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## Is Too Big to Fail Too Big to Confess?: Scrutinizing the SEC's "No-Admit" Consent Judgment Proposals

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# IS TOO BIG TO FAIL TOO BIG TO CONFESS?: SCRUTINIZING THE SEC'S "NO-ADMIT" CONSENT JUDGMENT PROPOSALS

**Abstract:** When the Securities and Exchange Commission initiates court action against a public company for violation of federal securities laws, it often proposes a court-enforced settlement between the parties known as a “consent judgment.” Nearly all SEC consent judgment proposals contain a “no-admit” clause, whereby the defendant explicitly refuses to confess to the allegations asserted in the SEC’s complaint. Although “no-admit” consent judgments avoid the costs and uncertainties associated with prolonged litigation, they might not be effective in deterring future misconduct, and they could conceal the full truth about the defendant’s wrongdoing. In the wake of the 2008 financial crisis, courts have increasingly questioned whether the SEC’s “no-admit” consent judgment proposals adequately promote the public interest. Despite the courts’ concerns, however, the SEC—and not the courts—is in the best position to assess whether its consent judgment proposals promote the public interest and to implement suitable changes. Accordingly, to ensure that consent judgment proposals do in fact promote the public interest, the SEC should reevaluate its current settlement practices and make appropriate adjustments.

## INTRODUCTION

During childhood, many disputes end by way of forced apology.<sup>1</sup> But in the securities world, malfeasants rarely acknowledge responsibility for their actions.<sup>2</sup> In fact, under the Securities Exchange Commission’s (SEC) standard settlement terms, malefactors may expressly refuse to confess to wrongdoing.<sup>3</sup> Since November 2011, in *SEC v. Citigroup Global Markets Inc. (Citigroup I)*, when Judge Jed S. Rakoff of the United States District Court for the Southern District of New York struck down a \$285 million settlement between the SEC and a subsidiary of Citigroup Inc. because the company explicitly refused to admit

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<sup>1</sup> Cathy Cassani Adams, *The Forced Apology—A Path to Peace?*, CHI. PARENT (OCT. 20, 2011), <http://www.chicagoparent.com/community/the-self-aware-parent/2011/october/the-forced-apology—a-path-to-peace>.

<sup>2</sup> Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627, 647 (2007).

<sup>3</sup> *Id.*

to misconduct, the SEC has come under increasingly intense pressure to force defendants to own up like grown-ups.<sup>4</sup>

The recent controversy originates in the SEC's endemic use of "no-admit" consent judgment proposals.<sup>5</sup> A "no-admit" consent judgment enforces a settlement containing a "no-admit" clause, under which the defendant explicitly disclaims any admissions of wrongdoing.<sup>6</sup> Defendants value "no-admit" clauses because they help to eliminate collateral estoppel effects and mitigate potential economic and reputational repercussions.<sup>7</sup> The SEC, in turn, willingly employs "no-admit" clauses to extract other concessions and to avoid the costs and uncertainty of trial.<sup>8</sup>

Critics, however, assert that "no-admit" consent judgments do not adequately promote the public interest because the judgments do not deter future misbehavior or aid the public in learning the truth about a defendant's prior misbehavior.<sup>9</sup> Moreover, "no-admit" consent judgments diminish a defendant's anticipated adverse consequences and thereby encourage unlawful conduct.<sup>10</sup> Additionally, such "no-admit"

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<sup>4</sup> See SEC v. Citigroup Global Mkts. Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 332, 335 (S.D.N.Y. 2011); Joe Palazzolo, *Law Professors Jump in Rakoff's Corner*, WALL ST. J.L. BLOG (Aug. 17, 2012, 9:54 AM), <http://blogs.wsj.com/law/2012/08/17/law-professors-jump-in-rakoffs-corner/>.

<sup>5</sup> See *Citigroup I*, 827 F. Supp. 2d at 328, 332, 335; Palazzolo, *supra* note 4 (indicating that many law professors oppose the SEC's "prevalent practice" of settling enforcement action by consent judgments).

