Release No. 79,815, 2017 WL 192377, at \*14 (Jan. 18, 2017).

187. See *JPMorgan Chase & Co.*, 107 SEC Docket 877.

188. See Oppenheimer & Co., Inc., Securities Act Release No. 9711, Exchange Act Release No. 74,141, 110 SEC Docket 3957, 3957 (Jan. 27, 2015).

189. See Ethiopian Elec. Power, Securities Act Release No. 10,093, 2016 WL 3181326, at \*1, \*3 (June 8, 2016).

violations.<sup>190</sup> There is no discernable pattern that would indicate which types of violations the SEC considers to be particularly egregious, or why some of these particular cases warranted an admission. Some of these cases are undoubtedly important for the message that they send to the public concerning the conduct and the entity involved. But others seem to offer little in the way of a compelling narrative. For example, the SEC seems particularly concerned with obtaining admissions from large financial institutions that fail to provide the SEC with accurate information about the trades they execute, known as Blue Sheet Data.<sup>191</sup>

With respect to individuals, the non-fraud charges in admissions cases have mostly been related to violations of the registration provisions of the Securities Act (section 5).<sup>192</sup> However, this may be a distortion: Seven individuals made admissions with respect to violations of section 5 in connection with a single case, *SEC v. Tropikgadget FZE*, which was described as a pyramid scheme targeting Latino communities.<sup>193</sup> This was undoubtedly a case that deserved to be publicized and where factual admissions might be very helpful to investors, both as a basis for recovering money and for evaluating the company and the quality of its investment product. It is, however, only one case and hardly suggestive of a trend.

### 3. Classification of Cases

With respect to the types of cases where admissions have been obtained, by far the largest number involves broker-dealers (23) followed by investment advisers/investment companies (10).<sup>194</sup> This suggests that the SEC is primarily interested in obtaining admissions with respect to registered persons, i.e., financial services companies and professionals that must be licensed in order to do business. These are also the areas where the SEC has the greatest leverage in obtaining admissions: Entities that want to remain

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190. See Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 75,083, 2015 WL 3452968, at \*2 (June 1, 2015) (rule 203(b) of Regulation SHO).

191. See Scottrade, Inc., Exchange Act Release No. 71,435, 108 SEC Docket 571, 571 (Jan. 29, 2014); Credit Suisse Sec. (USA) LLC, Exchange Act Release No. 75,992, 2015 WL 5675104, at \*1 (Sept. 28, 2015); Citigroup Glob. Mkts., Inc., Exchange Act Release No. 78,291, 2016 WL 4363820, at \*4 (July 12, 2016).

192. See, e.g., Consent of Defendant Chih Hsuan “Kiki” Lin and Relief Defendant USA Trade Group Inc., SEC v. CKB168 Holdings LTD, No. 13-CV-5584 (E.D.N.Y. July 10, 2015).

193. See SEC v. Tropikgadget FZE, No. 15-CV-10543, 2017 BL 56815 (D. Mass. Feb. 23, 2017); SEC, SEC Obtains Final Judgment Against Massachusetts-Based Promoter of Pyramid Scheme Targeting Latino Communities, Litigation Release No. 23548 (May 27, 2016), <https://www.sec.gov/litigation/litreleases/2016/lr23548.htm>; SEC, SEC Obtains Final Judgments Against Promoters of Pyramid Scheme Targeting Latino Communities, Litigation Release No. 23647 (Sept. 19, 2016), <https://www.sec.gov/litigation/litreleases/2016/lr23647.htm>.

194. I am using the primary classifications used by the SEC in its data sets. As the SEC notes, however, many cases could fit into several different classifications. For those cases filed in fiscal 2017, I have used the most likely case designation.

licensed, or that need relief from “bad boy” provisions<sup>195</sup> that would kick in if there was a finding of scienter-based fraud, often have little choice but to accede to the SEC’s demands. For example, entities that are repeat offenders, like many of the large financial institutions that are repeatedly sanctioned by the SEC, might fear that if they don’t make the requested admissions, the agency might actually get serious and pull their license.<sup>196</sup> Similarly, entities that are concerned with obtaining waivers and other relief from “bad boy” provisions might be willing to make admissions in exchange for non-scienter-based fraud charges. Individual violators in the securities industry are routinely barred from association when they commit serious offenses; however, they typically have a right to reapply after a certain amount of time, and may view admissions as a form of cooperation, the absence of which would color their chances of gaining readmission to the industry.

Other categories of cases where the SEC has obtained admissions include issuer reporting and disclosure (10) and securities offerings (6), both core areas of concern for the SEC, and also areas that are tightly regulated.<sup>197</sup> On the other hand, admissions have almost never been obtained in insider-trading cases (only once to date).<sup>198</sup>

#### 4. Form of the Admissions

The admissions at issue here have taken several forms. In some instances, the defendant or respondent has only admitted to certain facts, which are typically outlined in an appendix to the administrative order<sup>199</sup> or consent judgment.<sup>200</sup> Sometimes, the respondent has admitted to certain findings<sup>201</sup> or facts contained in the actual order. In other cases, there have been not only admissions of facts, but also an acknowledgment that the conduct at issue

195. On “bad boy” provisions, see *infra* notes 214–19 and accompanying text.

196. Some financial services companies have repeatedly violated the securities laws and have repeatedly been sanctioned by the SEC. Indeed, a few of the entities that have made admissions to date have already done so on more than one occasion. See, e.g., *supra* note 94 and accompanying text (discussing Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corporation). While those sanctions have often included significant financial penalties, those penalties are typically viewed as a cost of doing business and little else. While these entities have also been enjoined, or ordered to cease and desist, from future violations of certain provisions of the federal securities laws, there is apparently no consequence for violating the injunction or cease-and-desist order.

197. See, e.g., Press Release, SEC, Monsanto Paying \$80 Million Penalty for Accounting Violations (Feb. 9, 2016), <https://www.sec.gov/news/pressrelease/2016-25.html> (“Financial reporting and disclosure cases continue to be a high priority for the Commission.”). See generally SEC, *What We Do*, <https://www.sec.gov/Article/whatwedo.html> (last visited Sept. 12, 2017).

198. See SEC v. Watson, No. 15-CV-13868, 2015 WL 7273218 (D. Mass. Nov. 17, 2015).

199. See, e.g., JPMorgan Chase & Co., Exchange Act Release No. 70,458, 107 SEC Docket 877 (Sept. 19, 2013).

200. See, e.g., Final Consent Judgment Falcone, *supra* note 149.

201. See, e.g., Scottrade Inc., Exchange Act Release No. 71,435, 2014 WL 316743 (Jan. 29, 2014).

violated the federal securities laws.<sup>202</sup> Once again, there does not appear to be any discernable pattern to these admissions, or any explanation why some defendants and respondents have been allowed to settle with just an admission of facts while others have also had to admit that their conduct violated the law.<sup>203</sup> One might suspect that it is merely a matter of successful bargaining by the lawyers, perhaps on threat of litigating the matter if the SEC insists upon the more fulsome admission. To the extent that there is an emerging trend, most of the recent cases—all involving the entry of administrative cease-and-desist orders—have taken the form of an admission of facts detailed in specified sections of the order, along with an acknowledgment that the conduct violated the federal securities laws.<sup>204</sup> Even that, however, may be in flux: In the latest case involving admissions, Morgan Stanley Smith Barney did not “acknowledge[] that its conduct violated” the federal securities laws, which had been the emerging standard language, but instead only acknowledged that its conduct violated a specific provision of the Advisers Act.<sup>205</sup> This suggests that the language and form of the admissions is still very much open to negotiation.

#### IV. ASSESSMENT AND CRITIQUE

After more than four years, the SEC has proclaimed the new admissions policy to be a success. While there are still critics of the policy, the industry and the defense bar seem to have reconciled themselves to the idea of occasional admissions, perhaps in recognition that their worst fears have not come to pass. I would like to suggest here that this is the result of a calculated strategy of accommodation that has allowed the SEC to publicly tout a position of tough enforcement and public accountability, while in reality continuing business as usual. As detailed above, the overall number of admissions is small in comparison to the number of enforcement actions, and the vast majority of defendants and respondents who settle matters with the SEC continue to do so on a no-admit/no-deny basis. This is not in and of itself surprising: The SEC stated at the outset that admissions would be the exception rather than the rule. What is concerning is the lack of any clear

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202. See, e.g., Credit Suisse AG, Securities Act Release No. 10,299, Exchange Act Release No. 79,044, 2016 WL 5800369 (Oct. 5, 2016); Bank of Am. Corp., Exchange Act Release No. 72,888, 109 SEC Docket 3294, 3294 (Aug. 21, 2014).

203. See Lowenfels & Sullivan, *supra* note 166, at 802–03.

204. See, e.g., Orthofix Int'l, N.V., Securities Act Release No. 10,281, Exchange Act Release No. 79,815, 2017 WL 192377, at \*1 (Jan. 18, 2017); Allergan, Inc., Exchange Act Release No. 79,814, 2017 WL 167936, at \*1 (Jan. 17, 2017); Rafal, Exchange Act Release No. 79,755, Investment Company Act Release No. 32,416, 2017 WL 74963, at \*1 (Jan. 9, 2017); Deutsche Bank Sec. Inc., Securities Act Release No. 10,272, Exchange Act Release No. 79,576, 2016 WL 7324405, at \*1 (Dec. 16, 2016); Bank Leumi le-Israel B.M., Exchange Act Release No. 79,113, 2016 WL 6081797, at \*1 (Oct. 18, 2016).

205. Morgan Stanley Smith Barney, LLC, Investment Advisers Act Release No. 4649, 2017 WL 587246, at \*1 (Feb. 14, 2017).

pattern that might reveal a rationale to explain and justify the policy. There has been a remarkable lack of standards, consistency, and transparency in the application of the admissions policy, which undermines its effectiveness and value. Moreover, the SEC has seemingly agreed, by and large, to avoid seeking admissions in cases where there could be real collateral consequences. Limiting the number of cases where admissions are required and avoiding collateral damage may be judicious. It may also be a concession to practical reality: Defendants who are faced with real collateral consequences that could flow from admissions might refuse to settle on those grounds. Insisting on admissions in those cases could lead to an increase in litigation and a diversion of scarce agency resources. Indeed, this was the principal objection raised when the new policy was adopted. By not going down this road, the SEC may have chosen the prudent course. But it calls into question the stated purpose of the policy: to bring a measure of public accountability in the most egregious cases. It also calls into question whether the SEC is really prepared to go to trial if it does not obtain admissions.<sup>206</sup>

#### A. ABSENCE OF THE MOST SERIOUS CHARGES

As discussed above, the SEC has very rarely obtained admissions from entities in cases involving scienter-based fraud. Taking account of related entities, the SEC has obtained admissions with respect to only seven matters involving scienter-based fraud.<sup>207</sup> The remaining “fraud” cases against entities have all involved non-scienter-based charges, i.e., charges that only require a showing of negligence.<sup>208</sup> These distinctions are meaningful for several reasons.

First, scienter-based fraud is probably the most egregious form of misconduct under the securities laws. The fact that there have been so few instances where entities have made admissions in those kinds of cases suggests that the SEC may not in fact be requiring admissions with respect to the most egregious conduct, or that in settling cases involving what it perceives to be the most egregious conduct, the SEC is not insisting, for whatever reason, that the resolution involve the most serious charges.<sup>209</sup> Another possibility is that more entities are choosing to litigate when confronted with the necessity of an admission, but there is no evidence to that effect.

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206. Chair White had stated that her goal was to create a trial-ready agency. See White, *supra* note 14.

207. See *supra* Part III.B.2.a.i.

208. See *supra* Part III.B.2.a.i.

209. The disjunction between the conduct alleged and the charges filed was one of the main concerns expressed by Judge Rakoff in the Citigroup case: The described conduct looked like scienter-based conduct, yet the SEC was allowing a settlement that involved only negligence based charges. See SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328, 330–34 (S.D.N.Y. 2011) (looks like scienter but only charged with negligence).

