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SEC POLICY CHANGE RE SETTLEMENTS WITH ADMISSIONS OF WRONGDOING

Lewis D. Lowenfels* and Michael J. Sullivan**

I. INTRODUCTION

On June 18, 2013, the Chair of the Securities and Exchange Commission ("SEC") announced that the agency was revising its longstanding policy of permitting defendants in SEC enforcement cases to settle proceedings without admitting or denying the government's allegations.1 Going forward, the Chair stated, in certain circumstances the SEC will be demanding admissions of wrongdoing from defendants in order to settle cases.

Perhaps the most powerful influence leading to the SEC's revision of its longstanding policy of permitting defendants in SEC enforcement cases to settle proceedings without admitting or denying the government's allegations has been two decisions by U.S. District Judge Jed S. Rakoff: SEC v. Vitesse Semiconductor Corp.2 and SEC v. Citigroup Global Markets Inc.3 The latter decision was later vacated by the Second Circuit, SEC v. Citigroup Global Markets Inc.;4 see also SEC v. Citigroup

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Global Markets Inc. As we shall see below, however, the SEC appears to have adopted in practice certain tenets of Judge Rakoff's position that admissions of wrongdoing should be obtained from defendants to justify settling certain serious enforcement cases.

II. THE SEC'S POSITION

Forty days after Judge Rakoff's decision on November 28, 2011, in SEC v. Citigroup Global Markets Inc., rejecting a proposed SEC settlement and sharply criticizing the SEC's longstanding policy of settling cases on the basis of neither requiring an admission nor permitting a denial by defendants, the SEC announced an important change in its settlement policy. On January 7, 2012, the SEC's Enforcement Director announced that the agency was dropping its "neither admit nor deny" settlement language in cases where there were parallel criminal convictions or admissions by defendants of criminal violations. The comparatively short public statement emphasized the following:

[T]he new policy does not require admissions or adjudications of fact beyond those already made in criminal cases, but eliminates language that may be construed as inconsistent with admissions or findings that have already been made in the criminal cases.

. . . The change applies to cases involving parallel (i) criminal convictions or (ii) NPAs [non-prosecution agreements] or DPAs [deferred prosecution agreements] that include admissions or acknowledgments of criminal conduct. Under the new approach, for those settlements we will:

- Delete the "neither admit nor deny" language from the settlement documents.
- Recite the fact and nature of the criminal conviction or criminal NPA/DPA in the settlement documents.
- Give the staff discretion to incorporate into the settlement documents any relevant facts admitted during the plea allocution or set out in a jury verdict form or in the criminal NPA/DPA.
- Retain the current prohibition on denying the allegations of the Complaint/OIP [Order Instituting Administrative Proceedings] or making statements suggesting the Commission's allegations are without factual basis.

The revision applies in the minority of our cases where there is a parallel criminal conviction (by plea or verdict) or criminal NPA/DPA involving factual or legal claims that overlap to some degree with the factual or legal claims set out in the Commission's complaint or OIP.

This policy change does not affect our traditional "neither admit nor deny" approach in settlements that do not involve criminal convictions or admissions of criminal law violations.\textsuperscript{7}

There are two points that should be noted with respect to this SEC policy change.

First, this change is a limited concession to Judge Rakoff’s position. While still retaining its “neither admit nor deny” language for the majority of its settlements, the SEC has nonetheless modified its settlement language with respect to an important minority of its enforcement cases. Moreover, this change takes on particular significance in light of two trends: first, the increasing numbers of parallel proceedings and, second, that this increasing number of parallel proceedings commonly represents the most important SEC enforcement initiatives.

Second, this SEC policy change is eminently sensible on the merits and reflects sound public policy. It is hard to defend the presence of a “neither admit nor deny” provision in an SEC enforcement settlement where defendants have already admitted to, or have been criminally convicted of, conduct that formed the basis of a parallel criminal conviction.