<sup>6</sup> Johnson, *supra* note 2, at 647. The SEC allows defendants to settle on a "no-admit" basis by including a clause that states that the defendant "neither admits nor denies" the allegations in the SEC's complaint. See Kevin LaCroix, *A Closer Look at Judge Rakoff's Rejection of the SEC's Settlement with Citigroup*, D & O DIARY (Nov. 29, 2011), <http://dandodiary.com/2011/11/articles/securities-litigation/a-closer-look-at-judge-rakoffs-rejection-of-the-secs-settlement-with-citigroup/>.

<sup>7</sup> *Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 6 (2012) [hereinafter *Settlement Practices*] (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); Comm. on Fed. Reg., Am. Bar Ass'n, *Report of the Task Force on SEC Settlements*, 47 BUS. LAW. 1083, 1093 (1992) [hereinafter *ABA Report*].

<sup>8</sup> *Settlement Practices*, *supra* note 7, at 3, 6–7 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

<sup>9</sup> See Michael C. Macchiarola, "*Hallowed by History, but Not by Reason*": *Judge Rakoff's Critique of the Security and Exchange Commission's Consent Judgment Practice*, 16 CUNY L. REV. 51, 53 (2012) (suggesting that courts should curb the SEC's "affinity for settlement"); Edward Wyatt, *Responding to Critics, S.E.C. Defends "No Wrongdoing" Settlements*, N.Y. TIMES DEALBOOK, Feb. 22, 2012, <http://dealbook.nytimes.com/2012/02/22/se-c-chairwoman-defends-settlement-practices/> [hereinafter *Responding to Critics*] (noting that critics have raised concerns about the SEC's settlement practices over the past decade); Palazzolo, *supra* note 4 (describing a brief submitted by law professors that criticized the SEC's habit of "settling enforcement actions alleging serious fraud without any acknowledgement of the facts").

<sup>10</sup> See *Citigroup I*, 827 F. Supp. 2d at 332; Palazzolo, *supra* note 4.

consent judgments fail to provide the public with clear, definitive information about the defendant’s misconduct.<sup>11</sup>

Accordingly, some courts have followed Judge Rakoff’s lead in the *Citigroup I* litigation and have closely examined recent SEC consent judgment proposals.<sup>12</sup> As a result, ample attention has recently focused on the court’s role in approving or rejecting “no-admit” SEC consent judgment proposals.<sup>13</sup> Attitudes tend to diverge according to the way consent judgments are understood generally.<sup>14</sup> Models of consent judgments range from those that treat the parties’ agreement with substantial deference to those that demand exacting scrutiny.<sup>15</sup>

The SEC, however, is in a much better position than a court to identify and implement appropriate consent judgment terms.<sup>16</sup> Courts are far more limited than the SEC in determining whether a particular SEC consent judgment proposal adequately balances the competing considerations that factor into an SEC litigation decision, and courts cannot craft consent judgments on their own.<sup>17</sup> Unlike a court, which can reach decisions only upon the evidence presented before it, the SEC enjoys a broad perspective—including an awareness of budgetary constraints and historical litigation success—that allows it to effectively

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<sup>11</sup> See *Citigroup I*, 827 F. Supp. 2d at 332; Palazzolo, *supra* note 4.

<sup>12</sup> See *FTC v. Circa Direct LLC (Circa Direct III)*, No. 11-2172, 2012 WL 3987610, at \*1 (D.N.J. Feb. 22, 2012); Letter from the Court to Plaintiff’s counsel at 1, *SEC v. Koss Corp.*, No. 2:11-cv-00991-RTR (E.D. Wis. Dec. 20, 2011), [hereinafter *Letter from Judge Randa*].

<sup>13</sup> See Macchiarola, *supra* note 9, at 53; *Responding to Critics*, *supra* note 9; Palazzolo, *supra* note 4.

<sup>14</sup> See Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 292 (1988) (discussing the different principles embodied by the contract, judicial act, hybrid, and functional models of consent judgment proposals, each of which supports a different level of judicial scrutiny).

<sup>15</sup> *Id.* at 295, 313–14.