Second, the fraud cases involving violations of sections 17(a)(2) and (3) of the Securities Act are distinct for another reason. In addition to the fact that those charges involve a negligence standard, there is also no private right of action for violations of section 17(a).<sup>210</sup> It is noteworthy that in settling “egregious” cases involving some kind of fraudulent conduct, the SEC has opted for charges that do not involve the showing of intentionality that is typically required for a private lawsuit, and has proceeded pursuant to a statutory provision that does not allow for private actions.<sup>211</sup> For those reasons, Professor Coffee has called an admission of liability in an SEC action under section 17 “an admission that effectively admits nothing.”<sup>212</sup>

Third, scienter-based fraud liability carries other collateral consequences. For example, in 2005, the SEC adopted far-reaching changes to the registration and offering process under the Securities Act.<sup>213</sup> Among other things, the SEC adopted less stringent rules applicable to some of the largest and most widely followed issuers of securities, referred to as “Well-Known Seasoned Issuers” (“WKSIs”).<sup>214</sup> A WKSI is an issuer that has at least \$700 million in market capitalization, or that has at least \$1 billion in debt, and has timely filed all its periodic reports.<sup>215</sup> WKSIs can proceed much more quickly with public securities offerings because they can register their offerings on shelf registration statements that become effective automatically upon filing—rather than having to wait for the SEC to declare the registration statement effective before making sales—and can make unrestricted written and oral offers prior to filing a registration statement.<sup>216</sup> As a result, qualifying as a WKSI can be very beneficial for an issuer of securities.

In order to forestall abuse, the new rules included “bad boy” provisions that, among other things, excluded issuers that had been convicted of certain crimes, or that had violated the anti-fraud provisions of the federal securities

210. It is possible that the conduct admitted to in those cases could constitute a violation of other provisions of the securities laws. There are private rights of action that are based on negligence (and even strict liability) in cases involving fraud in connection with securities offerings (*see* sections 11 and 12(a)(2) of the Securities Act), but it does not appear that those types of violations were at issue in the settled admissions cases. There have been a few admissions cases involving violations of section 5 of the Securities Act. *See* SEC v. Tropikgadget FZE, 15-CV-10543, 2017 BL 56815 (D. Mass. Feb. 23, 2017); Ethiopian Elec. Power, Securities Act Release No. 10,093, 2016 WL 3181326, at \*3 (June 8, 2016). A violation of section 5 is a predicate for an action under section 12(a)(1) of the Securities Act, but that is not an anti-fraud provision.

211. Of course, as the Second Circuit made clear in the Citigroup case, it is not the SEC's job to make it easier for private litigants to prevail. SEC v. Citigroup Glob. Mkts., 752 F.3d 285, 297 (2d Cir. 2014) (“[T]he district court [cannot] reject a consent decree on the ground that it fails to provide collateral estoppel assistance to private litigants—that simply is not the job of the courts.”).

212. Coffee, *supra* note 75.

213. *See* Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 85 SEC Docket 2871 (Aug. 3, 2005).

214. Securities Act of 1933, 17 C.F.R. § 230.405 (2016).

215. *Id.*

216. *Id.*



laws. Specifically, an issuer that in the past three years “was made the subject of any judicial or administrative decree or order arising out of a governmental action that:” (1) enjoined the issuer from violating the anti-fraud provisions; (2) ordered the issuer to “cease and desist from violating the anti-fraud provisions”; or (3) “determines that the [issuer] violated the anti-fraud provisions of the federal securities laws,” is deemed to be an “ineligible issuer” that cannot qualify for WKSII status.<sup>217</sup>

However, the rules also provide that the SEC can grant a waiver of ineligible issuer status “upon a showing of good cause.” The Commission has delegated authority to grant waivers to its Division of Corporation Finance in most instances. In determining whether good cause exists, the Division looks, among other things, to “whether the conduct involved a criminal conviction or scienter-based violation, as opposed to a civil or administrative non-scienter-based violation.”<sup>218</sup> The issuer’s burden of showing that good cause exists for a waiver is “significantly greater” in cases involving a scienter-based violation.<sup>219</sup> To date, most of the big financial entities that have settled cases involving fraud charges with admissions have received WKSII waivers, either from the Division or from the Commission itself.<sup>220</sup> The one exception involved JPMorgan Chase, and that was likely due to a very public airing of the rather uncomfortable fact that the company had already obtained no fewer than six WKSII waivers relating to other misconduct!<sup>221</sup> Although the

217. *Id.*

218. SEC, Div. of Corp. Fin., Revised Statement on Well-Known Seasoned Issuer Waivers (Apr. 24, 2014) [hereinafter SEC, Revised Statement], <https://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm>; see SEC, Div. of Corp. Fin., Statement on Well-Known Seasoned Issuer Waivers (July 8, 2011), <https://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp.htm>.

219. SEC, Revised Statement, *supra* note 218.

220. See, e.g., Deutsche Bank Aktiengesellschaft, Securities Act Release No. 10,273, 2016 WL 7324406 (Dec. 16, 2016) (Order under rule 405 of the Securities Act of 1933, granting a waiver from being an ineligible issuer); Barclays PLC, Securities Act Release No. 10,012, 2016 WL 369807, at \*2 (Jan. 3, 2016) (Order under rule 405 of the Securities Act of 1933, granting a waiver from being an ineligible issuer); Letter from Tim Hensler, Chief, Office of Enft Liaison, SEC, to Elaine C. Greenberg, Greenberg Tranrig, LLP (Feb. 14, 2017), <https://www.sec.gov/divisions/corpfin/cf-noaction/2017/morgan-stanley-021417-405.pdf>; Letter from Tim Hensler, Chief, Office of Enft Liaison, SEC, to Paul R. Eckert, WilmerHale (June 13, 2016), <https://www.sec.gov/divisions/corpfin/cf-noaction/2016/bank-new-york-mellon-corporation-061316-405.pdf>.

221. The JPMorgan settlement occurred at a time when the policy of granting WKSII waivers was under considerable public scrutiny. In May of 2015, the Commission issued an Order granting a WKSII waiver to JPMorgan Chase & Co. See JPMorgan Chase & Co., Securities Act Release No. 9780, 2015 WL 2395509 (May 20, 2015). Commissioner Kara Stein dissented, issuing a statement in which she criticized the routine granting of such relief, noting that this was the sixth WKSII waiver that JPMorgan Chase had obtained since 2008. See Kara M. Stein, Comm’r, SEC, Dissenting Statement Regarding Certain Waivers Granted by the Commission for Certain Entities Pleading Guilty to Criminal Charges Involving Manipulation of Foreign Exchange Rates (May 21, 2015), <https://www.sec.gov/news/statement/stein-waivers-granted-dissenting-statement.html>. The waiver practice had also been publicly criticized by Senator Elizabeth Warren. See Ed Beeson, *Warren Blasts SEC, DOJ Over ‘Slap on the Wrist’ Enforcement*, LAW360 (Apr. 15, 2015, 7:07 PM), <https://www.law360.com/articles/643593/warren-blasts-sec-doj-over-slap-on-the-wrist-enforcement>; Kevin McCoy, *Warren Seeks Public*

practice of routinely, and sometimes repeatedly, granting WKSIs has been severely criticized, the agency has generally allowed large financial institutions to avail themselves of the fast-track regardless of their violations.<sup>222</sup>

Other provisions of the federal securities laws contain “bad boy” provisions that disqualify persons who have engaged in specified violative conduct. For example, rule 506 of Regulation D under the Securities Act of 1933 exempts certain offers and sales of securities from the registration provisions of the Securities Act, so long as the issuer meets certain specified conditions.<sup>223</sup> The rule, however, disqualifies “bad actor” issuers. Among other things, an issuer that, within the last five years, has been the subject of a Commission cease-and-desist order involving scienter-based fraud is deemed a bad actor and cannot avail themselves of the exemption.<sup>224</sup>

The rule also disqualifies an issuer who in the last five years has been subject of a court order enjoining it from engaging in any conduct in connection with the purchase or sale of any security,<sup>225</sup> or who is subject to a Commission order that places limits on the activities and functions of broker-dealers or investment advisers.<sup>226</sup> But the rule also allows the Commission to waive such disqualification “[u]pon a showing of good cause . . . if the Commission determines that it is not necessary under the circumstances that an exemption be denied.”<sup>227</sup> On at least one occasion, the Commission has waived the 506 “bad actor” disqualification in a case involving admissions,

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*Hearing on Bank Waivers*, USA TODAY (May 25, 2015, 11:26 AM), <https://www.usatoday.com/story/money/2015/05/25/elizabeth-warren-criticizes-bank-waivers/27911773>. When JPMorgan agreed to settle another case in December 2015, by paying \$267 million in disgorgement and penalties (the admissions case), another WSKI waiver was probably just too much for the agency to swallow. See Aruna Viswanatha & Emily Glazer, *SEC Takes Tougher Stance on Enforcement in J.P. Morgan Case*, WALL ST. J. (Oct. 27, 2015, 8:43 PM), <https://www.wsj.com/articles/sec-takes-tougher-stance-on-enforcement-in-j-p-morgan-case-1445986962>.

222. In addition to JPMorgan Chase, Bank of America also lost its WSKI status. In August 2014, Bank of America agreed to a global settlement with various agencies relating to certain mortgage loans and mortgage-backed securities. As part of the global settlement, Bank of America agreed to pay more than \$245 million to resolve two separate SEC matters. See Press Release, SEC, Bank of America Admits Disclosure Failures to Settle SEC Charges (July 26, 2016) [hereinafter Press Release, Bank of America], <https://www.sec.gov/news/press-release/2014-172>. One of the two SEC matters, involving books and records violations, was settled with admissions; the other settlement, which involved more serious fraud charges, did not include admissions. Compare Bank of Am. Corp., Exchange Act Release No. 72,888, 109 SEC Docket 3294, 3295 (Aug. 21, 2014) with Final Judgment as to Bank of America at 1, SEC v. Bank of Am., N.A., No. 13-CV-447 (W.D.N.C. Nov. 25, 2014). In connection with these settlements, a deeply divided Commission refused to grant Bank of America a WSKI waiver. See Peter J. Henning, *With Bank of America Order, S.E.C. Breaks the Mold*, N.Y. TIMES: DEALBOOK (Dec. 8, 2014, 12:47 PM), <https://dealbook.nytimes.com/2014/12/08/with-bank-of-america-order-s-e-c-breaks-the-mold>. The denial of the WSKI waiver was clearly based on the fraud charges; the books and records violations involved in the admissions would not have been disqualifying.

223. See rule 506 of Regulation D under the Securities Act of 1933, 17 C.F.R. § 230.506 (2016).

224. See *id.* § 230.506(d)(1)(v)(A).

225. See *id.* § 230.506(d)(1)(ii)(A).

226. See *id.* § 230.506(d)(1)(iv)(B).

227. See *id.* § 230.506(d)(2)(ii).

where the predicate was the entry of an order limiting the activities of a broker-dealer.<sup>228</sup>

The dearth of scienter-based fraud charges with respect to entities seems specifically designed to avoid the kinds of collateral consequences that the defense bar most feared when the admissions policy was first announced. Indeed, there is one recent and particularly telling example of the SEC bending over backwards to avoid collateral consequences in settling with an entity: In July 2016, State Street Bank and Trust agreed to settle an SEC enforcement action and admit certain findings, but the SEC agreed that the order (which would contain the admissions) would only issue “after a federal court approves State Street’s proposed settlement with private plaintiffs in pending securities class action lawsuits!”<sup>229</sup> This may be a sensible (and creative) means of dealing with a legitimate concern, but it undermines the idea that admissions will be required in “egregious” cases, and calls into question the principle of public accountability that ostensibly informed the admissions policy.

Overall, the absence of the most serious charges—*scienter*-based fraud—in admissions cases has mitigated the main concern voiced by the industry and the defense bar: By and large, entities that have made admissions when settling SEC enforcement actions have only rarely suffered any collateral consequences, either in the form of private litigation,<sup>230</sup> or some form of “bad boy” ineligibility. The lack of collateral consequences may be viewed as a positive thing: If there were serious collateral consequences, the SEC might not be able to obtain admissions in settlements, and might be forced to litigate certain actions which could eat up scarce agency resources. But there is a sense as well that the SEC is acting opportunistically by dropping the most serious charges in exchange for an admission. It also raises the question whether public accountability is better served by a settlement that includes an admission to a negligence charge (that may not reflect the actual seriousness of the misconduct), or a no-admit/no-deny settlement that includes a more serious (and more appropriate) scienter-based charge. Either the SEC is not requiring admissions in the most egregious cases, or it is allowing the most egregious cases to settle with an admission to a lesser charge. Either scenario undermines the value and purpose of requiring public admissions in settlements.

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228. See Barclays Capital Inc., Securities Act Release No. 10,011, 2016 WL 369806, at \*1 (Jan. 31, 2016).

229. See Press Release, SEC, State Street Misled Custody Clients About Prices for Foreign Currency Exchange Trades (July 26, 2016), <https://www.sec.gov/news/pressrelease/2016-152.html>. The Order was eventually entered on December 12, 2016. See *infra* Appendix.

230. On the very limited collateral impact of admissions in SEC enforcement actions on private securities litigation, see Siegel, *supra* note 61, at 455–61.