On June 18, 2013, the SEC went beyond its initial January 7, 2012 change in settlement policies where parallel criminal convictions were involved. On June 18, 2013, the agency announced that going forward it would be demanding admissions of wrongdoing to settle any enforcement proceedings, whether or not criminal convictions or admissions were involved, where the agency in its sole discretion deemed such admissions to be appropriate.\textsuperscript{8} The Chair of the SEC attempted to clarify this revised approach to the Commission’s longstanding policy in a speech before the Council of Institutional Investors on September 26, 2013.

Another principle of an effective enforcement program is the recognition that there are some cases where monetary penalties and compliance enhancements are not enough. An added measure of public accountability is necessary, and in those cases we should demand it. . . .

Since laying out this new approach, the most frequent question we get is about the types of cases where admissions might be appropriate.

Candidates potentially requiring admissions include:

- 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.


\textsuperscript{8} Michaels, supra note 1.
- Cases where reciting unambiguous facts would send an important message to the market about a particular case.

To reiterate, no-admit-no-deny settlements are a very important tool in our enforcement arsenal that we will continue to use when we believe it is in public interest to do so. In other cases, we will be requiring admissions. These decisions are for us to make within our discretion, not decisions for a court to make.\textsuperscript{9}

There are a number of points that should be noted with respect to this articulation of the new SEC policy.

First, the Chair’s list of the types of cases where admissions might be appropriate is sweeping in its coverage. The articulated criteria can be applied to almost any enforcement proceeding initiated by the Commission. Moreover, the combination of this sweeping coverage with the SEC’s position that it has complete discretion, unchecked by the courts, to determine whether or not to demand admissions to settle specific cases, is a very powerful tool to place in the arsenal of a U.S. government agency.

Second, the SEC itself has not been consistent in its definition of the criteria to be applied to determine the types of cases where admissions might be appropriate. In another speech delivered five months after her September 26, 2013 Address, Ms. White added two additional criteria to her list quoted above: first, she emphasized the importance of the SEC’s belief that the defendants’ misconduct had been intentional, and second, she indicated that the Commission may pursue admissions of wrongdoing “[w]hen a party obstructs an investigation.” Similarly, the SEC Enforcement Division’s co-directors had issued a memorandum to enforcement staff months before Chair White’s speeches that also added these additional criteria of intent and obstruction with respect to crafting SEC settlements.\textsuperscript{10}

Third, the Chair’s position, as she has readily admitted, was shaped by her successful, personal experience in the criminal arena. To many securities lawyers, however, whose views have been shaped by careers spent largely in the civil enforcement and transactional world of the SEC, the Chair’s position may be another example of the disquieting criminalization of the SEC’s enforcement process—clearly the questionable response of a proud agency to its humiliating failure to prevent, or at the least to uncover, the Bernard Madoff scandal.

Fourth, the SEC and Judge Rakoff share a common goal—more admissions by defendants regarding misconduct in determining the terms of SEC settlements. Both the SEC and Judge Rakoff share an emphasis upon the important policy of demanding public accountability for misconduct which undergirds and justifies this demand for admissions by de-


fendants. There are, however, crucial differences between Judge Rakoff’s position and the position of the SEC that are cogently summarized in the final paragraph of the quoted excerpt from Ms. White’s Address. The SEC is adamant that whether or not to demand admissions in the agency’s settlements of enforcement actions is a decision for the agency, within its discretion, and not a decision for the courts. This position, moreover, has the powerful support of the Second Circuit. A second crucial difference between Judge Rakoff and the SEC is the agency’s expressed intention, subsequently implemented in most of its cases, to continue to use its “neither admit nor deny” enforcement tool in the great majority of SEC settlements. The “win-win” attractions of eliminating litigation costs, returning money to victims more quickly, and preserving limited resources to deploy to other investigations, have evidently proved too advantageous for the SEC to abandon in most cases.

III. IMPLEMENTING THE SEC’S POSITION

At the date of this writing there have been sixteen settlements in SEC enforcement proceedings where the Commission has demanded admissions of wrongdoing from defendants in order to settle a particular proceeding. We will analyze a number of these settlements and in our analysis we will focus upon problems, questions, and issues which are common to many, if not all, of these settlements.