<sup>16</sup> See *SEC v. Bank of Am. Corp. (BoFA II)*, Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581, at \*5–6 (S.D.N.Y. Feb. 22, 2010) (referring to a settlement between the SEC and Bank of America as “half-baked justice at best,” but nevertheless approving the parties’ consent judgment proposal because the SEC is the regulatory body primarily responsible for overseeing the securities markets); U.S. SEC. & EXCH. COMM’N, DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL § 2.5.1 (2012) [hereinafter SEC ENFORCEMENT MANUAL], available at [www.sec.gov/divisions/enforce/enforcementmanual.pdf](http://www.sec.gov/divisions/enforce/enforcementmanual.pdf) (indicating that the SEC—not a court—formulates the consent judgments that arrive before the bench).

<sup>17</sup> See *SEC v. Citigroup Global Mkts. Inc. (Citigroup II)*, 673 F.3d 158, 163 (2d Cir. 2012) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (citations omitted)) (declaring that the federal courts should not choose between competing views of the public interest in deciding whether to approve an SEC consent judgment proposal); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1 (indicating that the SEC has sole authority to settle its enforcement actions).

weigh the benefits and drawbacks of its litigation options.<sup>18</sup> Moreover, courts can only consider the consent judgment proposals that the SEC places before it.<sup>19</sup> Accordingly, the SEC is the party in the best position to evaluate and adjust its settlements.<sup>20</sup>

Recognizing the courts' concerns regarding "no-admit" clauses, however, the SEC should take steps to ensure that their use is limited to circumstances in which they serve the public interest.<sup>21</sup> First, the SEC should limit the use of such proposals by requiring outright admissions in large, novel, and high-profile cases or, alternatively, by simply refusing to settle on a "no-admit" basis.<sup>22</sup> Second, when certain elements of a case prove more important than others, the SEC should limit the scope of "no-admit" clauses to narrower sets of allegations and narrower sets of collateral estoppel effects.<sup>23</sup> Third, the SEC should provide a court with an extremely thorough explanation for any consent judgment for which it seeks approval.<sup>24</sup> Collectively, these measures

<sup>18</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (elucidating the process by which the SEC makes enforcement-action decisions).

<sup>19</sup> See SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1.

<sup>20</sup> See *BofA II*, 2010 WL 624581, at \*5–6 (approving an SEC consent judgment proposal despite the court's belief that the proposal represented "half-baked justice at best" because the SEC shoulders the "primary responsibility for policing the securities market"); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1 (indicating that the SEC—rather than the courts—crafts every consent judgment proposal).

<sup>21</sup> See *Citigroup I*, 827 F. Supp. 2d at 332 (suggesting that the SEC should provide more thorough justifications for its proposed consent judgments); *ABA Report*, *supra* note 7, at 1169 (contending that the SEC should limit the breadth of its "neither admit nor deny" clauses); Fleming James, Jr., *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 193 (1959) (arguing that in order to obtain the collateral estoppel effects they desire parties should convey how they intend to be bound by a consent judgment); Johnson, *supra* note 2, at 679 (recommending that courts require the SEC to litigate novel cases).

<sup>22</sup> See Johnson, *supra* note 2, at 679. See generally *Citigroup I*, 827 F. Supp. 2d 328 (criticizing the SEC's "no-admit" consent judgment proposals). Requiring admissions differs from refusing to settle on a "no-admit" basis because the latter does not include explicit admissions; it simply creates ambiguity as to whether the consent judgment constitutes an admission or not. See William O. Reckler & Blake T. Denton, *Understanding Recent Changes to the SEC's "Neither Admit Nor Deny" Settlement Policy*, CORP. GOVERNANCE ADVISOR (Aspen Publishers, New York, N.Y.), Mar.–Apr. 2012, at 1–2.

<sup>23</sup> See *ABA Report*, *supra* note 7, at 1169 (arguing that the SEC should temper its "neither admit nor deny" policy by allowing mitigating or exculpatory language in its consent judgment proposals, which would further the SEC's interests and encourage settlement); James, *supra* note 21, at 176–77, 193 (describing collateral estoppel as "the effect of a former judgment in a later action based upon a different claim or demand" and asserting that a court should effectuate the parties' desired collateral estoppel effects).