*B. LACK OF CLEAR STANDARDS*

Another problem that has plagued the admissions policy is a lack of clear standards governing when, and under what circumstances, the SEC will require admissions. Chair White provided a non-exclusive list of “potential candidates” that included: cases where a large number of investors have been harmed or the conduct was otherwise egregious; cases where the conduct posed a significant risk to the market or investors; cases where admissions would aid investors deciding whether to deal with a particular party in the future; and cases where reciting unambiguous facts would send an important message to the market about a particular case.<sup>231</sup> But these descriptions are bare bones boilerplate, largely devoid of substantive guidance. They are so general and amorphous that arguably they could apply to almost any case the SEC brings.<sup>232</sup> A survey of the cases where admissions have been obtained to date does little to clarify matters.

To be sure, there have been cases that would seem to fit neatly into one of the described categories. These include several cases where the conduct was obviously egregious, where large numbers of investors were harmed, or where the conduct posed a significant risk to markets and investors. For example, in a case connected to massive losses caused by the so-called “London Whale,” the SEC obtained admissions from JPMorgan Chase for misstating financial results and lacking effective internal controls to detect and prevent its traders from fraudulently overvaluing investments to conceal hundreds of millions of dollars in trading losses. JPMorgan paid the SEC a \$200 million penalty that could be distributed to harmed investors as part of a global settlement with other regulators that totaled \$920 million.<sup>233</sup>

But there are other cases that are hard to place in any of the described categories. For example, in July 2015, the agency settled a matter with two respondents: a stock promoter named Kevin McKnight, and his entity, Undiscovered Equities. Both were charged with failing to disclose the amount of compensation they had received to promote a certain stock.<sup>234</sup> The fact that they had received compensation *was* disclosed, but the actual *amount* was not.<sup>235</sup> As part of the settlement, both respondents admitted certain facts and

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231. White, *supra* note 3; see also Ceresney, *supra* note 51 (“This could include matters involving a large number of harmed investors, where the conduct presented a significant risk to the market, where admissions would safeguard the investing public from risks posed by defendants, and where a recitation of unambiguous facts is important to send a message to the market about a particular case.”).

232. See Lowenfels & Sullivan, *supra* note 166, at 798 (“The articulated criteria can be applied to almost any enforcement proceeding initiated by the Commission.”).

233. See JPMorgan Chase & Co., Exchange Act Release No. 70,458, 107 SEC Docket 877, 888 (Sept. 19, 2013).

234. See Hous. Am. Energy Corp., Securities Act Release No. 9757, 2015 WL 1843840, at \*1 (Apr. 23, 2015).

235. *Id.* at \*1–2.

consented to the entry of an order finding that they had violated section 17(b) of the Securities Act.<sup>236</sup> McKnight was also ordered to pay a civil penalty of \$22,500 and agreed not to receive compensation for promoting stocks for a period of five years.<sup>237</sup> Undoubtedly, failing to disclose the amount of compensation received in connection with stock promotion activities is a clear violation of the law. But it is hard to argue that the conduct here was “egregious,” that “large numbers of investors” were harmed thereby, that the “conduct posed a significant risk to markets and investors,” or any of the other listed factors. This is amply reflected not only by the charge, but by the amount of the fine. Again, while this was clearly unlawful conduct, in the grand scheme of SEC enforcement actions it seems rather trivial, and hardly a candidate for admissions under the announced standards. The case is even more baffling in that the misconduct at issue was connected to a larger scheme that involved far more egregious misconduct and did result in large investor losses. Yet—as more fully discussed in the section below—the perpetrators of that far more egregious scheme were allowed to settle the charges (which included scienter-based fraud charges) on the same day as McKnight on a no-admit/no-deny basis.<sup>238</sup>

Or take the case of Reid Johnson. Johnson ran an investment advisory firm and was charged with making false statements in some registration forms filed by the advisory firm, as well as with aiding and abetting and causing his firm’s violations of certain rules relating to the custody of client funds.<sup>239</sup> As part of the settlement, Johnson admitted to the factual findings in the order and that his conduct violated the federal securities laws.<sup>240</sup> He was ordered to cease and desist from committing or causing any violations or future violations of sections 206(4) and 207 of the Advisers Act, and he was barred from association with any broker-dealer or investment adviser with a right to apply for readmission after one year, provided he completed 30 days of compliance training.<sup>241</sup> He was also ordered to pay a civil penalty of \$45,000.<sup>242</sup> Bad conduct? No doubt. Deserving of the punishment he received? Again, no doubt. But egregious conduct? Conduct that harmed a large number of investors, or created risk to the markets? Not by a long shot. Perhaps sadly, Reid Johnson is a run-of-the-mill case in the pantheon of SEC enforcement, of which there are probably dozens of examples every year. The comparatively small scale of the violations is again reflected in the charges, the penalty, and

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236. *Id.* at \*2.

237. *Id.*

238. *See* Hous. Am. Energy Corp., Exchange Act Release No. 74,800, 2015 WL 1843838, at \*1 (Apr. 23, 2015).

239. *See* Johnson, Exchange Act Release No. 77,625, Investment Company Act Release No. 32,073, 2016 WL 1461419, at \*1 (Apr. 14, 2016).

240. *Id.*

241. *Id.* at \*8.

242. *Id.* at \*9.

the other remedial sanctions that were ordered, all of which were relatively light compared to other cases. Why this one qualified as one of those exceptional situations where admissions were required is anybody's guess.

### C. LACK OF CONSISTENCY

In addition to lacking clear standards as to when admissions are required, and closely connected thereto, there has been a remarkable and troubling lack of consistency in the application of the admissions policy. While many of the cases where admissions were obtained fit squarely within the stated parameters of the policy, there are many other cases that would seem to easily fall within the four corners of the policy where settlements proceeded on a no-admit/no-deny basis. Similar cases have been treated differently, and even within the same case there have been inconsistent applications, with certain defendants or respondents making admissions while others are allowed to settle on a no-admit/no-deny basis. When then-Chair White announced the policy, she insisted that the determination of when admissions would be required should be solely a matter of agency discretion, but a review of the cases reveals a certain amount of arbitrariness in the process.

#### 1. Lack of Consistency Between Similar Cases

One way to gauge a lack of consistency—and a lack of clear standards—is to compare the admissions cases to the list of significant enforcement actions contained in SEC annual reports. Every year, the SEC puts out an annual report which contains, among other things, a description of significant enforcement matters that it brought during the previous fiscal year. A look at the 2016 annual report (“the Report”)—the latest year for which data is available and the time frame that reflects the admissions policy at its most mature stage—reveals some unusual and surprising points.<sup>243</sup>

Of the many “significant” matters highlighted in the Report, six were matters where admissions were obtained.<sup>244</sup> The first case described in the

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<sup>243</sup>. See generally SEC, AGENCY FINANCIAL REPORT: FISCAL YEAR 2016 (Nov. 14, 2016) [hereinafter 2016 SEC FINANCIAL REPORT], <https://www.sec.gov/about/secpar/secafr2016.pdf#chairmessage>. It's worth noting that just over half of the admissions cases that were filed and resolved in 2016 (6 out of 11), were referenced in the significant matters sections of the annual report. *Id.* at 155. To be sure, that section does not purport to be comprehensive or to be a listing of all the significant matters; it says that the “section highlights *some* of the significant enforcement cases filed or instituted by the SEC in FY 2016.” *Id.* (emphasis added). Nonetheless, it does suggest that some of the admissions cases were viewed as less significant, at least than those that were singled out. The six that were singled out in the report are: Barclays; Merrill Lynch; Citigroup; Grant Thornton; JPMorgan Chase; and Ethiopian Electric Power. *Id.* at 155–58. The five that were not are: Marwood; Steve Muehler (Alternative/Blue Coast); Bank of NY Mellon; Steve Pappas; and Reid Johnson. *Id.* In addition, there were several other matters that were resolved with admissions during fiscal 2016, but were filed or instituted in previous years; none of those settlements were highlighted in the report. *Id.*

<sup>244</sup>. *Id.* at 155–58.

report involved Merrill Lynch, and it's easy to see both why it was highlighted as significant and why the case was a good candidate for admissions.<sup>245</sup> Merrill Lynch admitted that it failed to adequately safeguard customer securities and misused customer cash to generate profits for the firm over a period of several years.<sup>246</sup> To resolve the matter, Merrill Lynch agreed to disgorge \$57 million in illicit profits, pay a \$358 million civil penalty and admit that its conduct violated the securities laws.<sup>247</sup> The case fit squarely within the stated parameters for when admissions might be required: The conduct was egregious and it posed a significant risk to investors. The size of the penalty reflected the seriousness of the wrongdoing and was one of the largest financial payments made in an SEC case that year.<sup>248</sup>

The second case highlighted in the report, however, starkly reveals the inconsistent application of the admissions policy. The report describes two matters, one involving Barclays the other involving Credit Suisse, that concerned violations of the federal securities laws in the operation of alternative trading systems ("ATS") and what are known as "dark pools."<sup>249</sup> In the report the two matters are treated together—as indeed they were in the press release announcing the settlements—almost as though they were a single case.<sup>250</sup> And it's easy to see why: The matters involved very similar forms of misconduct in the same industry space; both entities were charged with violations of section 17(a)(2) of the Securities Act (although each entity was also charged with other differing violations); and both entities made very similar financial payments to resolve the matters: Credit Suisse paid a \$30 million penalty and disgorged \$24.3 million in profits and interest to the SEC, and separately paid another \$30 million penalty to the Attorney General of New York, for total payments of \$84.3 million; Barclays paid a \$35 million penalty to the SEC, and another \$35 million penalty to the Attorney General of New York, for total payments of \$70 million.<sup>251</sup> There was only one significant difference: As part of the settlement, Barclays was required to make admissions of fact and to acknowledge that its conduct violated the federal securities laws, whereas Credit Suisse was allowed to settle the matter on a no-admit/no-deny basis.<sup>252</sup>

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<sup>245</sup>. *Id.* at 155.

<sup>246</sup>. *Id.* at 16.

<sup>247</sup>. Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 78,141, 2016 WL 4363431, at \*22 (June 23, 2016).

<sup>248</sup>. Press Release, Enforcement Results FY 2016, *supra* note 11.

<sup>249</sup>. 2016 SEC FINANCIAL REPORT, *supra* note 243, at 16.

<sup>250</sup>. Press Release, SEC, Barclays, Credit Suisse Charged with Dark Pool Violations: Firms Collectively Paying More Than \$150 Million to Settle Cases (Jan. 31, 2016) [hereinafter Press Release, Barclays], <https://www.sec.gov/news/pressrelease/2016-16.html>.

<sup>251</sup>. *Id.*

<sup>252</sup>. *Id.*

It is very difficult, if not impossible, to see why the Barclays and Credit Suisse matters were treated differently. The slightly higher penalty that Barclays paid may be indicative of slightly more egregious conduct, although the difference is marginal at best. At the same time, Credit Suisse's disgorgement of illicit profits suggests that its actions caused greater investor harm, a factor that should weigh in favor of requiring admissions. It's true that there were some differences in the provisions that were violated: Barclays, for example, was charged with violations of section 15(c)(3) of the Exchange Act and rules 15c3-5(c)(1)(i) and 15c3-5(b) thereunder (provisions that deal with custody of client funds), and Credit Suisse was not.<sup>253</sup> But section 15(c)(3) is not scienter-based, and both entities were charged with violations of section 17(a)(2) of the Securities Act (which is non-scienter-based fraud).<sup>254</sup> It's hard to see why a violation of section 15(c)(3) would make the difference (and to the extent that it does, it makes it hard to distinguish the Merrill Lynch case discussed below). In any event, Credit Suisse was also charged with violating various regulatory provisions that Barclays was not charged with.<sup>255</sup> In the end, facts can always be distinguished, and the relevant conduct may be subject to slightly different regulatory provisions, but from a big picture perspective it's hard to reconcile the different treatment of these two entities with respect to the misconduct at issue. There may ultimately be a reason, but if so, the SEC has failed to explain it, which itself undermines the value of requiring admissions, as more fully discussed below.

The next "significant" case highlighted in the Report involved Merrill Lynch (a different case than the Merrill Lynch case discussed above involving the payment of \$415 million in disgorgement and penalties), and this one did not involve admissions, although it certainly could have been a candidate.<sup>256</sup> The case involved Merrill's failure to implement effective controls to prevent erroneous orders from being sent to the market, a failure that led to a series of mini-flash crashes which caused certain stock prices to plummet and then suddenly recover within seconds.<sup>257</sup> The charge was a violation of section 15(c)(3) of the Exchange Act (one of the statutory provisions that Barclays violated, although it was a different rule under that provision).<sup>258</sup> The then-Director of Enforcement said in a press release that "[m]ini-flash crashes, such as those caused by Merrill Lynch, can undermine investor confidence in the markets,"<sup>259</sup> and Merrill Lynch paid a hefty \$12.5 million penalty to resolve the matter, a penalty that was touted in the

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253. *Id.*

254. *Id.*

255. *Id.*

256. 2016 SEC FINANCIAL REPORT, *supra* note 243, at 16.

