

Regulatory: SEC modifies settlement language for cases involving criminal convictions

Agency will no longer employ traditional “neither admit nor deny” approach

BY [LISA NOLLER](#)

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The Securities and Exchange Commission (SEC) announced on Jan. 6 that it would no longer allow a defendant to “neither admit nor deny” the allegations raised against it by the SEC when the defendant has already admitted to, or been convicted of, criminal violations stemming from the same conduct. Although the shift reflects a change to the SEC’s longstanding policy of using this language to facilitate settlement, the revision will only apply to the minority of its cases in which there is either a parallel criminal conviction (by plea or verdict) or an agreement with criminal authorities to defer prosecution or to not prosecute as part of a settlement (NPA/DPA).

Robert Khuzami, Director of Enforcement at the SEC, summarized the Commission’s new position:

“Under our traditional “neither admit nor deny” approach, a defendant could be found guilty of criminal conduct and, at the same time, settle parallel SEC charges while neither admitting nor denying civil liability. This approach has reflected that the goals, objectives and other factors in the civil settlements that we and other federal and state agencies enter into often are distinguishable from those at issue in criminal proceedings. It nevertheless seemed unnecessary for there to be a “neither admit” provision in those cases where a defendant had been criminally convicted of conduct that formed the basis of a parallel civil enforcement proceeding.”

Khuzami further explained that in cases for which the new policy is applicable, settlement agreements will now recite the fact and nature of the criminal conviction or criminal NPA/DPA in the settlement documents, while the SEC’s staff will be given discretion to incorporate into settlement documents any other relevant facts admitted or found during parallel criminal proceedings.

The policy shift comes after criticism of the SEC’s longstanding policy to include “neither admit” language in its settlements, perhaps most notably from Federal Judge Jed. S. Rakoff, who in November 2011 refused to accept a proposed \$285 million [settlement between the SEC and Citigroup](#). Judge Rakoff took specific aim at the use of “neither admit” provisions in SEC settlement agreements, concluding the parties’ use of “neither admit” language did “not provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified.” Judge Rakoff explained that without knowledge of the underlying facts, “the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.” The SEC has appealed Judge Rakoff’s order.

Khuzami was careful to note, however, that the SEC’s policy shift was “separate from and unrelated to the recent ruling in the Citigroup case” by Judge Rakoff. Indeed, because the Citigroup litigation does not involve parallel criminal proceedings, the SEC’s claims against Citigroup would be unaffected by the new policy.

The policy shift highlights the need for counsel representing targets and subjects of an SEC inquiry to determine at the outset whether the SEC has referred the case to the Department of Justice for parallel criminal proceedings. To preserve the ability to use “neither admit” language in any potential settlement with the SEC, counsel must defend against the SEC’s complaint as if it involves criminal charges, with the ultimate goal being to avoid criminal charges altogether. By avoiding criminal charges, counsel can retain

the ability to settle with the SEC without admitting liability, and therefore avoid making admissions that could be used in potential subsequent civil litigation by investors.

About the Author



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