

Rakoff Rebuffed on Rejection of SEC Settlement

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A three-judge panel of the U.S. Court of Appeals for the Second Circuit has vacated a provocative order by Southern District of New York Judge Jed Rakoff. In the November 2011 order, Rakoff rejected a proposed "no-admit, no-deny" consent decree to resolve an SEC enforcement action against Citigroup. See "Judges Refuse to Rubber Stamp SEC Settlements" and "SEC Enforcement Evolves," *Expect Focus*, Vol. I, Winter 2012. In vacating the order, **the Second Circuit found it "an abuse of discretion to require, as the district court did here, that the [SEC] establish the 'truth' of the allegations against a settling party."** The Second Circuit explained: "Trials are primarily about truth. Consent decrees are primarily about pragmatism [and] provide parties with a means to manage risk." Thus, while the reviewing court must assess whether the proposed consent decree is fair and reasonable, and whether the public interest would be disserved by any requested injunctive relief, "[t]he job of determining whether the proposed [SEC] consent decree best serves the public interest...rests squarely with the [SEC]." Moreover, the appellate court held that the district court could not second guess the nature of the charges the SEC brought (or failed to bring) against Citigroup. The Second Circuit also admonished, "Nor can the district court reject a consent decree on the ground that it fails to provide collateral estoppel assistance to private litigants – that simply is not the job of the courts." Not surprisingly, the SEC has publicly hailed the Second Circuit's ruling as a reaffirmation of "the significant deference accorded to the SEC in determining whether to settle with parties and on what terms." On remand, Judge Rakoff approved the Citigroup settlement, although he expressed concern that, under the Second Circuit's decision, regulators' settlements "will in practice be subject to no meaningful oversight whatsoever."

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