Testimony on "Examining the Settlement Practices of U.S. Financial Regulators"

by

Robert Khuzami
Director of the Division of Enforcement
U.S. Securities and Exchange Commission

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Chairman Bachus, Ranking Member Frank, and Members of the Committee: I appreciate the opportunity to testify on behalf of the U.S. Securities and Exchange Commission regarding the Commission's practices concerning settled enforcement actions.

While numbers alone do not capture the breadth of the Commission's work, the SEC's enforcement program is achieving significant results. During FY 2011, the Commission filed 735 enforcement actions – more than the SEC has ever filed in a single year. In addition, the SEC obtained orders in FY 2011 for $2.8 billion in penalties and disgorgement. During the same period, the SEC filed 146 enforcement actions related to investment advisers and investment companies, a single-year record and a 30 percent increase over FY 2010. Also in FY 2011, the SEC filed 57 insider trading actions, a nearly eight percent increase over last year's total. And lastly, the SEC in FY 2011 brought 112 enforcement actions related to broker-dealers, a 60 percent increase over the prior fiscal year. Cases arising out of the financial crisis have been a particular priority of the Enforcement Division: to date, we have filed actions against 102 individuals and entities, naming 55 CEOs, CFOs, and other senior corporate officers, and obtaining orders for $2 billion.[1] Of course, statistics are just one consideration regarding the efficacy of an enforcement program, and one must also consider various qualitative factors as well. More significant than the number of cases filed is the fact that numerous cases filed by the Enforcement Division from FY 2009 through the present involve highly complex financial products, market practices, and transactions where the investor harm is great, the investigatory hurdles are significant, and the perpetrators most elusive.

As set forth more fully below, the SEC's settlement policies, like our Enforcement program more broadly, help protect investors. These policies, including the practice of

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[1]Additional information concerning the SEC's financial crisis-related enforcement actions is available at http://www.sec.gov/spotlight/enf-actions-fc.shtml. Additional information concerning SEC enforcement actions filed in FY 2011 is available at http://www.sec.gov/news/press/2011/2011-234.htm ("SEC Enforcement Division Produces Record Results in Safeguarding Investors and Markets") and http://www.sec.gov/about/secpar2011.shtml ("SEC FY 2011 Performance and Accountability Report").

permitting defendants in appropriate circumstances to settle matters on a “neither-admit-nor-deny” basis, are common not just across federal financial agencies, but across federal agencies more generally, and they serve the critical enforcement goals of accountability, deterrence, investor protection, and compensation to harmed investors. It is for these reasons that federal courts across the country have repeatedly approved settlements including “neither-admit-nor-deny” provisions.

The SEC’s Approach to Settlement

Under existing policy, the Division of Enforcement recommends that the Commission settle a case only when our informed judgment tells us that the settlement agreement is within the range of outcomes we reasonably can expect if we litigate through trial. In making that determination, we take into account many factors, including: (i) the strength of the evidence and the potential defenses, including the possibility that the Commission might not prevail at trial, or prevail but be awarded less than the proposed settlement achieves; (ii) the delay in returning funds to harmed investors caused by litigation; and (iii) the resources required for a trial, including, most importantly, the opportunity costs of litigating rather than devoting those resources to investigating other cases.

This approach to settlement serves the important goals of accountability, deterrence, investor protection, and compensation to harmed investors. With respect to accountability, before the Division recommends an enforcement action, Enforcement staff spends months or years building a case by gathering evidence, analyzing relevant documents, interviewing witnesses, and assessing possible defenses. In addition, potential defendants have the opportunity to present their defenses to the Commission in the form of a Wells Submission. Thus, the decision by the Commission to initiate an action – settled or litigated – is made with the benefit of a comprehensive evidentiary record and a full and fair opportunity to evaluate the risks of bringing the action. Moreover, SEC settlements are accompanied by a civil Complaint or an administrative Order Instituting Proceedings where the facts painstakingly gathered by the SEC staff – facts that reveal both the wrongdoing and the wrongdoers – are set forth in great detail. Through this process, we ensure that the decision to settle is an informed one; that wrongdoers are held accountable through the public dissemination of information about their misconduct; that, where appropriate, private litigants are able to utilize the SEC’s detailed allegations to assist their own cases; and that the public sees that wrongdoers suffer penalties, bars, and other sanctions at a point in time when the misconduct is still fresh in their minds.