On June 28, 2012, the SEC filed actions in the U.S. District Court for the Southern District of New York against New York-based hedge fund adviser Philip A. Falcone and his advisory firm, Harbinger Capital Partners LLC, charging conduct that included misappropriation of client assets, market manipulations, and betraying clients. “The SEC also charged Peter A. Jenson, Harbinger’s former chief operating officer, for aiding and abetting the misappropriation scheme.”

In particular, the SEC alleges that:

1. Falcone fraudulently obtained $113.2 million from a hedge fund that he advised and misappropriated the proceeds to pay his personal taxes;

2. Falcone and two Harbinger investment managers, through which Falcone operated manipulated the price and availability of a series of distressed high-yield bonds by engaging in an illegal “short squeeze;”

3. Falcone and Harbinger secretly offered and granted favorable redemption and liquidity rights to certain strategically important investors in exchange for those investors’ consent to restrict redemption rights of other fund investors, and concealed the arrangement from the fund’s directors and investors; . . . ”

13. Id.
The SEC alleged that these actions violated the antifraud provisions of the federal securities laws and sought permanent injunctive relief against each defendant to enjoin them from future violations of the federal securities laws, disgorgement of ill-gotten gains, financial penalties, and an order barring Falcone from serving as an officer or director of a public company.

In May, 2013, almost a year after the filing of the SEC complaints, Falcone’s publicly traded holding company disclosed in an SEC filing that Falcone and certain of his affiliated entities had reached an agreement in principle with the SEC staff to settle with the Commission. The terms of the prospective settlement provided that defendants would pay $18 million in disgorgement, prejudgment interest, and civil penalties. In addition, while Falcone would continue to serve as CEO and board chairman of his publicly traded holding company, he would be barred for two years from associating with a broker-dealer, investment adviser, and other regulated entities. The prospective settlement provided that the defendants would neither admit nor deny the SEC’s allegations.

As we have discussed above, on June 18, 2013, the Chair of the SEC announced that the agency was revising its longstanding policy of permitting defendants in SEC enforcement cases to settle proceedings without admitting or denying the government’s allegations. While the Chair stated that the Commission would continue its “neither admit nor deny” policy in settling certain cases, in other cases, where the public interest demanded public accountability, the SEC would seek admissions from defendants in order to settle.

On July 18, 2013, a month after its policy change announcement, the Commission voted to reject the agreement in principle that its staff had reached with Falcone and certain affiliated entities earlier in the year. While it is not completely clear what role the policy shift played in the Commission’s rejection of the settlement, the subsequent events are clear. On August 19, 2013, the SEC announced that a final settlement agreement had been reached with Falcone and Harbinger on the same terms as the earlier agreement in principle except for two important differences. First, Falcone’s bar was increased from two years to five years, and, second, in the final settlement papers filed with the court, the settling defendants had admitted to “multiple acts of misconduct that harmed investors and interfered with the normal functioning of the securities markets.” After the court approved the settlement on September 26, 2013, the SEC enumerated the defendant’s admissions as follows:

Among the set of facts that Falcone and Harbinger admitted to in settlement papers filed with the court:

- Falcone improperly borrowed $113.2 million from the Harbinger Capital Partners Special Situations Fund (SSF) at an interest rate less than SSF was paying to borrow money, to pay his personal tax

obligation, at a time when Falcone had barred other SSF investors from making redemptions, and did not disclose the loan to investors for approximately five months.

