

Admissions of Wrongdoing Back in Vogue: SEC Enforcement Pendulum Swings

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The Securities and Exchange Commission (SEC) recently announced its intention to avoid “neither admit nor deny” settlements in some cases and instead return to an Obama-era policy requiring more individuals and companies to admit wrongdoing when settling civil enforcement actions.

That policy was something of an innovation. Previously, the SEC had a general practice of allowing settlements without admissions of wrongdoing, and under the Trump administration, the SEC had reverted to that past practice. The *Wall Street Journal* has now reported that, at a prominent SEC conference, Sanjay Wadhwa, the deputy director of enforcement at the SEC, stated that the SEC would seek admissions “in cases involving egregious misconduct” and where “a large number of investors were harmed or where defendants obstructed the SEC’s investigation.” At the same conference, the SEC’s enforcement chief, Gurbir Grewal, stated that the SEC would also use other remedial tools as appropriate, including officer and director bars, conduct-based injunctions, and undertakings such as a company’s agreement to hire an independent compliance consultant. Grewal framed the Commission’s goal as improving deterrence and boosting public trust in financial and government institutions.

The new policy brings with it new risks for companies, as admitting wrongdoing could have consequences in separate, private civil suits, such as class action lawsuits by shareholders or third parties. Admissions might also trigger “conduct” exclusions in D&O insurance policies that bar coverage for fraudulent conduct or intentional violations of the law. More dramatic still, admissions of wrongdoing could be used in parallel criminal proceedings.

For those reasons, a policy requiring admissions could increase the number of SEC cases that go to trial; litigants may be less willing to settle. If they do settle, they will have to focus on the precise language of the admissions.

However, it remains to be seen how the SEC will actually implement these policies, and how many cases those policies will actually affect.

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