The immediacy of sanctions offered by a settlement also sends a strong message of deterrence. Quick action by law enforcement communicates to other potential wrongdoers that those who violate the law face swift and certain sanctions. Conversely, the longer the passage of time between misconduct and sanctions, the more diluted the deterrence message becomes.

Similarly, appropriate settlements provide investors with greater protection, since violators are more quickly sanctioned in a manner that decreases the likelihood that they will commit future violations. This minimizes the chance that other investors will be victimized. This is particularly true where the settlement includes associational bars prohibiting violators from continuing to work in the securities industry or from serving as an officer or director of a public company.

Lastly, settlements return funds to harmed investors with increased speed and certainty. Even the strongest case can suffer unexpected outcomes in litigation, creating risk and uncertainty. The risks include not just a potential negative outcome at trial, but also the possibility that the SEC obtains lesser remedies after a successful trial than those being offered in a negotiated settlement. Settlement avoids these risks, and allows for a more expeditious distribution of funds to harmed investors, since the delay inherent in litigation is avoided. Such delays can be quite substantial, given the huge backlog of civil cases awaiting trial in federal courts. Indeed, the most recently available statistics indicate that the median time interval for disposition of civil cases across all U.S. federal district courts ranges from 19 months to 44 months.[2]

We recognize that to achieve appropriate settlements satisfying all four of these goals, potential defendants need to know that we are prepared to litigate cases in the event an appropriate settlement cannot be obtained. For that reason, the Enforcement Division has improved its capacity to bring cases to trial, and stands ready and willing to file our cases unsettled where settlement terms are unsatisfactory. For example, 75 percent of the SEC's financial crisis-related cases filed against individuals, including CEOs, CFOs and other high-ranking executives of companies, were filed as litigated actions. The fact that such a high percentage of cases are in litigation strongly suggests that some number of settlements were available but rejected by the SEC as inadequate. And when the Commission does litigate, our trial teams are largely successful. Our record of litigation victories – we have prevailed against defendants in 84 percent of our trials since the beginning of fiscal year 2010 – sends a strong message to defendants and those who may contemplate securities law violations in the future. This approach seems to be working. A recent independent study by NERA Economic Consulting concluded that the median monetary value of the Commission's settlements in fiscal 2011 was at or near its highest levels since the enactment of the Sarbanes-Oxley Act in 2002.[3] All of the above metrics – more litigated cases, more trial victories and higher monetary settlements – support the conclusion that we settle a case when it makes sense to do so, and litigate when it does not.

Many other federal agencies also resolve cases through negotiated settlements and consent judgments.[4] For example, in recent years, the EEOC resolved 80 percent of its cases and

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[2] Statistics identifying median time intervals from filing to disposition of civil cases by district and method of disposition for the 12-month period ending March 31, 2011 *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C05Mar11.pdf

[3] Gulker, Buckberg and Overdahl, *SEC Settlement Trends:2011 Update*, NERA Economic Consulting, January 23, 2012, *available at* http://www.securitieslitigationtrends.com/PUB_SEC_Trends_2H11_0112.pdf.

[4] Negotiated settlements submitted to a court for approval and entry of a judgment, such as those entered into by the SEC and other federal agencies, are called consent judgments or consent decrees. Consent judgments are unique forms of settlement because they possess "attributes both of contracts and of judicial decrees." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975). Fundamentally, consent judgments "embod[y] a

the FTC resolved 80 percent of its antitrust actions by consent judgment.[5] The "vast majority" of civil antitrust cases brought by the Department of Justice are resolved in this fashion.[6]

The availability of settlements or consent judgments is crucial for agencies and courts. In 1973, at a time when the SEC brought far fewer enforcement actions than it currently does, the Second Circuit Court of Appeals recognized that the Commission "can bring the large number of enforcement actions it does *only* because in all but a few cases consent decrees are entered."[7] Courts also benefit because consent judgments conserve judicial resources, which is a primary reason for the "strong federal policy favoring the approval and enforcement of consent decrees."[8] By "lessening docket congestion," consent decrees "make[] it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time."[9]

"Neither-Admit-Nor-Deny" Settlements are Both Common and Sound Public Policy

The SEC, like many other federal agencies without criminal prosecution authority, settles cases and obtains consent judgments on a "neither-admit-nor-deny" basis. This means that, while a defendant is not required to admit to the SEC's allegations of wrongdoing, it also is not permitted to deny the factual allegations in the SEC's Complaint or Order Instituting Proceedings as part of a negotiated settlement or consent judgment.