257. Press Release, SEC, Merrill Lynch Charged with Trading Controls Failures That Led to Mini-Flash Crashes (Sept. 26, 2016), <https://www.sec.gov/news/pressrelease/2016-192.html>.

258. *Id.*

259. *Id.*



Report as “the largest ever assessed” in a case involving violations of the SEC’s market access rule.<sup>260</sup> As reflected in the SEC’s statements and the penalty imposed, the conduct in this case could certainly be described as “pos[ing] a significant risk to the market or investors,”<sup>261</sup> one of the factors the agency said it would consider in determining whether to require admissions. Yet Merrill Lynch settled the matter on a no-admit/no-deny basis.<sup>262</sup>

Other significant cases highlighted in the Report reflect similar inconsistencies. For example, only two matters are described in the section of the Report highlighting significant “gatekeeper” cases, one involving Grant Thornton, the other Ernst & Young.<sup>263</sup> Both firms were found to have engaged in improper professional conduct pursuant to section 4C(b) of the Exchange Act and rule 102(e)(1)(iv) of the SEC’s Rules of Practice.<sup>264</sup> Both firms were also found to have caused issuers to violate section 13(a) of the Exchange Act and rule 13a-1. Grant Thornton was accused of “ignor[ing] red flags and fraud risks while conducting deficient audits of two publicly traded companies” and paid disgorgement of approximately \$1.5 million and a \$3 million penalty.<sup>265</sup> Ernst & Young was accused of violating auditor-independence rules by allowing close personal relationships between senior auditors and senior management at audit clients, and paid over \$9.3 million in monetary sanctions.<sup>266</sup> Despite the fact that the SEC singled out these two cases as significant gatekeeper actions, and despite the similar charges and substantial monetary sanctions, Grant Thornton was required to admit facts and acknowledge that its conduct violated the federal securities laws as part of the settlement, whereas Ernst & Young was allowed to settle on a no-admit/no-deny basis.<sup>267</sup> There may well be reasons to treat these cases differently, but they are not apparent on the surface. To make matters worse, there isn’t even any internal consistency: While Grant Thornton admitted certain facts and acknowledged that its conduct violated the federal securities laws, the two engagement partners who committed the misconduct at issue were allowed to

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260. 2016 SEC FINANCIAL REPORT, *supra* note 243, at 16.

261. *Id.*

262. Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 78,929, 2016 WL 5358114, at \*1 (Sept. 26, 2016).

263. 2016 SEC FINANCIAL REPORT, *supra* note 243, at 17.

264. See Ernst & Young LLP, Exchange Act Release No. 78,872, 2016 WL 4983301, at \*1 (Sept. 19, 2016); Grant Thornton, LLP, Exchange Act Release 76,536, 2015 WL 7755463, at \*1 (Dec. 2, 2015).

265. Press Release, SEC, Grant Thornton Ignored Red Flags in Audits (Dec. 2, 2015), <https://www.sec.gov/news/pressrelease/2015-272.html>.

266. Press Release, SEC, Ernst & Young, Former Partners Charged with Violating Auditor Independence Rules (Sept. 19, 2016), <https://www.sec.gov/news/pressrelease/2016-187.html>.

267. Compare Grant Thornton, LLP, Exchange Act Release No. 76,536, 2015 WL 7755463, at \*1 (Dec. 2, 2015), with Ernst & Young LLP, Exchange Act Release No. 78,872, 2016 WL 4983301, at \*1 (Sept. 19, 2016), and Ernst & Young LLP, Exchange Act Release No. 78,873, 2016 WL 4983302, at \*1 (Sept. 19, 2016).

settle the charges against them at the same time on a no-admit/no-deny basis.<sup>268</sup>

Similarly, in the section of the Report on “Investment Advisers and Companies,” the SEC singled out three noteworthy enforcement actions during fiscal 2016. One involved charges against JPMorgan Chase for failing to disclose conflicts of interest with clients. JPMorgan settled the matter by paying \$267 million in disgorgement, interest, and penalties.<sup>269</sup> JPMorgan also admitted certain facts and acknowledged that its conduct violated the federal securities laws.<sup>270</sup> The JPMorgan case clearly involved egregious conduct, as reflected by the size of the monetary payments, and failure to disclose conflicts of interest with clients is undoubtedly the kind of conduct that puts investors at risk. But the other two cases singled out by the SEC in the Report also involved conduct that was similarly egregious and put investors at risk. One of the cases involved four private equity fund advisers affiliated with Apollo Global Management who agreed to pay \$52.7 million in disgorgement, interest, and penalties—described in the SEC Report as “the largest monetary sanctions ever assessed against a private equity firm”—to settle charges that they had misled fund investors about fees the advisers collected.<sup>271</sup> The other case also involved conflicts of interest and improper fee disclosure: Three private equity fund advisers in The Blackstone Group agreed to pay \$39 million to resolve charges that they failed to fully inform investors about benefits the advisers obtained from various fees and discounts.<sup>272</sup> Yet the Apollo and Blackstone matters both settled on a no-admit/no-deny basis.

The section at the front of the Report on accounting fraud highlights two “notable” actions during fiscal 2016, one involving Weatherford International, the other the Monsanto Company. These were clearly important cases, involving egregious conduct and high risk to investors and the markets, in an area that the SEC has repeatedly singled out as being fundamental to the health of the securities markets and a high priority for SEC enforcement.<sup>273</sup> Weatherford, for example, was accused of inflating

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268. See Koeppel, Exchange Act Release No. 76,537, 2015 WL 7755467, at \*1 (Dec. 2, 2015).

269. 2016 SEC FINANCIAL REPORT, *supra* note 243, at 18.

270. *Id.* at 18; see also Press Release, SEC, J.P. Morgan to Pay \$267 Million for Disclosure Failures (Dec. 18, 2015) [hereinafter Press Release, J.P. Morgan], <https://www.sec.gov/news/pressrelease/2015-283.html>.

271. 2016 SEC FINANCIAL REPORT, *supra* note 243, at 17; see also Press Release, SEC, Apollo Charged with Disclosure and Supervisory Failures (Aug. 23, 2016), <https://www.sec.gov/news/pressrelease/2016-165.html>.

272. 2016 SEC FINANCIAL REPORT, *supra* note 243, at 17; see also Press Release, SEC, Blackstone Charged with Disclosure Failures: Private Equity Advisers to Pay Nearly \$39 Million Settlement (Oct. 7, 2015), <https://www.sec.gov/news/pressrelease/2015-235.html>.

273. See 2016 SEC FINANCIAL REPORT, *supra* note 243, at 17 (“Comprehensive, accurate, and reliable financial reporting is the bedrock upon which our markets are based. Because of this,

earnings by using deceptive income tax accounting.<sup>274</sup> The conduct was prolonged, spanning from 2007 to 2012, and resulted in the issuance of false financial statements that inflated Weatherford's earnings by over \$900 million.<sup>275</sup> As a result of the misconduct, Weatherford was forced to restate its earnings on three separate occasions.<sup>276</sup> The impact on investors was considerable: "After announcing the First Restatement, Weatherford's stock price declined nearly 11% in one trading day (\$2.38 per share), closing at \$21.14 per share on March 2, 2011. The decline eliminated over \$1.7 billion from Weatherford's market capitalization."<sup>277</sup> The seriousness of the misconduct was reflected in the charges, which included scienter-based fraud (section 17(a)(1) of the Securities Act and section 10(b) of the Exchange Act), and the size of the penalty imposed (\$140 million).<sup>278</sup> Yet the company and the two individuals charged in connection with the misconduct settled the matter on a no-admit/no-deny basis.<sup>279</sup>

In the other highlighted case, Monsanto agreed to pay an \$80 million penalty to resolve charges that it violated accounting rules and misstated company earnings as pertaining to one of its principal products.<sup>280</sup> The conduct here was arguably less egregious than in the Weatherford case (the charges included non-scienter-based fraud), but it was clearly viewed as an important message case for the SEC: Not only was the case highlighted in the Report, but the press release announcing the matter included a quote by the SEC Chair, which is highly unusual in enforcement actions.<sup>281</sup> Yet despite the seriousness of the misconduct and the evident need to publicize it, the company and the individuals responsible were all allowed to settle the charges on a no-admit/no-deny basis.<sup>282</sup>

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rooting out financial and disclosure fraud thus must be a priority for Enforcement—and FY 2016 was no exception.”).

274. See Weatherford Int'l PLC, Securities Act Release No. 10,221, Exchange Act Release No. 78,944, 2016 WL 5390511, at \*1 (Sept. 27, 2016).

275. *Id.*

276. *Id.*

277. *Id.* at \*2.

278. *Id.* at \*3, \*22.

279. *Id.* at \*1.

280. See Monsanto Co., Securities Act Release No. 10,037, Exchange Act Release No. 77,087, 2016 WL 537943, at \*19 (Feb. 9, 2016).

281. Press Release, SEC, Monsanto Paying \$80 Million Penalty for Accounting Violations (Feb. 9, 2016), <https://www.sec.gov/news/pressrelease/2016-25.html> (“Financial reporting and disclosure cases continue to be a high priority for the Commission and these charges show that corporations must be truthful in their earnings releases to investors and have sufficient internal accounting controls in place to prevent misleading statements,” said SEC Chair Mary Jo White. “This type of conduct, which fails to recognize expenses associated with rebates for a flagship product in the period in which they occurred, is the latest page from a well-worn playbook of accounting misstatements.”).

282. *Monsanto Co.*, 2016 WL 537943, at \*1–2.

The significant cases involving complex financial instruments highlighted in the Report also reflect a lack of consistency. For example, the Report groups together “charges against UBS AG, Merrill Lynch, and UBS Financial Services involving misstatements and omissions by issuers of structured notes, a complex financial product.”<sup>283</sup> However, the case against Merrill Lynch included admissions, while the cases against UBS AG and UBS Financial Services were settled on a no-admit/no-deny basis.<sup>284</sup> It is true that the Merrill Lynch case—which we have already discussed (it is highlighted in several sections of the Report)—involved truly egregious conduct and included payments of \$415 million in disgorgement and penalties.<sup>285</sup> But the two cases against UBS entities were included in the significant case part of the Report for a reason: They too involved serious misconduct and the payment of large monetary fines. UBS Financial Services paid more than \$15 million to settle charges that it failed to adequately educate and train its sales force about important factors concerning the structure and risks of certain complex financial products that it sold to retail investors.<sup>286</sup> That may not seem the most egregious form of misconduct, except that “UBS sold approximately \$548 million [of these complex products] to more than 8,700 relatively inexperienced retail customers.”<sup>287</sup> To the extent that risk to investors is a criterion for requiring admissions, this one would seem to qualify.

The case against UBS AG also involved the sale of complex financial instruments to large numbers of unsophisticated investors. In this instance, UBS AG sold approximately \$190 million of the notes in question to approximately 1,900 U.S. investors.<sup>288</sup> UBS was charged with misleading investors through material misstatements or omissions in the offering documents for these products, including failing to disclose certain markups.<sup>289</sup> Moreover, there were real investor losses that could be traced to the misconduct, amounting to some \$5.5 million.<sup>290</sup> The firm was charged with violating section 17(a)(2) of the Securities Act, which prohibits obtaining money or property by means of misstatements and omissions in the offer or sale of securities.<sup>291</sup> To settle the case, UBS agreed to pay more than

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283. See 2016 SEC FINANCIAL REPORT, *supra* note 243, at 19.

284. See UBS AG, Securities Act Release No. 9961, 2015 WL 5935345, at \*1 (Oct. 13, 2015); UBS Fin. Servs. Inc., Exchange Act Release No. 78,958, 2016 WL 5404891, at \*1 (Sept. 28, 2016); Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 78,929, 2016 WL 5358114, at \*1 (Sept. 26, 2016).

285. See, e.g., 2016 SEC FINANCIAL REPORT, *supra* note 243, at 16.

286. See UBS Fin. Servs. Inc., 2016 WL 5404891, at \*6–7.

287. Press Release, SEC, SEC Charges UBS With Supervisory Failures in Sale of Complex Products to Retail Investors (Sept. 28, 2016), <https://www.sec.gov/news/pressrelease/2016-197.html>.

288. See UBS AG, 2015 WL 5935345, at \*1–2.

289. *Id.* at \*2.

290. *Id.*

291. *Id.* at \*5.

