

PUBLICATION

SEC Modifies Its "Neither Admit Nor Deny" Policy in Enforcement Actions

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For many years, the Securities and Exchange Commission (SEC) has permitted defendants in enforcement actions to settle actions by entering into settlement agreements in which the defendants neither admitted nor denied the SEC's allegations. The SEC has justified this "neither admit nor deny" policy as helping it reach settlements without prolonged litigation while achieving the goals of its enforcement program, namely: deterring misconduct by imposing appropriate sanctions; protecting investors by barring wrongdoers from employment and positions that place investors at risk; achieving corporate reform and other relief designed to prevent future violations; and quickly returning money to harmed investors. In the SEC's view, these settlements achieve a significant measure of accountability and deterrence because the complaints outline the SEC's findings and provide a roadmap of the alleged violations. Additionally, achieving quick results has allowed the SEC to deploy its limited resources efficiently and without litigation risk.

On January 7, 2012, following a review by its senior enforcement staff, the SEC modified its settlement policy for enforcement actions involving parallel criminal convictions and non-prosecution and deferred prosecution agreements that include admissions or acknowledgments of criminal conduct so that the "neither admit nor deny" language would be deleted from those settlements. That policy change did not, however, affect the SEC's traditional "neither admit nor deny" approach in settlements not involving criminal convictions or admissions or acknowledgments of criminal conduct.

Last week, the SEC announced an additional policy change, indicating that it will require, as a condition of settlement, an admission of wrongdoing in cases that are beyond the categories described above but that justify requiring the defendant's admission of the allegations of the SEC complaint or other acknowledgment of the alleged misconduct. Going forward, if the SEC determines that admissions of misconduct are critical, it will require such admissions as a condition of settling the enforcement action. The SEC did not indicate specific types of cases where admissions of misconduct would be critical, but it did state there may be cases "where heightened accountability or acceptance of responsibility through the defendant's admissions of misconduct may be appropriate, even if it does not allow us to achieve a prompt resolution." Examples of the criteria used to identify such cases "may include misconduct that harmed large numbers of investors or placed investors or the market at risk of potentially serious harm."

The SEC staff has recognized that insisting on admissions could delay the resolution of cases and that many cases will not fit the criteria for requiring admissions. Accordingly, notwithstanding this recent policy shift, most cases will still be settled under the "neither admit nor deny" policy.

If you have questions about the change in the SEC's "neither admit nor deny" policy, please contact one of the attorneys in Baker Donelson's Securities Practice Group.