- Falcone and Harbinger granted favorable redemption and liquidity terms to certain large investors in HCP Fund I, and did not disclose certain of these arrangements to the fund's board of directors and the other fund investors.
- During the summer of 2006, Falcone heard rumors that a Financial Services Firm was shorting the bonds of [a] Canadian manufacturer, and encouraging its customers to do the same.
- In September and October 2006, Falcone retaliated against the Financial Services Firm for shorting the bonds by causing the Harbinger funds to purchase all of the remaining outstanding bonds in the open market.
- Falcone and the other Defendants then demanded that the Financial Services Firm settle its outstanding transactions in the bonds and deliver the bonds that it owed. Defendants did not disclose at the time that it would be virtually impossible for the Financial Services Firm to acquire any bonds to deliver, as nearly the entire supply was locked up in the Harbinger funds' custodial account and the Harbinger funds were not offering them for sale.
- Due to Falcone's and the other Defendants' improper interference with the normal interplay of supply and demand in the bonds, the bonds more than doubled in price during this period.\textsuperscript{15}

The SEC settlement with Peter A. Jenson, Harbinger's former chief operating officer and a chartered accountant, who was charged with aiding and abetting the loan transaction, did not occur until October 1, 2014. Jenson agreed to pay $200,000 to the SEC as a civil penalty, to be enjoined from participating in the securities industry for at least two years, and to be denied the privilege of appearing or practicing before the Commission as an accountant for a similar period. As part of his settlement, Jenson not only admitted to certain acts of misconduct as had Falcone and Harbinger, but, importantly, also acknowledged that his conduct violated the federal securities laws.

[Peter A. Jenson ("Jenson")] admits the facts set forth [below and] acknowledges that his conduct violated the federal securities laws. . .

1. On August 13, 2013, Philip A. Falcone ("Falcone") and Harbinger [Capital Partners LLC ("Harbinger")] entered into a Final Consent Judgment to resolve the claims asserted against them in the civil action 12-CV-5028 (PAC) (the "Action") pending in the United States District Court for the Southern District of New York. As part of the Consent Judgment, Falcone and Harbinger admitted, among other things, that on October 14, 2009, without seeking or obtaining investor consent, in connection with the purchase, offer or sale of a secur-

ity, Falcone improperly borrowed $113.2 million from the Harbinger Capital Partners Special Situations Fund, L.P. ("SSF") to pay his state and federal taxes.

2. Jenson, Harbinger’s Chief Operating Officer, among other things, executed the loan agreement and other transaction documents on behalf of the SSF in connection with the loan.

3. The loan agreement provided that “[t]he Lender’s counsel shall have provided advice to the Lender to the effect that the making of the Loan . . . would not be inconsistent with the Borrower’s fiduciary obligation to the Lender.” Jenson, however, did not ensure that SSF as lender had separate counsel, and did not ensure that the loan was consistent with the Borrower’s fiduciary obligation to the Lender.

4. Jenson also failed to ensure that Falcone paid an “above market” interest rate on the loan, failed to timely disclose the loan to investors, and failed to take actions to cause the SSF to accelerate Falcone’s payment on the loan once investors in the SSF were permitted to begin redeeming their investments.

5. Jenson, with knowledge of Falcone’s and Harbinger’s violations in connection with the loan, substantially assisted these violations.¹⁶

The Falcone, Harbinger, and Jenson settlements are not only significant because they represent, in the case of Falcone and Harbinger, the first settlements under the SEC’s new admissions policy, but for other reasons as well.

First, as set out above in the settlement between Falcone, Harbinger, and the SEC finalized on October 2, 2013, the defendants’ admissions of facts were described by the SEC as follows: “Among the set of facts that Falcone and Harbinger admitted to in settlement papers filed with the court [were the following]: . . .”¹⁷ By contrast, in the settlement between Jenson and the SEC in the same case one year later, defendant Jenson’s admissions of facts were coupled with his acknowledgement that his conduct had violated the federal securities laws as follows: “Peter A. Jenson ("Jenson") admits to the facts set forth below and acknowledges that his conduct violated the federal securities laws: . . .”¹⁸ Therefore, in summary, there are three different gradations of wording with respect to admissions or the lack of admissions in the SEC enforcement settlements involving Falcone and his associated parties. In the initial agreement in principle between Falcone, Harbinger, and the SEC staff, the defendants did not admit or deny the government’s allegations. After the Commission’s rejection of the initial agreement in principle, however, the final settlement agreement between Falcone, Harbinger, and the Commission contained crucial admissions of facts by the settling defendants. The final settlement

¹⁸. SEC Release No. 3589, supra note 16 (emphasis added).
agreement between Jenson and the SEC contained admissions of facts and an acknowledgment of violations of the federal securities laws. Clearly, for purposes of res judicata and collateral estoppel in parallel private damage actions, the different practical impacts that may result from these different gradations of wordings in SEC settlement agreements are potentially enormous.