\$19.5 million in disgorgement, interest and penalties.<sup>292</sup> Judged by the amount of investor harm, the overall risk to investors, and the need to put the investing public on notice, the case could easily qualify as one requiring admissions, yet it was allowed to settle on a no-admit/no-deny basis.<sup>293</sup>

Since the admissions policy was introduced, there have been many other curious examples where entities have made admissions in cases that could fit well within the stated parameters of the admissions policy, while other companies charged with far more egregious conduct of the exact same sort have been allowed to resolve matters on a no-admit/no-deny basis. For example, the SEC recently settled a case with a medical device company called Orthofix over Foreign Corrupt Practices Act (“FCPA”) violations. The company was charged with paying bribes to doctors at government-owned hospitals in Brazil in order to increase sales.<sup>294</sup> The scheme lasted for a period of two years and resulted in illicit profits totaling just under \$3 million.<sup>295</sup> As part of the settlement, Orthofix admitted certain facts, acknowledged that its conduct violated the federal securities laws, and paid over \$6 million in disgorgement, interest, and penalties.<sup>296</sup> A few months earlier, the SEC settled a much larger foreign bribery scheme with Och-Ziff Capital Management Group. That scheme spanned a period of four years and involved payments to high ranking government officials in multiple African countries including Libya, Chad, Niger, and the Democratic Republic of the Congo.<sup>297</sup> To settle the matter, Och-Ziff agreed to pay nearly \$200 million in disgorgement, interest, and penalties.<sup>298</sup> Yet Och-Ziff was allowed to settle on a no-admit/no-deny basis.<sup>299</sup>

## 2. Lack of Consistency Between Entities and Individuals in the Same Case

The Grant Thornton case discussed above is not the only time an entity has made admissions as part of a settlement while the SEC allowed the individuals who actually committed the admitted acts to settle on a no-admit/no-deny basis.<sup>300</sup> For example, in November 2014, the SEC settled a pending action against Wedbush Securities, a Los Angeles area broker-

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292. *Id.* at \*5–6.

293. *Id.* at \*1.

294. Orthofix Int’l, N.V., Exchange Act Release No. 79,828, 2017 WL 192393, at \*1 (Jan. 18, 2017).

295. *Id.*

296. *Id.* at \*6.

297. Och-Ziff Capital Mgmt. Grp. LLC, Exchange Act Release No. 78,989, 2016 WL 5461964, at \*1 (Sept. 29, 2016).

298. *Id.* at \*35.

299. *Id.* at \*2.

300. *See supra* note 268 and accompanying text.

dealer.<sup>301</sup> Wedbush settled the charges, which involved violations of market access rules, by paying a penalty of \$2.44 million, admitting specified facts, and acknowledging that its conduct violated the federal securities laws.<sup>302</sup> The same day, the SEC settled with two Wedbush executives for causing the violations at issue on a no-admit/no-deny basis.<sup>303</sup> Similarly, in October 2016, Credit Suisse paid \$90 million and admitted wrongdoing to settle charges that it misrepresented certain key performance metrics.<sup>304</sup> The same day, the SEC settled charges against the executive who caused the violations at issue on a no-admit/no-deny basis.<sup>305</sup>

More recently, in the Orthofix case discussed above, the SEC brought charges against Orthofix for accounting violations as well as violations of the FCPA.<sup>306</sup> Orthofix settled the two matters at the same time by paying more than \$14 million in disgorgement and civil penalties.<sup>307</sup> There were two separate orders entered against Orthofix; in each order, Orthofix admitted specified facts and acknowledged that its conduct violated the federal securities laws.<sup>308</sup> At the same time, the SEC settled with four former Orthofix executives allegedly responsible for the misconduct (or at least for the accounting violations) at issue; the four executives settled on a no-admit/no-deny basis.<sup>309</sup>

The disparate treatment of entities and individuals in the same matter is particularly jarring because entities act only by and through individuals. Entities may be held responsible for the unlawful acts of the individuals in their employ when those acts are done on behalf of the entity. In the situations just described, there are entities (inanimate juridical creatures) admitting to facts concerning the acts of certain individuals, while those same individuals—the ones who actually committed the acts in question—are refusing to admit those facts. This is all the more disconcerting given that in the very same release where she announced the new admissions policy, Chair White also

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301. Press Release, SEC, Wedbush Securities and Two Officials Agree to Settle SEC Case: L.A.-Based Broker-Dealer Admits Wrongdoing and Will Pay Financial Penalty for Market Access Violations (Nov. 20, 2014), <https://www.sec.gov/news/press-release/2014-263>.

302. *See id.*

303. *See id.*

304. Press Release, SEC, Credit Suisse Paying \$90 Million Penalty for Misrepresenting Performance Metric (Oct. 5, 2016), <https://www.sec.gov/news/pressrelease/2016-210.html>.

305. *See id.*

306. *See supra* notes 294–97 and accompanying text.

307. *See* Press Release, SEC, Medical Device Company Charged with Accounting Failures and FCPA Violations (Jan. 18, 2017), <https://www.sec.gov/news/pressrelease/2017-18.html>.

308. Orthofix Int'l, N.V., Securities Act Release No. 10,281, Exchange Act Release No. 79,815, 2017 WL 192377 (Jan. 18, 2017) (accounting case); Orthofix Int'l, N.V., Exchange Act Release No. 79,828, 2017 WL 192393 (Jan. 18, 2017) (FCPA case).

309. *See* Jeffrey Hammel, Securities Act Release No. 10,282, Exchange Act Release No. 79,817, 2017 WL 192378, at \*1 (Jan. 18, 2017); McCollum, Exchange Act Release No. 79,819, 2017 WL 192389, at \*1 (Jan. 18, 2017); Mack, Exchange Act Release No. 79,820, 2017 WL 192390, at \*1 (Jan. 18, 2017).

stated that a “core principle of any strong enforcement program is to pursue responsible individuals wherever possible.”<sup>310</sup> Chair White further noted that “[c]ompanies, after all, act through their people. And when we can identify those people, settling only with the company may not be sufficient. Redress for wrongdoing must never be seen as ‘a cost of doing business’ made good by cutting a corporate check.”<sup>311</sup> In light of these statements, it seems wholly disingenuous to insist that admissions are required as a price of settlement for an entity, but not for the individuals who actually committed the wrongdoing in question. It also creates the inescapable impression that individuals are being let off easy so long as the corporate check is big enough.

More to the point, many of the cases where entities have made admissions as part of a settlement involved no individual charges at all, and this includes some of the most egregious cases as measured by the sums involved and the penalties assessed. For example, in August 2014, Bank of America agreed to pay \$245 million and made admissions in settling two cases involving disclosures concerning mortgage loans during the financial crisis.<sup>312</sup> No individuals were charged.<sup>313</sup> In December 2015, the SEC brought an action against two JPMorgan entities for failing to disclose conflicts of interest with clients.<sup>314</sup> JPMorgan settled the matter by paying \$267 million in disgorgement, interest and penalties, admitted certain facts and acknowledged that its conduct violated the federal securities laws.<sup>315</sup> No individuals were charged.<sup>316</sup> In January 2016, the SEC brought a case against Barclays, which Barclays settled by paying \$70 million in disgorgement and penalties and admitting wrongdoing.<sup>317</sup> Again, no individuals were charged.<sup>318</sup> In July 2016, the SEC settled a case with Citigroup, which paid a \$7 million penalty and admitted wrongdoing; no individuals were charged.<sup>319</sup> In December 2016, the SEC settled a matter with Deutsche Bank, which was accused of misleading clients about the performance of an automated order router.<sup>320</sup> Deutsche Bank admitted wrongdoing and paid an \$18.5 million penalty to the SEC and another \$18.5 million to the Attorney General of New

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310. White, *supra* note 3.

311. *Id.* Chair White also stated: “I want to be sure we are looking first at the individual conduct and working out to the entity, rather than starting with the entity as a whole and working in.” *Id.*

312. Press Release, Bank of America, *supra* note 222.

313. *See id.*

314. *See* Press Release, J.P. Morgan, *supra* note 270.

315. *See id.*

316. *See id.*

317. *See* Press Release, Barclays, *supra* note 250.

318. *See id.*

319. *See* Press Release, SEC, SEC: Citigroup Provided Incomplete Blue Sheet Data for 15 Years (July 12, 2016), <https://www.sec.gov/news/pressrelease/2016-138.html>.

320. *See* Press Release, SEC, Deutsche Bank Settles Charges of Misleading Clients About Order Router (Dec. 16, 2016), <https://www.sec.gov/news/pressrelease/2016-264.html>.

York.<sup>321</sup> No individuals were charged.<sup>322</sup> Most recently, the SEC brought a settled action against Morgan Stanley Smith Barney concerning a failure to implement proper compliance procedures with respect to certain risky investments.<sup>323</sup> Morgan Stanley paid an \$8 million penalty, admitted certain facts and acknowledged that its conduct violated the federal securities laws.<sup>324</sup> No individuals were charged.<sup>325</sup>

The lack of individual charges, and the concomitant lack of individual responsibility, was at the root of much of the critique that Judge Rakoff and others leveled against the agency, which ultimately prompted the move towards requiring admissions in certain cases.<sup>326</sup> But despite the policy change, beneath the surface it appears to be business as usual. Redress for wrongdoing is still “‘a cost of doing business’ made good by cutting a corporate check,” albeit with corporate admissions of responsibility that may, or may not, lead to further corporate liability that requires cutting another corporate check. Individuals are still not being held to account, even in those situations where, by the SEC’s proffered standards for requiring admissions, the conduct has put investors and the markets most at risk or is otherwise egregious.<sup>327</sup>

It is also noteworthy that the cases described above all involved major financial institutions: JPMorgan, Citigroup, Deutsche Bank, Barclays, and Morgan Stanley. Indeed, to date only four of the admissions cases involving large banks and other major financial institutions have involved charges against individuals.<sup>328</sup>

321. *Id.*

322. *See id.*

323. Morgan Stanley Smith Barney, LLC, Investment Advisers Act Release No. 4649, 2017 WL 587246, at \*1 (Feb. 14, 2017).

324. *Id.* at \*7.

325. *Id.* at \*2.

326. *See supra* Part II.B–C.

327. The two notable exceptions are the Falcone/Harbinger matter, and the G-Trade/Convergex matter, both of which involved admissions by both entities and individuals, and both of which included scienter-based fraud charges. Final Consent Judgment Falcone, *supra* note 149, at 2–3; Final Consent Judgment Harbinger, *supra* note 150, at 2–3; G-Trade Servs. LLC, Exchange Act Release No. 71,128, 107 SEC Docket 5418, 5419–20 (Dec. 18, 2013).

328. Credit Suisse AG, Securities Act Release No. 10,299, Exchange Act Release No. 79,044, 2014 WL 316743 (Oct. 5, 2016); Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 78,141, 2016 WL 4363431, at \*3 (June 23, 2016); Standard & Poor’s Ratings Servs., Securities Act Release No. 9705, Exchange Act Release No. 74,104, 110 SEC Docket 3793, 3794 (Jan. 21, 2015); JPMorgan Chase & Co., Exchange Act Release No. 70,458, 107 SEC Docket 877, 877 (Sept. 19, 2013). If the hedge fund Harbinger is added, the number jumps to five. In addition, Wells Fargo made admissions in a case involving controls over non-public information, in a case where an individual was charged with insider trading. *See* Wells Fargo Advisors, LLC, Exchange Act Release No. 73,175, 109 SEC Docket 4995, 4995 (Sept. 22, 2014). In contrast, several major cases that involved both entities and individuals being charged, were settled on a no-admit/no-deny basis. *See, e.g.,* Weatherford Int’l, PLC, Securities Act Release No. 10,221,



To the extent that any trend has emerged, it would appear that the SEC is typically seeking admissions from big financial institutions in cases where no individuals are being charged and where there is no realistic possibility of collateral consequences in the form of criminal charges, private class actions or regulatory infirmities.

### 3. Other Lack of Consistency Within the Same Case

Even within the same case there are other curious inconsistencies. For example, in January 2015, the SEC brought a major case against Standard & Poor's Rating Services involving a series of securities law violations in connection with the ratings of certain commercial mortgage-backed securities.<sup>329</sup> The case was important because it was one of the few significant actions the SEC brought concerning misconduct related to the types of products at the root of the financial crisis of 2008. Standard & Poor's paid a \$58 million penalty to settle the SEC charges, which included scienter-based fraud (section 17(a)(1) of the Securities Act), and an additional \$19 million to two State Attorneys General.<sup>330</sup> As part of the settlement, the SEC entered three separate orders on consent against Standard & Poor's. One of the orders contained a limited admission of facts; the other two orders were entered on a no-admit/no-deny basis.<sup>331</sup>

Other discrepancies are also hard to explain. Take the example of Spongetech Inc., a company that was involved in a fraudulent pump-and-dump scheme. Two of Spongetech's attorneys, Joel Pensley and Jack Halperin, were charged and accused of making false and misleading statements in attorney opinion letters which stated that restrictive legends could be removed from shares of Spongetech's common stock.<sup>332</sup> At different times during 2016, each of them settled the underlying action by consenting to the entry of a judgment permanently enjoining them from violating the registration and anti-fraud provisions of the federal securities laws. In connection with the entry of those orders, Pensley made admissions, while

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Exchange Act Release No. 78,944, 2016 WL 5390511 (Sept. 27, 2016); Monsanto Co., Securities Act Release No. 10,037, Exchange Act Release No. 77,087, 2016 WL 537943 (Feb. 9, 2016).