Consent judgments in which "none of the issues are actually litigated" – because the defendants do not admit, or outright deny, the factual allegations or liability – are the norm.[10] As one leading legal treatise states, the "central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented."[11]

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compromise." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) that, like any settlement, reflects a "balance of advantages and disadvantages." *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983).

[5] U.S. EEOC, *Office of the General Counsel Fiscal Year 2009 Annual Report*, at 62 (2009); U.S. FTC, *The FTC in 2010*, at 2 (2010).

[6] Acting Principal Deputy Assistant Attorney General John M. Nannes, *Termination, Modification, and Enforcement of Antitrust Consent Decrees*, 15 ANTITRUST 55, 55 (2000).

[7] *SEC v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1973) (emphasis added).

[8] *Wang*, 944 F.2d at 85; *Anita Foundations, Inc. v. ILGWU Nat'l Retirement Fund*, 902 F.2d 185, 190 (2d Cir. 1990) (settlements "represent compromise and conservation of judicial resources, two concepts highly regarded in American jurisprudence").

[9] *Evans v. Jeff D.*, 475 U.S. 717, 760 n.15 (1986).

[10] RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

[11] 18A Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 4443, at 256–57 (2d ed. 2002).

The Supreme Court has recognized that defendants entering into injunctive consent judgments "often admit to no violation of the law."[12] In describing one consent decree, which stated that nothing in the decree was "intended to constitute an admission of fault," the Supreme Court stated that it was "customary" that "the consent decree did not purport to adjudicate" the plaintiff's claims.[13] Indeed, the Supreme Court has discussed consent judgments containing similar provisions without any suggestion that they are unfair, unreasonable, inadequate, or not in the public interest.[14]

Many federal agencies negotiate settlements in federal court and administrative proceedings containing "no admit" provisions. Several recent examples include:

- A settlement between the CFTC and Goldman Sachs Clearing & Execution, L.P. announced on March 13, 2012 where Goldman Sachs agreed to pay a $7 million fine for supervision failures and the settlement documents stated that *"[w]ithout admitting or denying any of the findings or conclusions herein*, Goldman Sachs Execution and Clearing, L.P. consents to the entry of this Order …"[15]

- A settlement between the FDIC and certain directors and officers of Washington Mutual announced on December 15, 2011 where the settlement documents provided that it "*shall not be deemed to constitute an admission by Defendants of fault, liability, or wrongdoing* …"[16]

- A consent order imposed by the Federal Reserve against Morgan Stanley announced on April 3, 2012 to address a pattern of misconduct and negligence in residential mortgage loan servicing and foreclosure practices at its subsidiary, Saxon Mortgages Services, Inc. where the consent order states that "*without this Order constituting an admission* by [Morgan Stanley], Saxon, or their subsidiaries of any allegation made or implied by the Board of Governors in connection with this matter …"[17]

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[12] *ITT Continental Baking*, 420 U.S. at 236 n.10.

[13] *Maher v. Gagne*, 448 U.S. 122, 126 n.8 (1980).

[14] *See, e.g., Swift & Co. v. United States*, 276 U.S. 311 (1928) (refusing to vacate consent judgment in which defendant denied allegations of complaint); *United States v. Armour & Co.*, 402 U.S. 673 (1971) (addressing same consent judgment); *accord Arizona v. California*, 530 U.S. 392, 414 (2000); *Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992); *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561, 565, 577 (1984); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 & n.3 (1959); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 141 n.3 (1948).

[15] *Available at* http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfgoldmanorder031312.pdf.

[16] *Available at* http://www.fdic.gov/news/news/press/2011/pr11192.html.