Second, while the increasingly severe gradations from (1) neither admit nor deny, to (2) admissions of facts, to (3) admissions of facts accompanied by acknowledgements of violations of law, are clear, their application to specific defendants is puzzling. Jenson is only an aider and abettor while Falcone is the prime mover and prime wrongdoer; yet Jenson is required to acknowledge violations of law as well as admit facts while Falcone is permitted by the SEC to settle without any acknowledgement of violations of law.

Third, with respect to satisfying the criteria for requiring admissions of wrongdoing set out in the SEC Chair's public address on September 26, 2013, quoted above, the wrongdoings attributed to the primary wrongdoers in the Falcone case would appear to fully satisfy each and every one of Chair White's four enumerated sets of criteria. Falcone and Harbinger egregiously harmed a large number of investors by using their assets to pay Falcone's taxes, by secretly favoring certain customers to the detriment and at the expense of other customers, and by engaging in bond transactions in the public securities markets at arbitrary and inflated prices which Falcone and Harbinger had manipulated. Also, this conduct, particularly the manipulation of bond prices, posed a significant risk to the public securities markets. In addition, the admissions described above would warn investors against dealing with Falcone and Harbinger in the future and thereby send an important message to the markets. Unfortunately, however, these criteria, which are all-encompassing in their breadth, would apply to almost any enforcement proceeding initiated by the SEC, and, therefore, in reality, are not particularly useful in terms of practical guidance with respect to future admissions.

As of this writing the SEC has not clarified in any meaningful way the criteria that it will apply in determining the types of cases where admissions will be demanded from defendants to settle enforcement actions. Indeed, an analysis of the following SEC settlements which contain admissions and which have been concluded after the Commission's policy change in June, 2013, appears to offer little guidance with respect to when admissions will be required from defendants.

On September 19, 2013, the SEC charged JPMorgan Chase & Co "with 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 agreed to settle the SEC's charges by paying a $200 million penalty, ad-
mitting the facts underlying the charges and publicly acknowledging that it had violated the federal securities laws. The facts admitted by JPMorgan included the following:

- The trading losses occurred against a backdrop of woefully deficient accounting controls in the [firm’s chief investment office,] CIO, including spreadsheet miscalculations that caused large valuation errors and the use of subjective valuation techniques that made it easier for the traders to mismark the CIO portfolio.
- JPMorgan senior management personally rewrote the CIO’s valuation control policies before the firm filed with the SEC its first quarter report for 2012 in order to address the many deficiencies in existing policies.
- By late April 2012, JPMorgan senior management knew that the firm’s Investment Banking unit used far more conservative prices when valuing the same kind of derivatives held in the CIO portfolio, and that applying the Investment Bank valuations would have led to approximately $750 million in additional losses for the CIO in the first quarter of 2012.
- External counterparties who traded with CIO had valued certain positions in the CIO book at $500 million less than the CIO traders did, precipitating large collateral calls against JPMorgan.
- As a result of the findings of certain internal reviews of the CIO, some executives expressed reservations about signing sub-certifications supporting the CEO and CFO certifications required under the Sarbanes-Oxley Act.
- Senior management failed to adequately update the audit committee on these and other important facts concerning the CIO before the firm filed its first quarter report for 2012.
- Deprived of access to these facts, the audit committee was hindered in its ability to discharge its obligations to oversee management on behalf of shareholders and to ensure the accuracy of the firm’s financial statements.20

The SEC administrative order required JPMorgan Chase to cease and desist from causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Securities Exchange Act of 1934 and Rules 13a-11, 13a-13 and 13a-15.

