

SEC CHANGES POLICY ON SETTLEMENT LANGUAGE; “NEITHER ADMIT NOR DENY” APPROACH NARROWED

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To Our Clients and Friends:

In the wake of widespread criticism and a recent adverse ruling in federal court, the Securities and Exchange Commission (“SEC”) has announced a change in policy aimed at settling parties with parallel criminal convictions or resolutions. Traditionally, the SEC has entered into settlement agreements in which the defendant neither admits nor denies the SEC’s allegations, enabling defendants to settle without incurring the stigma of liability or the potential consequences in subsequent shareholder actions.¹ On Friday, January 6, 2012, Robert S. Khuzami, Director, Division of Enforcement for the SEC, announced in a statement that the SEC will no longer use this language in certain enforcement actions.

Under the new policy, settling defendants will not be permitted to invoke the “neither admit nor deny” language in settlements with the SEC if, in a parallel action with overlapping facts, (i) the defendant was convicted of a crime, or (ii) the defendant entered into a Non-Prosecution Agreement (“NPA”) or a Deferred Prosecution Agreement (“DPA”) which included admissions or acknowledgments of criminal conduct. In such cases, the SEC will now adjust settlement agreements as follows:

- the “neither admit nor deny” language will be deleted;
- the fact and nature of the criminal conviction or criminal NPA or DPA will be recited in the SEC settlement; and
- at the staff’s discretion, relevant facts admitted during the plea allocution or set out in a jury verdict form or in the criminal NPA or DPA may be detailed in the SEC settlement documents.

¹ For example, *Wachovia Bank*, last month, admitted to allegations of bid-rigging in the municipal bond market in its settlement of criminal charges brought by the Department of Justice. In the parallel SEC settlement, however, *Wachovia* neither admitted nor denied the SEC’s overlapping allegations.

The SEC will also retain the current prohibition on denying the allegations of the SEC's complaint or making statements that the SEC's allegations are without factual basis. In announcing the new policy, Enforcement Director Khuzami stated that the policy will not affect the SEC's traditional "neither admit nor deny" approach in settlements without parallel criminal admissions.²

Although the SEC's announcement created a stir, the practical implications of the SEC's policy change appear not to have changed the settlement landscape considerably. Even before the policy change, a defendant who was convicted or otherwise acknowledged criminal misconduct in a parallel criminal proceeding was already forced to contend with the potential collateral impact of such an admission on any pending shareholder or derivative litigation. Nevertheless, in light of the continued pressure on the SEC's "neither admit nor deny" policy from courts, commentators and members of Congress, the SEC's announcement may signal more dramatic changes yet to come in the settlement of cases not involving parallel criminal proceedings.

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² Per the statement, a recent ruling by Judge Rakoff in the Southern District of New York in the Citigroup case is unrelated to this policy shift because Citigroup was not involved in a parallel criminal proceeding. In his ruling, Judge Rakoff rejected a proposed consent judgment containing "neither admit nor deny language" on the grounds that the underlying allegations were unsupported by any proven or acknowledged facts. The SEC has appealed.