[17] *Available at* http://www.federalreserve.gov/newsevents/press/enforcement/20120403b.htm

In addition, while the SEC does not permit denials of wrongdoing by defendants in its settled enforcement actions, some federal agencies do permit such denials in the context of settlements. Recent examples include:

- A civil settlement with Bank of America announced by the Department of Justice on December 21, 2011 in which Bank of America agreed to pay $335 million in a fair-lending settlement concerning Countrywide's loan practices where the settlement documents provided that "the Defendants *deny all of the allegations and claims* of a pattern or practice of discrimination in violation of the FHA and ECOA as set forth in the United States' Complaint."[18]

- A settlement with Facebook announced by the FTC on November 29, 2011 in which Facebook agreed to settle charges that it "deceived consumers by failing to keep privacy promises" where the settlement documents provide that "Respondent *expressly denies the allegations* set forth in the complaint, except for the jurisdictional facts."[19]

Indeed, the SEC goes one step further and not only prohibits defendants from denying wrongdoing in a settlement, but has demanded a retraction or correction on those occasions when a defendant's post-settlement statements are tantamount to a denial.[20]

There is little dispute that if "neither-admit-nor-deny" settlements were eliminated, and cases could be resolved only if the defendant admitted the facts constituting the violation, or was found liable by a court or jury, there would be far fewer settlements, and much greater delay in resolving matters and bringing relief to harmed investors. The reality is that many companies likely would refuse to settle cases if they were required to affirmatively admit unlawful conduct or facts related to that conduct. This is because such admissions would not only expose them to additional lawsuits by private litigants seeking damages, but would also risk a "collateral estoppel" effect in such lawsuits. This means that a defendant could, as a result of the admission in the SEC settlement, be precluded from challenging liability in the private civil litigation. In addition, and most significantly, such an admission can help to establish elements of criminal liability, since many federal securities laws provide for both civil and criminal liability for the same violation. At a minimum, the risks of increased civil and criminal liability that flow from an admission in an SEC action are sufficiently real that defendants are highly unlikely to settle, if at all, until those risks have passed or are quantified and deemed acceptable.

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[18] *Available at* http://www.justice.gov/crt/about/hce/documents/countrywidesettle.pdf.

[19] *Available at* http://ftc.gov/opa/2011/11/privacysettlement.shtm.

[20] For example, in April 2003, after participating with several Wall Street firms in an global settlement with the Commission and state regulators, Morgan Stanley, through its CEO, Phillip Purcell, downplayed the seriousness of the charges against it and attempted to characterize itself as less culpable than other settling firms. In response, SEC Chairman Donaldson sharply rebuked Purcell, reminding him that "the [C]omission would regard a violation [of the duty not to deny the Commission's findings] as seriously as a failure to comply with any other term of the settlement." Purcell then issued a letter expressing regret and stating that the firm would not deny the allegations. *See* Floyd Norris, Morgan Stanley Draws SEC's Ire, THE NEW YORK TIMES, May 2, 203, Section A., Col. 1, Business/Financial Desk p. 1.

To be clear, the Commission has no sympathy for alleged securities law violators, or for the increased legal risks those companies or other defendants may face if required to admit wrongdoing as a condition of settlement. While some assert admissions may provide marginally increased accountability, the fact is that requiring admissions as a condition of settlement would likely result in longer delays before victims are compensated, dilution of the deterrent impact of sanctions imposed because of the passage of time, and the expenditure of significant SEC resources that could instead be spent stopping the next fraud. All of these are the very real costs of refusing to settle cases where we otherwise have obtained most or all of the sanctions and other remedies available to compensate and protect harmed members of the public.

The Commission discussed these costs, as well as the other factors that the Commission considers when deciding whether to settle any particular case, as part of its filings in the *Citigroup* case, which is currently on appeal before the United States Court of Appeals for the Second Circuit. The Commission charged Citigroup with violating the Securities Act of 1933 and simultaneously entered into a proposed consent judgment with Citigroup that resolved these charges. Through the consent judgment, which contained "neither admit nor deny" language, the Commission obtained most of what it could have obtained after a successful trial, including injunctive relief and $285 million in disgorgement, interest, and penalties. The district court rejected the consent judgment because, in the district court's words, it was not based on "facts, established by admissions or by trials."