329. See Press Release, SEC, SEC Announces Charges Against Standard & Poor's for Fraudulent Ratings Misconduct (Jan. 21, 2015) [hereinafter Press Release, SEC Announces Charges], <https://www.sec.gov/news/pressrelease/2015-10.html>.

330. *Id.*

331. Compare Standard & Poor's Ratings Servs., 110 SEC Docket at 3793, with Standard & Poor's Ratings Servs., Securities Act Release No. 9705, Exchange Act Release No. 74,102, 110 SEC Docket 3790, 3790 (Jan. 21, 2015), and Standard & Poor's Ratings Servs., Exchange Act Release No. 74,103, 110 SEC Docket 3854, 3854 (Jan. 21, 2015).

332. See Press Release, SEC, SEC Charges Spongetech and Senior Executives in Pump-and-Dump Scheme (May 5, 2010), <https://www.sec.gov/news/press/2010/2010.70.htm>.

Halperin was allowed to settle on a no-admit/no-deny basis.<sup>333</sup> Both lawyers subsequently consented to the entry of orders in follow-on administrative proceedings barring them from appearing or practicing before the Commission. In connection with the entry of those orders, Pensley again acknowledged that his conduct violated the federal securities laws, while Halperin did not.<sup>334</sup>

Inconsistencies in the treatment of similarly situated individuals is one thing, but several of the admissions cases have involved inconsistent treatment where the least culpable respondents made admissions, while the most culpable ones did not. The case involving Kevin McKnight and Undiscovered Equities, discussed above, is a good example. McKnight and his firm made admissions in settling a case involving the failure to disclose the amount of compensation they received as part of a public relations effort to increase interest in Houston American Energy Corp.<sup>335</sup> There were no fraud charges and McKnight was fined a total of \$22,500.<sup>336</sup> Houston American and its president John Terwilliger were charged with far more serious misconduct: making multiple fraudulent statements concerning estimated oil and gas reserves in an area that Houston American was going to exploit.<sup>337</sup> As a result of the misstatements, Houston American's stock price jumped from "\$4 per share to \$20 per share" over approximately six months.<sup>338</sup> When the wells turned out to be dry, Houston American's share price dropped to 40 cents per share, wiping out \$600 million in market capitalization.<sup>339</sup> McKnight and his firm made admissions as part of their settlements, while Houston American and John Terwilliger were allowed to settle on the same day on a no-admit/no-deny basis, even though their conduct was clearly more egregious, as evidenced by the charges, which included scienter-based fraud, and the amount of the penalties they were required to pay (\$400,000 and \$150,000 respectively).<sup>340</sup>

Even in cases where multiple parties have made admissions, there have been troubling inconsistencies in the form of admission, with less culpable defendants arguably receiving harsher treatment than more culpable ones. In the Falcone/Harbinger matter, for example, Peter Jenson, who was charged

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333. Compare Consent of Defendant Joel Pensley, SEC v. Spongetech Delivery Sys., Inc., No. 10-cv-2031 (E.D.N.Y. Aug. 4, 2016), with Final Judgment as to Defendant Jack H. Halperin, SEC v. Spongetech Delivery Sys., Inc., No. 10-cv-2031 (E.D.N.Y. May 13, 2016).

334. Compare Joel Pensley, Exchange Act Release No. 79,202, 2016 WL 6441267 (Oct. 31, 2016), with Jack H. Halperin, Exchange Act Release No. 77,972, 2016 WL 3072176 (June 1, 2016).

335. Hous. Am. Energy Corp., Securities Act Release No. 9757, 2015 WL 1843840, at \*4 (Apr. 23, 2015).

336. *Id.* at \*2.

337. Hous. Am. Energy Corp., Exchange Act Release No. 74,800, 2015 WL 1843838, at \*2 (Apr. 23, 2015).

338. *Id.*

339. *Id.* at \*3.

340. *Id.* at \*15.

with aiding and abetting Harbinger's violations, admitted not only to certain facts, but also acknowledged that his conduct violated the federal securities laws.<sup>341</sup> Conversely, Philip Falcone, who was charged as a primary violator, made only certain factual admissions without acknowledging that his conduct violated the law.<sup>342</sup>

#### D. LACK OF TRANSPARENCY

The lack of consistency in treatment of seemingly similar cases and the lack of clear standards for when admissions will be required is compounded by an almost complete lack of transparency in the process. The press releases and the litigation and administrative releases frequently trumpet admissions, but they never reveal why admissions were deemed necessary or desirable in any particular case, or likewise why the agency did not obtain them in other cases. There may well be good reasons why seemingly similar cases are treated differently, but the SEC never reveals why, at least with respect to admissions.

A good example of this lack of transparency is the Standard & Poor's case discussed above. In 2015, the SEC brought three settled administrative proceedings against Standard & Poor's regarding misconduct in the rating of certain mortgage-backed securities. The three actions were brought at the same time and announced in the same press release;<sup>343</sup> clearly, they could have been brought as a single action.<sup>344</sup> But only one of the three orders involved admissions; the other two cases were settled on a no-admit/no-deny basis.<sup>345</sup> With respect to one of the three actions, it's possible to venture a guess as to why admissions were not required: According to the SEC, Standard & Poor's self-reported the particular misconduct at issue in that case and cooperated with the investigation, enabling the agency to "resolve the case more quickly and efficiently."<sup>346</sup> The SEC specifically noted that cooperation resulted in a "reduced penalty for the firm."<sup>347</sup> Perhaps the SEC similarly

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341. See Final Consent Judgment as to Defendant Peter A. Jenson, *supra* note 173, at 2.

342. Final Consent Judgment Falcone, *supra* note 149, at 13; see also Lowenfels & Sullivan, *supra* note 166, at 803 (finding application of admissions criteria "puzzling" and referencing the differential treatment between Jenson and Falcone).

343. Press Release, SEC Announces Charges, *supra* note 329.

344. The SEC often brings cases involving distinct instances of misconduct as a single action. It is unclear whether the SEC issued three orders with respect to Standard & Poor's because of a legitimate need to separate things out (perhaps relating to the fact of admissions in one case and not the others), or whether the SEC was simply padding its enforcement numbers.

345. See Standard & Poor's Ratings Servs., Securities Act Release No. 9705, Exchange Act Release No. 74,102, 110 SEC Docket 3790, 3790 (Jan. 21, 2015) (resolving on a no-admit/no-deny basis); Standard & Poor's Ratings Servs., Exchange Act Release No. 74,103, 110 SEC Docket 3854, 3854 (Jan. 21, 2015) (resolving on a no-admit/no-deny basis); Standard & Poor's Ratings Servs., Securities Act Release No. 9705, Exchange Act Release No. 74,104, 110 SEC Docket 3793, 3793 (Jan. 21, 2015) (involving admissions).

346. Press Release, SEC Announces Charges, *supra* note 329.

347. *Id.*

considered cooperation in deciding whether or not to require admissions; if that were the case, it would be nice if the agency said so explicitly.

Trying to distinguish the other two Standard & Poor's orders is considerably more difficult. Both matters were connected to the same line of business (commercial mortgage-backed securities); both involved violations of the same scienter-based statutory provision (section 17(a)(1) of the Securities Act); and both resulted in significant financial penalties (\$35 million and \$15 million respectively).<sup>348</sup> Yet one matter settled with admissions, the other on a no-admit/no-deny basis.<sup>349</sup> Again, there may be valid reasons for treating the cases differently, but the SEC should at least explain its reasoning.

On a few occasions, then-Chair White and the then-Director of Enforcement have tried to elucidate the goals that admissions in particular cases have served, but the pronouncements have been few in number and are typically bare bones declarations that are less than enlightening.<sup>350</sup> In a speech in May 2014, then-Director of Enforcement Andrew Ceresney tried to provide some clarity by pointing to five matters where the SEC had obtained admissions and giving a very brief explanation tying the admissions to the stated framework. For example, he noted that in the ConvergeX matter "the defendants were regulated entities and their egregious and fraudulent conduct harmed numerous clients."<sup>351</sup> Similarly, he stated that the JPMorgan case pertaining to the so-called "London Whale" "created a significant risk to investors."<sup>352</sup> Admissions in the Philip Falcone/Harbinger matter "helped give the public unambiguous information about the defendant's actions so they would be empowered to make informed decisions about whether to continue investing in companies with which he was involved."<sup>353</sup> Scottrade had

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348. *Standard & Poor's Ratings Servs.*, 110 SEC Docket at 3790; *Standard & Poor's Ratings Servs.*, 110 SEC Docket at 3793.

349. *Compare* *Standard & Poor's Ratings Servs.*, Securities Act Release No. 9705, Exchange Act Release No. 9704, 110 SEC Docket 3790 (Jan. 21, 2015), *with* *Standard & Poor's Ratings Servs.*, Securities Act Release No. 9705, Exchange Act Release No. 74,104, 110 SEC Docket 3793, 3793 (Jan. 21, 2015).

350. *See, e.g.*, Mary Jo White, Chair, SEC, Chairman's Address at SEC Speaks 2014 (Feb. 21, 2014), <https://www.sec.gov/news/speech/2014-spcho22114mjw> (citing examples where the new admissions policy was used, without explanation); Andrew Ceresney, SEC, Remarks at SIFMA's 2015 Anti-Money Laundering & Financial Crimes Conference (Feb. 25, 2015), <https://www.sec.gov/news/speech/022515-spchc.html> (citing specific examples of requiring admissions in two anti-money-laundering cases, Wedbush and Oppenheimer, as cases "where heightened accountability and acceptance of responsibility are in the public interest" and noting the "magnitude of Oppenheimer's regulatory failures"); Andrew Ceresney, SEC, The SEC's Cooperation Program: Reflections on Five Years of Experience (May 13, 2015), <https://www.sec.gov/news/speech/sec-cooperation-program.html> (noting that the SEC had entered into a settlement with an individual defendant and "obtained admissions from him as part of his settlement to provide clarity on what he would testify to at trial").

351. Ceresney, Compliance Week, *supra* note 12.

352. *Id.*

353. *Id.*

“impeded the SEC’s ability to investigate misconduct and protect investors” and Lions Gate “sent an important message to the market about the perils of misleading investors in the midst of a tender offer battle.”<sup>354</sup> As meager as these explanations are, they at least try to give the public some understanding of why the SEC sought admissions in particular cases and what function they served.

But Ceresney’s speech is the only real attempt to situate admissions cases and provide some explanation of why the SEC is proceeding the way it is. Beyond that speech, there has been almost no attempt to explain, and certainly no in-depth explanations of how the stated factors apply or, more significantly, why they don’t. There has been no explanation whatsoever as to why the SEC is still allowing most cases to settle on a no-admit/no-deny basis, even though the stated standards would seem to apply. The lack of transparency leaves market participants, defense counsel, and the public in the dark about when or why admissions will be required, or the purpose they serve in particular cases. This deficiency seriously undermines any value that admissions may have, particularly with respect to public perceptions of agency fairness and effectiveness. When similar cases are treated differently without any attempt at explanation, the process starts to appear arbitrary, or worse, rigged—the exact opposite of what the admissions policy was ostensibly designed to achieve.

