SEC Extracts Public Confession

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The SEC's new policy of requiring more settling defendants to admit wrongdoing saw its first application in *SEC v. Falcone*, which was approved in the Southern District of New York on September 16, 2013. As part of that settlement, the defendants – hedge fund manager Philip Falcone and his advisory firm – admitted that they engaged in a market manipulation scheme; that, in order to pay his personal income taxes, Falcone improperly borrowed $113.2 million from a client hedge fund; and that they offered preferential redemption terms to large investors to gain support for more restrictive terms for smaller investors without properly disclosing the arrangement to independent trustees or other investors. The defendants agreed not to deny, directly or indirectly, or make any statements to the effect that they have not admitted the SEC's allegations against them, in addition to agreeing to a five year industry bar and disgorgement of more than $18 million. In announcing the new policy last June, SEC Chairperson Mary Jo White stated that such admissions, which stand in sharp contrast to the decades-old norm of settling defendants neither admitting nor denying wrongdoing, would be required in particularly egregious cases. This followed, among others, Southern District of New York Judge Jed Rakoff's highly publicized decision in 2011 (currently on appeal) refusing to approve a $285 million settlement between the SEC and Citigroup in part because Citigroup was not required to admit wrongdoing. Proponents argue that the new policy will help deter misconduct by enhancing the reputational harm resulting from wrongdoing, while critics worry that it will needlessly prolong litigation as defendants, unwilling to admit wrongdoing for fear it will enhance their exposure in investor lawsuits, choose to take their chances at trial.

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