The Commission appealed to the Second Circuit. To avoid wasting resources on a trial that would not occur if the district court's ruling were reversed, the Commission sought to stay the district court proceedings pending appeal. The Second Circuit granted the Commission's request on March 15, 2012. In its stay order, which is not dispositive, the Second Circuit held that the Commission had "made a strong showing of likelihood of success" on the merits, stating that it knew "of no precedent" supporting the proposition that admissions are a precondition for the approval of a consent judgment and finding it "doubtful" that the district court properly deferred to the Commission's judgment that the settlement was in the public interest.

The Second Circuit's preliminary decision also acknowledged the "numerous factors" that inform the Commission's exercise of this judgment, explaining that these factors "include the value of the particular proposed compromise, the perceived likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt." The Commission's decision to settle also features "an assessment of how the public interest is best served," and the Second Circuit saw "no basis to doubt that the SEC's decision was in the public interest." Indeed, the Commission takes seriously its responsibility to assess whether a proposed settlement serves the public interest and in our view we exercise this authority with due consideration.

The reasons described above are among the factors weighed by the Commission when resolving cases though negotiated settlements and consent judgments on a "neither-admit-nor-deny" basis. And these reasons are among the reasons why federal courts across the country have time and again approved settlements by federal agencies containing "neither-admit-nor-deny" terms, or terms providing for the outright denial of allegations. In enforcing the securities,[21] antitrust,[22] environmental,[23] consumer protection,[24] public health,[25] and civil rights laws,[26] federal courts have entered consent judgments in actions resolved by federal agencies

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[21] Nearly all of the largest injunctive consent judgments proposed by the Commission and approved in federal court in 2010 and 2011 contain "neither-admit-nor-deny" clauses. *See, e.g.*, *SEC v. Alexander* (E.D.N.Y. Nov. 30, 2010) ($54 million) http://sec.gov/litigation/litreleases/2010/lr21753.htm; *SEC v. JP Morgan Secs. LLC*, (D.N.J. Jul. 7, 2011) ($51 million) http://sec.gov/litigation/litreleases/2011/lr22031.htm; *SEC v. Johnson & Johnson*, (D.D.C. Apr. 13, 2011) ($49 million) http://sec.gov/litigation/litreleases/2011/lr21922.htm; *SEC v. UBS Fin. Servs.*, (D.N.J. May 6, 2011) ($47 million) http://sec.gov/litigation/litreleases/2011/lr21956.htm; *SEC v. Alcatel-Lucent, SA*, (S.D. Fla. Dec. 30, 2010) ($45 million) http://sec.gov/litigation/litreleases/2010/lr21795.htm; *SEC v. ENI, S.p.A*, (S.D. Tex. Jul. 20, 2010) ($125 million) http://sec.gov/litigation/litreleases/2010/lr21588.htm; *SEC v. Technip*, (S.D. Tex. Jul. 9, 2010) ($98 million) http://sec.gov/litigation/litreleases/2010/lr21578.htm; *SEC v. Citigroup Inc.*, (D.D.C. Oct. 8, 2010) ($75 million) http://sec.gov/litigation/litreleases/2010/lr21605.htm; *SEC v. ABB Ltd.*, (D.D.C. Oct. 12, 2010) ($39 million) http://sec.gov/litigation/litreleases/2010/lr21673.htm; *SEC v. Diebold, Inc.*, (D.D.C. Jun. 14, 2010) ($25 million) http://sec.gov/litigation/litreleases/2010/lr21543.htm; *SEC v. General Elec. Co.*, No. (D.D.C. Jul. 30, 2010) ($23 million) http://sec.gov/litigation/litreleases/2010/lr21602.htm; *SEC v. Pequot Capital Mgmt.*, (D. Conn. Jun. 2, 2010) ($23 million) http://sec.gov/litigation/litreleases/2010/lr21540.htm.

