SEC's New Priorities Continue To Come Into Focus: Admissions Of Liability

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Since taking the reins of the SEC in April 2013, SEC Chair Mary Jo White has shifted SEC enforcement policy in several areas: pursuing violations of all sizes—including small ones, increasing the SEC's use of technology to find and prevent fraud in the market, and requiring an admission of liability in order to settle certain cases, the focus of this post. Prior to 2013, the SEC as a matter of policy permitted companies and individuals to settle charges without admitting or denying liability. This policy typically benefitted both sides, strongly incentivizing settlement. Among other things, the policy enabled a defendant to avoid the exposure to private litigation that often resulted from an admission of liability. For its part, the SEC was able to conserve resources by avoiding trial. And, of course, the SEC and defendants avoided the uncertainty of a trial verdict. The policy was not without its critics. In late 2011, Federal District Judge Jed Rakoff criticized the policy as "depriv[ing] the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." *Sec. & Exch. Comm'n v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011). Judge Rakoff also argued that this policy allowed companies to treat settlements as a "cost of doing business." Senator Elizabeth Warren wrote that this policy gave the SEC "a lot less leverage in settlement negotiations and . . . forced [the SEC] to settle on terms . . . much more favorable to the wrongdoer." Such criticisms did not fall on deaf ears. There was a decided impression that this policy allowed even the worst offenders in the financial crisis to avoid admitting guilt. Under her new leadership, the SEC will now require admissions of liability in cases where, according to Chair White, "it's very important to have that public acknowledgement [of wrongdoing] and accountability." At the recent SEC Speaks conference, Chair White stated that the Commission would consider requiring admissions in "certain types of cases, including those involving particularly egregious conduct, where a large numbers of investors were harmed, where the markets or investors were placed at significant risk, where the conduct undermines or obstructs our investigative processes, where an admission can send a particularly important message to the markets or where the wrongdoer poses a particular future threat to investors or the markets." Even with this new policy, however, decisions are expected to be made on a case-by-case basis. And Chair White has indicated that most settlements will not require an admission of liability. Although still in its infancy, the new policy has resulted in admission of liability in a variety of recent settlements: in August 2013, by hedge fund manager Philip A. Falcone arising from his improper use of investor funds; by a large international bank arising from a multibillion dollar trading loss; in December 2013, by subsidiaries of ConvergEx, who deceived their customers about the commissions they charged when executing customers' trading orders; in January 2014, by Scottrade arising from its failure to provide the SEC with accurate information about trades done by the firm and its customers (commonly called "blue sheet" date); and in February 2014, by Credit Suisse arising from its provision of cross-border securities services to thousands of U.S. clients without

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adhering to the registration provisions of the federal securities laws. The Falcone, ConvergEx, and Credit Suisse settlements were for either or a combination of widespread misconduct and arguably intentional misconduct, thus the admissions of liability in addition to very substantial monetary penalties: $18 million in the Falcone case, $20 million in the ConvergEx case (despite the company's substantial cooperation after the investigation began and its significant remedial measures); and $196 million by Credit Suisse. The Scottrade penalty was quite small in comparison, only $2.5 million, but the SEC emphasized that Scottrade's failure to provide accurate blue sheet information could significantly compromise the SEC's ability to detect and investigate securities law violations. In short, these recent settlements fit within the categories that the SEC has identified as meriting an admission of liability. Chair White stated that these examples give the public guidance as to when the Commission thinks it is appropriate to require admissions as a condition of settlement. She also anticipated that additional settlements will require admissions in 2014. Time will reveal the true extent and implications of this policy shift. For more on the SEC's new priorities, we recommend Chair White's speech that she gave to the Council of Institutional Investors on Sept. 26, 2013: "Deploying the Full Enforcement Arsenal." The text of her speech is available online here.