This settlement appears to be the first case under the SEC’s new admissions policy where the defendant not only admitted certain facts, but also acknowledged violations of the federal securities laws—acknowledgements that may well have substantial collateral effects. These SEC demands, however, would seem to be justified in this high profile “London Whale” case against a mega financial institution where the dollars involved were substantial and the violations extremely serious. Moreover, JPMorgan’s CEO initially dismissed the allegations as “a tempest in a

20. Id. at 2.
teapot"—a statement guaranteed to heighten the regulatory response. On December 18, 2013, the SEC settled administrative proceedings containing fraud charges against three brokerage subsidiaries and two former employees of ConvergEx Group LLC, a global trading services provider that caused many institutional clients to pay substantially higher amounts than disclosed for the execution of trading orders. Under the terms of these settlements each of the defendants admitted the facts underlying the charges and publicly acknowledged that they had violated the federal securities laws. Parallel criminal charges against ConvergEx Group LLC, a brokerage subsidiary, and the two former employees were concurrently resolved, and the defendants agreed to pay an aggregate of fines, penalties, disgorgement, and interest totaling more than $150 million to resolve all administrative and criminal charges.

The SEC found that the defendants' acts violated Section 10(b) and 15(c) of the Securities Exchange Act of 1934 and described these acts as follows:

Customers with large orders typically rely on their brokers to execute orders on their behalf at the most favorable terms reasonably available. Monitoring the execution quality and costs of these orders can be difficult even for the most sophisticated investors given the complex nature of the markets where brokers must choose from a variety of order types, routing strategies, and trading venues.

According to the SEC's order instituting settled administrative proceedings, the ConvergEx brokerage firms represented to customers that they charge explicit commissions to execute equity trading orders. However, they routinely routed orders, including orders for U.S. equities, to an offshore affiliate in Bermuda that executed them on a riskless basis and opportunistically boosted their profits by adding a mark-up or mark-down on the price of a security. The offshore affiliate often consulted with the client-facing brokers to assess the risk of customer detection before taking the extra money on top of the disclosed commissions. The mark-ups and mark-downs caused many customers to unknowingly pay more than double what they understood they were paying to have their orders executed.

According to the SEC’s order, the ConvergEx brokerages involved in the scheme were G-Trade Services LLC, ConvergEx Global Markets Limited, and ConvergEx Execution Solutions LLC. Their cus-

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tomers included funds managed on behalf of charities, religious organizations, retirement plans, universities, and governments. The ConvergEx brokerages believed they would lose business if customers became aware of their mark-ups and mark-downs, so they engaged in specific acts to hide the scheme. Typically, they only took mark-ups and mark-downs on top of the disclosed commissions in situations where they believed the risk of detection was low. They also made false and misleading statements to customers who inquired about their overall compensation, even providing certain customers with falsified trading data to cover up the fact that the offshore affiliate had taken mark-ups or mark-downs on their orders.

The practice of executing orders through the offshore affiliate was not adequately disclosed to customers and was inconsistent with ConvergEx's advertised conflict-free agency model. Using this practice, the ConvergEx brokers failed to seek best execution for their customers' orders.23

It should be noted that in this ConvergEx case, the SEC's demands for admissions were an implementation of its policy decision on January 7, 2012 to drop its "neither admit nor deny" settlement language in cases where there were parallel criminal convictions or admissions by defendants of criminal violations. It should also be noted that the SEC's demands for admissions in this case would appear to be justified by the widespread global activities of the corporate defendant, the large number of customers affected, the magnitude of the monies involved, and by the serious nature of the violations.

On January 29, 2014, discount broker Scottrade, Inc. admitted SEC findings that for a period of six years it had failed to provide the SEC with complete and accurate information regarding trades completed by the firm and its customers, commonly called "blue sheet" data. The firm admitted SEC findings that it violated certain recordkeeping provisions of the federal securities laws, agreed to pay a $2.5 million penalty, and undertook to implement remedial measures. The SEC had requested the data while investigating unauthorized uses of accounts and found that certain "blue sheet" data was missing.24 The SEC's Administrative Order summarized the underlying policies, facts and violations as follows:

Scottrade admits the findings set forth in Section III below, . . .