The admissions policy was adopted in large part in reaction to judicial criticism and public perception that the SEC was prone to entering into sweetheart deals that essentially swept wrongdoing under the rug. One of the stated purposes behind requiring admissions was the cathartic effect that accompanies a public rendering of accountability. Chair White compared the process to an admission made in connection with a guilty plea: “[I]t creates an unambiguous record of the conduct and demonstrates unequivocally the defendant’s responsibility for his or her acts.”<sup>355</sup> When Ms. White was the U.S. Attorney for the Southern District of New York, she began using deferred prosecution agreements—which did not require a guilty plea—and insisted that “a public admission of wrongdoing was required for the resolution to have sufficient teeth and public accountability.”<sup>356</sup> The SEC admissions policy followed the same model.<sup>357</sup> Then-Director of Enforcement Andrew Ceresney made the same point about public accountability and responsibility, referring to the “cathartic” quality of admissions.<sup>358</sup>

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354. *Id.*

355. White, *supra* note 3.

356. *Id.*

357. *Id.*

358. See Ceresney, *supra* note 51 (“But there also is a group of cases where a public airing of unambiguous facts—whether through admissions or a trial—serve such an important public interest that we will demand admissions, and if the defendant is not prepared to admit the conduct, litigate the case at trial. I analogize it to a guilty plea in a criminal case—there is a certain

But public accountability depends, at least in part, on transparency. Without some measure of explanation of why some cases, some persons, and some entities are providing admissions while others—the vast majority—are not, admissions lose much of their value. The lack of transparency with respect to admissions is all the more glaring given that the SEC is now increasingly using the administrative process to settle cases.<sup>359</sup> While the SEC used to settle most of its important enforcement matters in federal district court proceedings, where the settlement is subject to review and approval by a federal district judge, the agency is now settling most of its big cases in-house, where the settlement need only be approved by the Commission.<sup>360</sup> The move to administrative settlements was driven by the fact that federal judges were beginning to scrutinize these settlements carefully, and on a few notable occasions rejected settlements they thought were inadequate and possibly collusive.<sup>361</sup> Ironically, the judicial call for greater public accountability led the SEC to further insulate the settlement process from public review. The SEC's move to requiring admissions was also a response to judicial criticism of the settlement process, but without a public reckoning of why admissions are obtained in certain cases, the process seems murkier than ever.

Finally, public accountability also depends, in some measure, on publicity. While the SEC has certainly publicized some settlements that have included admissions, it has buried others in the muck: They are difficult to find, and often difficult to decipher. In one particularly egregious example, in February 2016, the SEC entered into a settlement with Sidney M. Field in connection with a Ponzi scheme that netted nearly \$8 million in illicit profits.<sup>362</sup> This was a case “where a large number of investors ha[d] been harmed” and where “the conduct was . . . egregious.”<sup>363</sup> It was also a case “where the conduct posed a significant risk to . . . investors,” and one “where admissions would aid investors deciding whether to deal with a particular party in the future.”<sup>364</sup> So clearly it met the test for requiring admissions, and the consent judgment included an admission by Mr. Field of the facts in the SEC complaint, as well as an admission that the conduct violated the law. But outside of the proposed consent judgment and the actual order—which are

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amount of accountability that comes from a defendant admitting to unambiguous, uncontested facts. It is in many respects a cathartic moment. And there can be no denying the facts under those circumstances.”).

359. See, e.g., Ceresney, White Collar Institute, *supra* note 12.

360. See Velikonja, *supra* note 93 (“Before Dodd-Frank, 40% of settlements were filed in administrative proceedings; in fiscal year 2015, over 80% were.”).

361. See, e.g., SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. Nov. 28, 2011); SEC v. Bank of Am. Corp., 653 F. Supp.2d 507 (S.D.N.Y. 2009).

362. See Final Judgment as to Defendant Sidney M. Field, *supra* note 102, at 8.

363. White, *supra* note 3.

364. *Id.*

public documents available by accessing the Court docket—the SEC never publicly disclosed the settlement or the admissions it contained: There was no press release or litigation release (the latter of which is supposed to be issued with respect to all major litigation developments). Indeed, as of this date, there is absolutely no mention of Mr. Field’s settlement anywhere on the SEC website. If the goal is public accountability and helping investors decide whom they want to do business with, it is hard to see how an admission buried deep in a court filing could ever accomplish anything. The SEC nonetheless included Mr. Field settlement in the numbers it released when it touted the success of the new admissions policy.<sup>365</sup>

Similarly, in 2015 the SEC brought an action in federal district court in California against Paul Mata and two cohorts for running a wide ranging real estate investment scheme.<sup>366</sup> In June 2016, the Commission settled its case against Mr. Mata who consented to the entry of a judgment in which he admitted certain facts.<sup>367</sup> The case was certainly ripe for admissions: Investors lost millions of dollars, and there was a need to warn the public about the illicit nature of the investment scheme.<sup>368</sup> But the consent judgment, which contains the admissions, is not available on the SEC website, and the SEC did not announce the entry of the judgment or the admissions in any way: There is no press release or even a litigation release with respect to the entry of the judgment.<sup>369</sup> Again, to whatever extent it was important to obtain admissions from Mr. Mata as a condition of settlement—and the conduct in that case did appear to be egregious and resulted in large losses to investors—the value of the admissions is entirely undermined by the fact that the SEC never set forth

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365. The White Release states that the SEC obtained admissions from 29 individual defendants (as of November 14, 2016). *See* Press Release, White Departure, *supra* note 13. To arrive at that number, the Fields settlement had to be included. *See infra* Appendix.

366. *See* Complaint, SEC v. Paul Mata, No. 15-CV-1792 (C.D. Cal. Sept. 2, 2015).

367. Final Judgment as to Paul Mata, SEC v. Paul Mata, No. 15-CV-1792 (C.D. Cal. June 17, 2016); Consent to Entry of Final Judgment by Paul Mata, SEC v. Paul Mata, No. 15-CV-1792 (C.D. Cal. June 16, 2016).

368. *See* Consent to Entry of Final Judgment by Paul Mata, *supra* note 367.

369. A few months later, Mr. Mata consented to the entry of an order in a follow-on administrative proceeding barring him from association with a broker-dealer. Mata, Exchange Act Release No. 78,736, 2016 WL 4537679, at \*1 (Aug. 31, 2016). In that order, Mr. Mata neither admitted nor denied the findings except for the findings in one paragraph, which did no more than recite the entry of the judgment in the underlying matter. *See id.* There is no reference to the admissions obtained in connection with that judgment. *See id.* The failure to publicize Mata’s admissions is all the more baffling given that this was another example of defendants within the same case being treated differently: Mata’s two co-defendants, Mario Pincheira and David Kayatta, were both allowed to settle on a no-admit/no-deny basis. *See* SEC v. Paul Mata, No. 15-CV-1792 (C.D. Cal. Sept. 2, 2015); Consent to Entry of Final Judgment by Mario Pincheira, No. 15-CV-01792 (C.D. Cal. June 16, 2016); Consent to Entry of Final Judgment by David Kayatta, No. 15-CV-01792 (C.D. Cal. June 16, 2016). Mata was clearly the ring-leader of the scheme and obtained the bulk of the proceeds; that is the likeliest reason for the differential treatment, but it is all the more reason to say so publicly. *See* Final Judgment as to Paul Mata, *supra* note 367.

the admissions in a way that the public would be on notice of them. Mr. Mata was ordered to pay more than \$11 million in disgorgement and a \$4 million penalty, and he admitted the facts of the illegal scheme,<sup>370</sup> but you would never know it from the SEC.

## V. CONCLUSION

When the SEC first announced its new policy on admissions, it was met with considerable concern by the industry and defense bar. In particular, there was concern that admissions in SEC settlements would have collateral consequences for defendants and respondents—especially, increased exposure to private class action law suits. As a result, many predicted that defendants and respondents, particularly entities, would no longer be willing to settle matters, preferring to take their chances in litigation. The consequence would be more trials, which would consume precious agency resources and impede productive investigatory work. In the end, the SEC's enforcement program would be compromised, leaving investors and the markets at risk.

Four years on, it is safe to say that the worst fears have failed to materialize. The SEC continues to bring record numbers of enforcement actions and most of these cases continue to settle without collateral consequences. The reason for this result is simple, but it calls into question the SEC's claims concerning the success of the admissions policy and whether the policy is worth maintaining.

The sky has not fallen because the SEC has very rarely resorted to requiring admissions as the price of settling cases. The overwhelming majority of SEC settlements are still done on a no-admit/no-deny basis. Moreover, when the SEC has obtained admissions in connection with settlements, the charges have almost never involved scienter-based fraud, or violations of securities law provisions that could give rise to private liability. This is no doubt by design. Whether the SEC has acted judiciously, or whether defendants and respondents have simply refused to settle where the admissions could lead to collateral consequences, the result is the same. This may be a concession to reality, but it hits at the heart of why admissions were thought desirable in the first place.

One possibility is that the SEC is not requiring admissions in the most egregious cases, contrary to the stated framework and goals of the policy. If this is correct, it would imply that the requisite measure of public accountability is actually greater in cases of less egregious conduct, which makes very little sense on either practical or moral grounds.

Another possibility is that the conduct at issue was indeed egregious, but the SEC was willing to negotiate the charge down in order to obtain an

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<sup>370</sup>. Final Judgment as to Paul Mata, *SEC v. Paul Mata*, 15-CV-1792 (C.D. Cal. June 17, 2016).



admission. If that is the case, whatever public accountability is obtained by virtue of an admission that the conduct violated the law is immediately undermined by a charge that reflects negligent, rather than intentional or even reckless, conduct; such a settlement says “yes, we admit that we violated the law, but clearly the conduct was not that bad.” If an admission signals “egregiousness,” a weak charge simultaneously signals a lack of “egregiousness.” At best, they cancel one another out.<sup>371</sup>

The tension between egregiousness and lower charges also feeds cynicism that the SEC is willing to negotiate the other way as well: seeking higher penalties, and perhaps insisting on higher charges, as a condition for settling a case without factual admissions or an admission of liability.<sup>372</sup> There is some belief among the defense bar—though no actual evidence—that this is in fact occurring.<sup>373</sup> If that were true, it would suggest that the admissions policy is being used as a cudgel to extort high monetary settlements from less culpable defendants who feel they have no choice. Whether or not it is true, perceptions often matter most. Indeed, it was in part the perception that the SEC was acting collusively with defendants in settling matters that led the agency to adopt the admissions policy, with its focus on openness and public accountability.

Unfortunately, on that score the SEC has utterly failed to effectuate the goal of public accountability. There has been a complete lack of consistency and transparency in the use of the admissions policy, and this too feeds considerable cynicism. When similar cases are treated differently without any explanation, the process begins to look arbitrary. Today, the SEC continues to settle the vast majority of its cases on a no-admit/no-deny basis, including cases that, by virtue of the charges and monetary sanctions involved, clearly amount to egregious conduct or conduct that puts investors or the markets at risk. The few cases in which admissions have been obtained cannot readily be distinguished from others that look very similar but settled without admissions. There may well be good reasons why admissions were felt

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371. Carmen Germaine, *SEC Lobs Another Soft Admission with Credit Suisse Deal*, LAW360 (Oct. 6, 2016), <https://www.law360.com/articles/849064/sec-lobs-another-soft-admission-with-credit-suisse-deal>.

372. See, e.g., Bradley J. Bondi, *An Evaluation of the SEC's Admissions Policy*, CTR. FOR FIN. STABILITY (July 7, 2016), [http://www.centerforfinancialstability.org/research/Bondi\\_070716.pdf](http://www.centerforfinancialstability.org/research/Bondi_070716.pdf).

373. Matthew Garza, *Piwowar Says Focus on “Broken Windows” Could Harm Markets*, WOLTERS KLUWER: SEC. REG. DAILY (Oct. 15, 2014), [http://www.dailyreportingsuite.com/securities/news/piwowar\\_says\\_focus\\_on\\_broken\\_windows\\_could\\_harm\\_markets](http://www.dailyreportingsuite.com/securities/news/piwowar_says_focus_on_broken_windows_could_harm_markets) (noting that SEC Enforcement Director “bristled” when former SEC Enforcement Director, now a defense lawyer, “said the admissions policy was being used as leverage in negotiations”); Lou R. Mejia, *The State of the SEC's Admissions Policy: Three Years Later*, PERKINSOIE (Nov. 10, 2016), <https://www.assetmanagementadvocate.com/2016/11/the-state-of-the-secs-admissions-policy-three-years-later/> (“While some commentators have suggested that the SEC uses the threat of admissions to extract higher penalties, we are unaware of any specific case where that has occurred. At a recent SEC conference, SEC Associate Director Gerald Hodgkins firmly denied that the SEC engages in such a practice.”).

necessary in one case and not another, but the public cannot tell because the SEC provides no explanation as to why it proceeded one way or another.

The lack of consistency between similarly situated persons and entities is particularly troubling. That like cases should be treated alike is a fundamental legal principle. To be sure, there is an element of discretion that is inherent in the prosecutorial function, particularly at the settlement stage: All cases are a little different, and the agency must weigh the litigation risks against the certainty of settlement in situations involving multiple variables, ranging from the quality of the evidence and the reliability of witnesses to the location of a possible trial and everything in between. A certain amount of discretion in fashioning the terms of settlement is imperative.<sup>374</sup> Moreover, settlements are extremely important to an agency like the SEC, which is highly constrained by limited resources: Settlements allow the agency to obtain relief that is within the range of what it could obtain at trial, without the risk and without the expenditure of scarce resources that are better deployed elsewhere.<sup>375</sup> But while discretion in the settlement process is both necessary and beneficial, there are dangers when discretion veers towards the arbitrary. The SEC has obtained admissions in very few cases, without any perceivable consistency, and without any explanation. If the goal of admissions is public accountability and the “cathartic” effect that comes from a public reckoning of responsibility for misconduct, the goal cannot be achieved unless the public is properly put on notice of what is at stake and why.<sup>376</sup> The lack of consistency and the lack of transparency wholly undermine whatever value may be had by obtaining admissions. Worse, these failures breed cynicism that undercuts, rather than enhances, public trust in the process.

