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Allowing firms to enter into consent judgments without having to admit material facts or liability prevents excessive disruption of the regulatory/enforcement framework. Read more from Paul, Weiss litigators **Brad Karp** and **Susanna Buerger**.

FOR: Neither admit nor deny

For nearly 50 years, regulatory and enforcement agencies entered into hundreds of consent judgments that all shared one critical attribute: the settling corporate defendant neither admitted nor denied the allegations asserted in the charging instrument. “Neither admit nor deny” settlements had become an article of faith, with district courts uniformly declaring them fair, reasonable, and adequate—with only two exceptions. And in both cases, federal courts of appeal emphatically ruled that those district courts had committed reversible error in rejecting the neither admit nor deny settlement structure.

Then, on November 28, 2011, highly regarded SDNY Judge Jed Rakoff condemned this practice in *SEC v. Citigroup Global Markets*, describing neither admit nor deny settlements as unfair, unreasonable, inadequate, and contrary to the public interest. Several other district judges followed Judge Rakoff’s lead.

Within a matter of months, the appropriateness of neither admit nor deny settlements became a red-hot topic of debate among judges, regulators, enforcement officials, and academics. Ultimately, the Second Circuit Court of Appeals reversed Judge Rakoff’s ruling and decisively held that regulators have ample discretion to exercise their judgment and resolve matters on a neither admit nor deny basis, free from judicial second-guessing.

Although the power of regulators to enter into neither admit nor deny settlements is now beyond doubt, the question still remains whether these settlements are an appropriate means of resolving regulatory and enforcement matters. We believe they are, for many salutary reasons—just as numerous regulatory and enforcement agencies and hundreds of judges have determined over the decades.

Most significantly, a neither admit nor deny consent judgment allows a corporate defendant to avoid making admissions that could be used against it in parallel civil litigation. Such a result enables a corporation to resolve regulatory exposure efficiently and continue its business for the benefit of its many stakeholders without a cloud of legal uncertainty or the prospect of additional exposure threatening its viability. Employees will retain their jobs. Creditors will be paid. Commercial counterparties can enforce their contracts. And

allegedly harmed individuals will be provided relief promptly.

Requiring corporations to admit material facts or liability as a condition of entering into a consent judgment can have devastating consequences. In the wake of any government investigation, plaintiffs’ lawyers circle. The settlements extracted in parallel civil litigation often are an order of magnitude greater than the penalties exacted by the government. Corporations cannot effectively defend these civil lawsuits if they have been forced to make material admissions as the price of a regulatory settlement. Indeed, in recognition of this dynamic, although the SEC now seeks admissions as a matter of policy in certain limited circumstances, it generally does not demand admissions when corporations face the prospect of collateral civil liability unless criminal conduct has been proved.

Moreover, by enabling corporations to avoid collateral estoppel effects, neither admit nor deny consent judgments encourage negotiated resolutions, which the Supreme Court has consistently favored for nearly a century. Under a regulatory regime that insists on admissions, corporations would be deterred from entering into settlements with government regulators, given the potentially dire consequences that would ensue. Instead, corporations would be incentivized to defend regulatory investigations and proceedings through trial, consuming scarce government resources and limiting the ability of regulators to pursue other cases and fulfill their enforcement mission. Contested proceedings also would congest the dockets of courts around the country, further increasing the burden on judges and depriving many litigants of their opportunity for swift justice.

Neither admit nor deny settlements are a key and necessary component of our nation’s regulatory framework, and have been for almost half a century. They facilitate the smooth operation of our regulatory and enforcement system, allowing sensible resolutions to be reached quickly without years of contested proceedings. They enable government attorneys to investigate other matters and fulfill their enforcement mission. They spare corporate shareholders potentially crippling exposure. And they preserve accountability for individual wrongdoers. ■