III

On the basis of this Order and Respondent's Offer, the Commission finds that:

Summary

It is a fundamental obligation of broker-dealers to provide complete and accurate blue sheet data when requested by representatives of

the Commission to do so. Blue sheet data is critical to many aspects of the Commission's operations and its ability to discharge its enforcement and regulatory mandates. The failure of a broker-dealer to provide complete and accurate blue sheet information in response to a Commission request can impact the Commission's ability to discharge its statutory obligations, undermine the integrity of its investigations and examinations, and ultimately interfere with the Commission's ability to protect investors.

This action results from Scottrade's violation of the recordkeeping requirements of Section 17(a) of the Exchange Act and Rules 17a-4(j), 17a-25 and 17a-4(f)(3)(v) thereunder. From March 2006 through April 2012 (the "relevant period"), Scottrade failed to provide required accurate and complete blue sheet submissions to the Commission, and also failed to have an audit system that provided accountability regarding the inputting of records required to be maintained and preserved.

Section 17 of the Exchange Act imposes on broker-dealers recordkeeping requirements that are essential to the Commission's ability to enforce the federal securities laws and to protect investors. To ensure the continued effectiveness of the Commission's enforcement and regulatory programs, broker-dealers must comply with, among other things: Rule 17a-25, requiring that broker-dealers submit electronically securities transaction information upon request by the Commission's staff; Rule 17a-4(j), requiring broker-dealers to furnish promptly true, complete, and current copies of those records upon request by the Commission's staff; and Rule 17a-4(f)(3)(v), requiring broker-dealers to have an audit system that provides for accountability regarding the inputting of records required to be maintained and preserved. Scottrade failed to comply with these requirements . . . .25

The precise wording of this settlement order is a bit different from the wording in the Jenson, JPMorgan, and ConvergEx settlement orders. Scottrade admits "SEC findings" of facts and violations of law rather than admitting facts and acknowledging violations of law directly. While it is difficult to discern or anticipate any practical impact from this slight difference in wording, the difference does exist. More importantly, however, the SEC's policy of demanding admissions seems less justified in this case than in JPMorgan or ConvergEx. The dollar amounts involved are comparatively small. There are no criminal violations. The public impact is comparatively less consequential. And the violations of law regarding recordkeeping and satisfying SEC requests for "blue sheet" data are considerably less serious.

On February 21, 2014, Zurich based Credit Suisse Group AG agreed to pay $196 million, to admit certain facts, and to acknowledge certain violations of the federal securities laws to resolve an SEC administrative pro-

25. Id. at 1–2 (footnote omitted).
ceeding against it. The core of the admitted facts and acknowledged violations included charges that Credit Suisse had provided cross-border brokerage and investment advisory services to U.S. clients without first registering with the SEC.26 The admitted facts and acknowledged violations were summarized by the SEC as follows:

According to the SEC's order instituting settled administrative proceedings, Credit Suisse provided cross-border securities services to thousands of U.S. clients and collected fees totaling approximately $82 million without adhering to the registration provisions of the federal securities laws. Credit Suisse relationship managers traveled to the U.S. to solicit clients, provide investment advice, and induce securities transactions. These relationship managers were not registered to provide brokerage or advisory services, nor were they affiliated with a registered entity. The relationship managers also communicated with clients in the U.S. through overseas e-mails and phone calls.

According to the SEC's order, Credit Suisse began conducting cross-border advisory and brokerage services for U.S. clients as early as 2002, amassing as many as 8,500 U.S. client accounts that contained an average total of $5.6 billion in securities assets. The relationship managers made approximately 107 trips to the U.S. during a seven-year period and provided broker-dealer and advisory services to hundreds of clients they visited. Credit Suisse was aware of the registration requirements of the federal securities laws and undertook initiatives designed to prevent such violations. These initiatives largely failed, however, because they were not effectively implemented or monitored.