[22] Antitrust consent decrees in which a defendant does not admit or outright denies liability or the allegations in the complaint have restructured entire industries, significantly affecting the economy. RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE 1 (2007). In *United States v. Microsoft*, the Department of Justice used the "not uncommon technique" of entering into a consent decree to resolve allegations that Microsoft unlawfully monopolized the market for operating systems for IBM-compatible PCs. 56 F.3d 1448, 1451–52 (D.C. Cir. 1995). The district court rejected the proposed consent decree and criticized the absence of an admission. The D.C. Circuit reversed, holding that the judge's "criticism of Microsoft for declining to admit that the practices charged in the complaint actually violated the antitrust laws" was "unjustified." *Id*. In addition, "no admit" clauses were central to consent decrees that fundamentally altered the meatpacking industry, *Swift*, 276 U.S. at 320; that dismantled AT&T, one of the world's largest corporations at the time, *United States v. AT&T*, 552 F. Supp. 131, 143 (D.D.C. 1982) (decree "would not constitute any evidence against, an admission by, or an estoppel against AT&T"), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); that forced IBM to license its patents and spin off its service business, *United States v. IBM Corp.*, No. 72-344 (S.D.N.Y. Jan. 25, 1956) (consenting to judgment "without any admission by either party with respect to any such issue"); and that resolved charges of price fixing asserted against six American airlines, *United States v. Airline Tariff Publ'g Co.*, 1994 U.S. Dist. Lexis 11904 (D.D.C. Aug. 10, 1994) (consent judgment would "not be evidence against or an admission by any party with respect to any issue of fact or law").

[23] *See, e.g.*, *United States v. American Electric Power Serv. Corp.*, No. 99-1250 (S.D. Ohio Dec. 10, 2007) (In this largest consent judgment in EPA history (measured by the cost of the injunctive relief), the defendant, which denied that it violated the Clean Air Act or was liable "for civil penalties or injunctive relief," agreed to spend approximately $4.6 billion to cut emissions and to pay a $15 million penalty); *United States v. BP Prods. North America Inc.*, No. 4:10-cv-3569 (S.D. Tex. Dec. 30, 2010) (BP resolved charges that it violated the Clear Air Act in connection with the Texas City refinery explosion, which killed 15 people and injured 170, by entering into a consent judgment that ordered it to undertake an array of remedial measures and pay one of the largest civil penalties ever assessed for Clean Air Act violations at an individual facility. BP consented "without the adjudication or admission of any issue of fact or law" and did "not admit any liability to the United States arising out of the allegations in the complaint."); *United States v. Massey Energy Co.*, No. 07-2999 (S.D. W.Va. Apr. 9, 2008) (defendants, who did "not admit any liability," agreed to undertake various remedial measures and pay a $20 million penalty, one of the largest ever penalties for wastewater discharge violations); *United States v. Caterpillar, Inc.*, No. 98-02544 (D.D.C. Jul. 1, 1999), cited by *United States v. Caterpillar, Inc.*, 2002 U.S. Dist. Lexis 468, at *7 (D.D.C. Jan. 17, 2002) (a group of defendants, which denied violating the Clean Air Act, agreed to spend nearly $1 billion dollars in remediation and pay a $83.4 million penalty); *United States v. Koch Indus*., No. H-95-1118 (S.D. Tex. Mar. 7, 2000) (defendant, which did "not admit to any liability," resolved claims related to over 300 oil spills by agreeing to clean up the spills and pay a $30 million penalty, one of the largest penalties ever imposed upon a single company).

through negotiated settlements that may require the payment of significant penalties, imposition of substantial injunctive relief, and a prohibition against future violations of the law, among other things, but in which a defendant does not admit, or outright denies, factual allegations.

<u>Recent Modifications to "Neither-Admit-Nor-Deny" Resolutions are Narrow in Scope</u>

As noted, federal agencies commonly use, and federal courts commonly approve, settlements of civil enforcement actions on terms that do not require admissions, all to sound public policy effect. In light in the special situation where an SEC civil action may also involve a parallel criminal action, senior officials in the Division of Enforcement recently undertook a review of the "neither-admit-nor-deny" settlement policy. While reaffirming the policy more generally, as a result of this review, the Division, after consulting with the Commission, modified its policy to eliminate "neither-admit-nor-deny" language that could be construed as inconsistent with admissions or findings made in a parallel criminal proceeding.[27] In other words, it seemed unwarranted for there to be a "neither-admit-nor-deny" provision in those cases where a defendant had already admitted to, or been criminally convicted of, conduct that formed the basis of a parallel civil enforcement proceeding.