So what should be the future of the admissions policy? In answering this question, it is important to recognize that admissions can indeed have a very salutary effect: They can bring a measure of public accountability and responsibility that is wholly lacking when a defendant can settle a matter on a no-admit/no-deny basis. But admissions can only have that effect if they are used more frequently, more consistently, more openly, and with respect to the worst forms of misconduct.

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374. Even critics of the agency recognize that discretion is important. *See, e.g.*, Testimony of William F. Galvin, Sec’y of the Commonwealth of Massachusetts, Examining Settlement Practices of U.S. Financial Regulators Before the H. Comm. on Financial Services, 112th Cong. 7 (2012) (“As an executive agency, in the absence of obvious error, the SEC must be able to decide which matters to investigate, which cases to litigate, which charges to bring, and the terms of any settlements.”).

375. *See, e.g.*, White, *supra* note 3.

376. There are, of course, other reasons besides public accountability for requiring admissions, such as locking-in a witness who may be required to testify at a future trial. *See, e.g.*, Ceresney, White Collar Institute, *supra* note 12 (discussing the importance of obtaining admissions in order to lock in a witness in the Wyly case).

One approach then, would be to do away with no-admit/no-deny and require admissions in every case.<sup>377</sup> But this is simply unrealistic. That approach *would* lead to the results most feared at the time the admissions policy was adopted: a huge increase in litigation. The SEC, at least as currently constituted, is not equipped for that task. And it would serve little purpose. Settlements are important and they work; and settlements are all about compromise and discretion.<sup>378</sup> A blanket policy requiring admissions in all cases would be counter-productive.

However, if the SEC is going to continue requiring admissions only in certain cases, it has a duty to more explicitly lay out the framework of the policy and the criteria it will apply. The SEC needs to be more consistent and transparent, and to make clear in each instance why admissions were, or were not, required, particularly if there is disparate treatment of persons and/or entities accused of the same misconduct. Public accountability can only be served if there is some measure of publicity in the process.

One possibility would be for the SEC to adopt a clear set of rules, specifying when admissions will be required. But bright-line rules have their own costs, and they too can be counter-productive. For example, a rule requiring admissions in the most egregious cases—those involving scienter-based fraud—could lead the agency to back away from bringing those charges. If defendants balk at making admissions, the SEC might prefer a weaker settlement rather than the uncertainties and costs of litigation.

At the other extreme, the SEC could go back to its old policy of settling cases on a no-admit/no-deny basis, save perhaps in cases where the defendant or respondent has previously made an admission in another proceeding concerning the same underlying activity. This would not actually be much of a change, given that admissions are the rare exception, and most cases still settle on a no-admit/no-deny basis. Moreover, from a public accountability standpoint, a no-admit/no-deny settlement involving serious charges is often preferable to obtaining an admission to less egregious conduct. Going back to no-admit/no-deny would also have the virtue of eliminating inconsistent applications of the admissions policy, along with all of concerns over arbitrariness, power, and pressure that accompany a policy of uncertain application.

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377. See, e.g., Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. MICH. J.L. REFORM 535, 558–64 (2015).

378. See *SEC v. Citigroup Glob. Mkts.*, 752 F.3d 285, 295–96 (2d Cir. 2014).

Appendix  
Admissions in SEC Enforcement Cases  
From Inception Through February 15, 2017

Case Name (Federal Court Actions & Administrative Proceedings)	Individual Defendant(s) and Respondent(s)	Entity Defendant(s) and Respondent(s)	Date Consent Judgment or Order Containing Admissions was Entered
SEC v. Falcone, et al., 12-cv-5027 (S.D.N.Y)	Philip Falcone		Sept. 16, 2013
		Harbinger Capital Partners Offshore Manager, L.L.C.	Sept. 16, 2013
		Harbinger Capital Partners Special Situations GP, L.L.C	Sept. 16, 2013
SEC v. Harbinger Capital Partners LLC et al., 12-cv-5028 (S.D.N.Y)		Harbinger Capital Partners LLC	Sept. 16, 2013
	Philip Falcone		Sept. 16, 2013
	Peter Jenson		Oct. 1, 2014
JPMorgan Chase & Co., EA Rel. 70,458		JPMorgan Chase & Co.	Sept. 19, 2013
G-Trade Services LLC, et al., EA Rel. 71,128		G-Trade Services LLC	Dec. 18, 2013
		Convergex Global Markets Limited	Dec. 18, 2013
		Convergex Execution Solutions LLC	Dec. 18, 2013
Jonathan Samuel Daspin, EA Rel. 71,126	Jonathan Daspin		Dec. 18, 2013
Thomas Lekargeren, EA Rel. 71,127	Thomas Lekargeren		Dec. 18, 2013
SEC v. Craig S. Lax, 15-cv-01079 (DNJ)	Craig S. Lax		Mar. 11, 2015

Scottrade, Inc., EA Rel. 71,435		Scottrade Inc.	Jan. 29, 2014
Credit Suisse Group AG, EA Rel. 71,593		Credit Suisse Group AG	Feb. 21, 2014
Lions Gate Entertainment Corp., EA Rel. 71,717		Lions Gate Entertainment Corp.	Mar. 13, 2014
SEC v. Samuel E Wyly, et al., 10-cv-5760 (S.D.N.Y.)	Michael C. French		Mar. 21, 2014
SEC v. Heinz, et al., 13-cv-0753 (D. Utah)	Steven B. Heinz		Apr. 28, 2014
Michael A. Horowitz, et al., SA Rel. 9620	Michael A. Horowitz		July 31, 2014
Bank of America Corp., EA Rel. 72,888		Bank of America Corp.	Aug. 21, 2014
Wells Fargo Advisors, LLC, EA Rel. 73,175		Wells Fargo Advisors, LLC	Sept. 22, 2014
Wedbush Securities Inc., et al., EA Rel. 73,652		Wedbush Securities Inc.	Nov. 20, 2014
HSBC Private Bank (Suisse), SA, EA Rel. 73,681		HSBC Private Bank (Suisse), SA	Nov. 25, 2014
F-Squared Investments, Inc., AA Rel. 3988		F-Squared Investments, Inc.	Dec. 22, 2014
Standard & Poor's Ratings Services, SA Rel. 9705		Standard & Poor's Ratings Services	Jan. 21, 2015

Oppenheimer & Co., Inc., SA Rel. 9711		Oppenheimer & Co. Inc.	Jan. 27, 2015
BDO China Dahua CPA Co., Ltd., et al., EA Rel. 74,217		Deloitte Touche Tohmatsu CPA Ltd.	Feb. 6, 2015
		Ernst & Young Hua Ming LLP	Feb. 6, 2015
		KPMG Huazhen (Special General Partnership)	Feb. 6, 2015
		PricewaterhouseCoopers Zhong Tian CPAs Ltd.	Feb. 6, 2015
SEC v. CKB168 Holdings Ltd, et al., 13-cv-5584 (E.D.N.Y.)	Rayla Melchor Santos		July 10, 2015
	Chih Hsuan "Kiki" Lin		July 10, 2015
Sean C. Cooper, AA Rel. 4063	Sean C. Cooper		Apr. 16, 2015
SEC v. Fusamae, 15-cv-3142 (N.D. Ill.)	Katsuichi Fusamae		Apr. 16, 2015
Houston Am. Energy Corp, et al., SA Rel. 9757		Undiscovered Equities, Inc.	Apr. 23, 2015
	Kevin T. McKnight		Apr. 23, 2015
SEC v. Grant, et al., 11-cv-11538 (D. Mass)		Sage Advisory Group, LLC	May 27, 2015
	Benjamin Lee Grant		May 27, 2015
Merrill Lynch, Pierce, Fenner & Smith Inc., et al., EA Rel. 75,083		Merrill Lynch, Pierce, Fenner & Smith Inc.	June 1, 2015
		Merrill Lynch Professional Clearing Corp.	June 1, 2015
SEC v. Aquaphex Total Water Res., et al., 15-cv-0438 (N.D. Tex.)		Aquaphex Total Water Solutions	June 25, 2015
	Gregory G. Jones		June 25, 2015

OZ Management, LP, EA Rel. 75,445		OZ Management, LP	July 14, 2015
ITG Inc., et al., SA Rel. 9887		ITG Inc.	Aug. 12, 2015
		Alternet Securities, Inc.	Aug. 12, 2015
BDO USA, LLP, EA Rel., 75,862		BDO USA, LLP	Sept. 9, 2015
Credit Suisse Securities (USA) LLC, EA Rel. 75,992		Credit Suisse Securities (USA) LLC	Sept. 28, 2015
Marwood Group Research, LLC, EA Rel. 86,512		Marwood Group Research, LLC	Nov. 24, 2015
SEC v. Watson, 15-cv-13868 (D. Mass.)	Steven C. Watson		Nov. 18, 2015
Grant Thornton, LLP, EA Rel. 76,536		Grant Thornton, LLP	Dec. 2, 2015
JPMorgan Chase Bank N.A., et al., SA Rel. 9992		JPMorgan Chase Bank, N.A.	Dec. 18, 2015
		J.P. Morgan Securities LLC	Dec. 18, 2015
Barclays Capital Inc., SA Rel. 10,010		Barclays Capital Inc.	Jan. 31, 2016
SEC v. Medical Capital Holdings, Inc., 09-cv-818 (C.D. Cal.)	Sidney M. Field		Feb. 23, 2016
Steve Pappas, EA Rel. 75,525	Steve Pappas		Apr. 5, 2016
Reid S. Johnson, EA Rel. 77,625	Reid S. Johnson		Apr. 14, 2016

SEC v. Tropikgadget FZE, et al., 15-cv-10543 (D. Mass.)	Simonia de Cassia Silva		May 27, 2016
	Vinicius Romulo Aguiar		Sept. 7, 2016
	Thais Utino Aguiar		Sept. 7, 2016
	Geovani Nascimento Bento		Sept. 16, 2016
	Priscilla Bento		Sept. 16, 2016
	Dennis Arthur Somaio		Sept. 16, 2016
	Elaine Amaral Somaio		Sept. 16, 2016
Steven J. Muehler, et al., EA Rel. 78,118	Steven J. Muehler		June 21, 2016
		Alternative Securities Markets Group Corp.	June 21, 2016
		Blue Coast Securities Corp.	June 21, 2016
The Bank of New York Mellon, IC Rel. 32,151		The Bank of New York Mellon	June 13, 2016
Ethiopian Electric Power, SA Rel. 10,093		Ethiopian Electric Power	June 8, 2016
SEC v. Paul Mata, et al., 15-cv-1792 (C.D. Cal.)	Paul Mata		June 17, 2016
Merrill Lynch, Pierce, Fenner & Smith Inc., et al., EA Rel. 78,141		Merrill Lynch, Pierce, Fenner & Smith Inc.	June 23, 2016
		Merrill Lynch Professional Clearing Corp.	June 23, 2016
Citigroup Global Markets, Inc., EA Rel. 78,291		Citigroup Global Markets, Inc	July 12, 2016



SEC v. Spongetech Delivery Systems, Inc., 10-cv-2031 (E.D.N.Y.)	Joel Pensley		Aug. 4, 2016
Credit Suisse AG, SA Rel. 10,229		Credit Suisse AG	Oct. 5, 2016
Bank Leumi le-Israel B.M., et al., EA Rel. 79,113		Bank Leumi le-Israel B.M	Oct. 18, 2016
		Leumi Private Bank	Oct. 18, 2016
		Bank Leumi (Luxembourg) S.A.	Oct. 18, 2016
State Street Bank and Trust Co., IA Rel. 32,390		State Street Bank and Trust Co.	Dec. 12, 2016
Deutsche Bank Securities, Inc., SA Rel. 10,272		Deutsche Bank Securities, Inc.	Dec. 16, 2016
John W. Rafal, EA Rel. 79,755	John W. Rafal		Jan. 9, 2017
Allergan, Inc., EA Rel. 79,814		Allergan, Inc.	Jan. 17, 2017
Orthofix International, N.V., SA Rel. 10,281		Orthofix International, N.V.	Jan. 18, 2017
Orthofix International, N.V., EA Rel. 79,828		Orthofix International, N.V.	Jan. 18, 2017
Morgan Stanley Smith Barney, LLC, IA Rel. 4649		Morgan Stanley Smith Barney, LLC	Feb. 14, 2017