

White Collar Defense & Investigations and  
Securities Litigation & Enforcement  
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To: Our Clients and Friends

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## SEC Changes Settlement Policy for Enforcement Actions With Parallel Criminal Proceedings

The Securities and Exchange Commission (“SEC”) announced earlier this month a significant change in its settlement policy for civil enforcement actions in which the defendant is also subject to parallel criminal proceedings. Under the SEC’s new policy, any defendant who has admitted to or been found guilty of criminal conduct cannot settle parallel SEC charges without also admitting the SEC’s allegations.

In addition, the new policy permits the SEC staff to include in settlement documents a description of the criminal conduct and, importantly, any relevant facts that the defendant may have admitted during a plea allocution or in a non-prosecution agreement (“NPA”) or deferred prosecution agreement (“DPA”). As in the past, defendants will be further prohibited from denying the SEC’s allegations or suggesting that they are not based in fact.

This is a significant change for the cases to which the new policy applies. The SEC has traditionally permitted all defendants in civil enforcement proceedings to enter into consent orders without admitting or denying the allegations in the civil complaint. This practice has come under fire in recent months, most notably in the November decision by Judge Jed Rakoff in *SEC v. Citigroup Global Markets, Inc.*, Case No. 1:11-cv-07387-JSR (S.D.N.Y. Nov. 28, 2011).

In the *Citigroup* decision, Judge Rakoff rejected a proposed consent order and settlement of the SEC’s civil charges against Citigroup. Judge Rakoff stated that, in the absence of admitted or adjudicated facts, he had no basis to evaluate whether the settlement was fair, reasonable, adequate, or in the public interest. The SEC and Citigroup have both appealed Judge Rakoff’s decision, and the SEC has also filed a mandamus proceeding.

In addition to Judge Rakoff, Judge Rudolph T. Randa of the United States District Court for the Eastern District of Wisconsin has similarly questioned an SEC proposed settlement, and the House Financial Services Committee has announced that it will hold hearings on the issue.

The SEC’s statement announcing the new settlement policy expressly denied that this action is related to or a result of the *Citigroup* proceedings, which do not involve parallel criminal proceedings.

The SEC's new policy will not affect the majority of SEC enforcement proceedings. Rather, it applies only to enforcement proceedings in which (1) a defendant is also subject to parallel criminal proceedings *and* (2) the defendant has admitted or acknowledged criminal conduct. It is unclear, however, whether the policy will evolve and affect other situations, such as SEC civil actions involving multiple defendants or separate cases involving related conduct. For example, it remains to be seen whether the SEC begins to insist that a settling corporate defendant admit facts admitted by an officer or director in a related criminal proceeding (or in an administrative proceeding in which the SEC has made "findings" of misconduct). Answers to such questions may not emerge until after the Second Circuit rules on the SEC's appeal in the *Citigroup* case and the results of Congress's consideration of the issue become clear.

For questions or further information, please speak to your Bryan Cave contact, a member of our [White Collar Defense and Investigations](#) or [Securities Litigation and Enforcement](#) groups, or the authors of this client alert:

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