As a result of this change, the SEC will no longer include "neither-admit-nor-deny" language in those settlements where there is a parallel criminal conviction (by plea or verdict) involving factual or legal claims that overlap to some degree with the factual or legal claims set out in the Commission's Complaint or Order Instituting Proceedings. This change will only affect a minority of cases, and does not affect our traditional "neither-admit-nor-deny" approach

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[24] *FTC v. Countrywide Home Loans*, No. 10-4193 (C.D. Cal. Jun. 15, 2010) (Countrywide Home Loans, "without admitting any of the allegations" that it overcharged 500,000 borrowers, entered into a consent judgment in which it agreed to be enjoined from engaging in certain conduct, to change its lending practices, and to pay $108 million); *United States v. Choicepoint, Inc.*, No. 1:06-cv-0198 (N.D. Ga. Feb. 15, 2006) (ChoicePoint, a data broker accused of unlawfully disclosing the records of nearly 200,000 consumers, agreed to injunctive relief and payment of the largest-ever civil penalty imposed by the FTC as part of a consent judgment that stated, "Defendant makes no admissions to, and denies, the allegations in the complaint.").

[25] Consent decrees between the FDA and biomedical firms accused of violating the Food, Drug, and Cosmetic Act contain similar disclaimers of admissions and liability. In one consent judgment, Abbott Laboratories agreed to pay a $100 million fine and to cease manufacturing over 50 diagnostic products "without admitting the allegations of the Complaint." *United States v. Abbott Laboratories*, No. 99 C 7135 (N.D. Ill. Nov. 2, 1999). Schering-Plough paid a $500 million fine—the largest at the time—and halted production of nearly 75 drugs "without admitting or denying the allegations of the Complaint and disclaiming any liability in connection herewith." *United States v. Schering-Plough Corp.*, No. C 02-2397 (JAP) (D.N.J. May 20, 2002).

[26] The approval of consent judgments that order significant injunctive relief without admissions by defendants—or with outright denials by defendants—also occurs with great frequency in the civil rights context. As just one example among many, state and municipal law enforcement agencies have altered their policing practices as a result of approved consent judgments in which the law enforcement agencies denied allegations of unconstitutional conduct by police officers. *E.g.*, *United States v. City of Los Angeles*, No. 00-11769 GF (C.D. Cal. Jun. 15, 2001) ("defendants deny the allegations in the complaint"); *United States v. New Jersey*, No. 99-5970 (D.N.J. Dec. 30, 1999) (the State "denies" the allegations).

[27] January 7, 2012 statement by Robert Khuzami on this policy change available at http://www.sec.gov/news/speech/2012/spch010712rsk.htm

in settlements that do not involve criminal convictions or admissions of criminal law violations.[28]

Conclusion

In sum, settling enforcement actions in appropriate circumstances allows the Commission to advance its investor protection mandate effectively and efficiently. We agree to settlements when the terms reflect what we reasonably believe we could obtain if we litigate through trial without the risk of delay and uncertainty that comes with litigation. Equally important, this settlement approach provides public accountability closer in time to securities laws violations with a detailed SEC Complaint or Order outlining the facts developed through a comprehensive investigation and identifying the wrongdoers by name. Settlements result in the prompt payment of disgorgement and penalties (which can be returned to injured investors), and the timely imposition of industry bars or other appropriate relief on wrongdoers, which protects investors and sends a strong deterrent message to the public. Our approach also preserves resources that we can use to stop other frauds and protect other victims. This approach, like the approach of other federal agencies, may require some measure of reasonable compromise, but is calibrated to redress wrongs committed by securities law violators, preclude wrongdoers from working with the investing public in the future, reform company practices, deter similar misconduct by others, and return funds directly to harmed investors in a timely manner.

Thank you for the opportunity to be here today. I am happy to answer any questions.

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[28] A respondent in an SEC action recently admitted limited factual findings that were admitted for the purpose of a state civil enforcement consent order, while otherwise neither admitting nor denying the SEC's findings. *See* http://www.sec.gov/news/press/2012/2012-61.htm (press release describing SEC action against Goldman Sachs & Co charging that Goldman lacked adequate policies and procedures to address the risks posed by research "huddles" with a parallel action by the Massachusetts Securities Division).