According to the SEC's order, it was not until after a much-publicized civil and criminal investigation into similar conduct by Swiss-based UBS that Credit Suisse began to take steps in October 2008 to exit the business of providing cross-border advisory and brokerage services to U.S. clients. Although the number of U.S. client accounts decreased beginning in 2009 and the majority were closed or transferred by 2010, it took Credit Suisse until mid-2013 to completely exit the cross-border business as the firm continued to collect broker-dealer and investment adviser fees on some accounts.

The SEC's order finds that Credit Suisse willfully violated Section 15(a) of the Securities Exchange Act of 1934 and Section 203(a) of the Investment Advisers Act of 1940. Credit Suisse admitted the facts in the SEC's order, acknowledged that its conduct violated the federal securities laws, accepted a censure and a cease-and-desist or-

der, and agreed to retain an independent consultant. Credit Suisse agreed to pay $82,170,990 in disgorgement, $64,340,024 in prejudgment interest, and a $50 million penalty.\textsuperscript{27}

As with respect to the JPMorgan and ConvergEx settlements discussed above, the SEC demands for admissions by Credit Suisse seem justified. Credit Suisse’s violations were serious, global in scope, affected hundreds of U.S. investors, and involved substantial sums of money. Also, the wrongdoing was known to the defendant bank for years, and the bank took years to comply fully with U.S. securities laws. Finally, and perhaps most important, at the time of the SEC investigation, Credit Suisse was also under investigation by the U.S. Department of Justice for allegedly assisting U.S. citizens for decades in concealing offshore assets and income from the Internal Revenue Service. Indeed, on May 19, 2014, three months after its SEC settlement, Credit Suisse pled guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the Internal Revenue Service. “[T]his guilty plea . . . [was] the result of a years-long investigation by U.S. law enforcement authorities that has also produced indictments of eight Credit Suisse executives . . . .”\textsuperscript{28}

For another settled SEC administrative proceeding against a Swiss bank for providing brokerage and advisory services to U.S. customers before registering with the SEC as a broker-dealer or investment adviser see In re HSBC Private Bank (Suisse), SA.\textsuperscript{29} To settle this proceeding, HSBC Private Bank admitted the alleged facts, acknowledged that its conduct violated the federal securities laws, accepted a cease and desist order as well as a censure, and agreed to pay a total of $12.5 million consisting of $5.7 million in disgorgement, $4.2 million in prejudgment interest, and a $2.6 million civil penalty. The SEC had alleged that the bank had realized approximately $5.72 million through its U.S. cross-border business activities between 2003 and 2011 in violation of Section 15(a) of the Securities Exchange Act of 1934 and Section 203(a) of the Investment Advisers Act of 1940.

While the SEC’s charges against HSBC paralleled the SEC’s charges against Credit Suisse and while there were also reported tax-evasion schemes involving HSBC that had attracted the attention of the criminal authorities, HSBC’s $12.5 million payout was only a fraction of Credit Suisse’s $196 million payout. These different payouts would seem to be explained by the different amounts of fees collected by the banks while not adhering to the registration requirements of the federal securities laws—$5.7 million by HSBC and $82 million by Credit Suisse—and the different interest payments thereby generated. The SEC’s admissions demands under its revised policy, however, were identical in both cases.

\textsuperscript{28} DOJ Press Release No. 14-531 (May 19, 2014).
\textsuperscript{29} SEC Admin. Proc. File No. 3-16288 (Nov. 25, 2014).
At the time of this writing, additional proceedings reflecting the SEC's new policy of requiring admissions of wrongdoing from defendants in order to settle certain charges are listed below. Because of the space limitations upon this article, the authors include only a listing of these additional settlements. A careful analysis of these settlements by the authors, however, has unearthed little additional guidance regarding SEC demands for admissions of wrongdoing in the future. The essential problem remains: a lack of standards or guidelines to both restrain the government and to offer a degree of predictability and protection for potential respondents.


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