<sup>24</sup> See *Citigroup I*, 827 F. Supp. 2d at 332 (holding that the SEC failed to provide sufficient information upon which the court could make an informed judgment regarding a consent judgment proposal).

would ensure that the SEC retains sufficient leverage to stave off potential securities violations and would provide the public with clearer and more conclusive information about violations that have already taken place.<sup>25</sup>

Accordingly, this Note argues, from an executive-centric perspective, that the SEC should alter its current “no-admit” consent judgment policies and procedures.<sup>26</sup> Part I describes the SEC’s “no-admit” consent judgment proposals and the controversy they have engendered.<sup>27</sup> Part II explains the major judiciary-centric views of consent judgments and details the executive-centric perspective.<sup>28</sup> Finally, Part III justifies an executive-centric assessment of SEC “no-admit” consent judgment proposals and, from that perspective, contends that the SEC should exclude “no-admit” clauses in some cases, narrow their scope in others, and fully explain their use or disuse in all cases.<sup>29</sup>

## I. THE CONTROVERSY OVER THE SEC’S “NO-ADMIT” CONSENT JUDGMENT PROPOSALS

Activities in the national securities market fall within the jurisdiction of the SEC.<sup>30</sup> When the SEC detects a possible violation of federal securities laws, it may initiate an enforcement proceeding against the alleged perpetrator in either an administrative or judicial forum.<sup>31</sup> When choosing the latter, the SEC often proposes a court-enforced settlement known as a “consent judgment,” which often contains a “no-admit” clause.<sup>32</sup> The SEC’s “no-admit” consent judgment proposals,

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<sup>25</sup> See *id.* at 333 (“The S.E.C., by contrast, took the position that, because Citigroup did not expressly deny the allegations, the Court, and the public, somehow knew the truth of the allegations. This is a wrong as a matter of law and unpersuasive as a matter of fact.”); Ryan Grim, *Elizabeth Warren Embarrasses Hapless Bank Regulators at First Hearing (Video)*, HUFFINGTON POST, Feb. 14, 2013, available at [http://www.huffingtonpost.com/2013/02/14/elizabeth-warren-bank-regulators\\_n\\_2688998.html](http://www.huffingtonpost.com/2013/02/14/elizabeth-warren-bank-regulators_n_2688998.html) (describing Senator Elizabeth Warren’s concern that the SEC loses leverage over defendants when the agency fails to hold them accountable for their financial misconduct).

<sup>26</sup> See *infra* notes 215–297 and accompanying text.

<sup>27</sup> See *infra* notes 30–125 and accompanying text.

<sup>28</sup> See *infra* notes 126–214 and accompanying text.

<sup>29</sup> See *infra* notes 215–297 and accompanying text.

<sup>30</sup> JOHN C. COFFEE, JR. & HILLARY A. SALE, *SECURITIES REGULATION* 55 (12th ed. 2006).

<sup>31</sup> Johnson, *supra* note 2, at 644–45.

<sup>32</sup> *Id.* at 647; Mengler, *supra* note 14, at 292; see, e.g., Proposed Final Consent Judgment as to Defendants Quadrangle Group LLC and Quadrangle GP Investors II, L.P., SEC v. Quadrangle Group, LLC, 10-cv-1392 (S.D.N.Y. Apr. 14, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21487-consent.pdf> (proposing a consent judgment containing a “no-admit” clause stating that “the Defendants having executed the Consent

however, have received heavy criticism in the aftermath of the 2008 financial crisis.<sup>33</sup>

Section A of this Part describes SEC consent judgments and the criteria by which courts evaluate them.<sup>34</sup> Section B details “no-admit” clauses.<sup>35</sup> Finally, Section C identifies recent judicial decisions that have expressed concerns about “no-admit” consent judgment proposals, and highlights the subsequent SEC and congressional developments regarding their use.<sup>36</sup>

### A. SEC Consent Judgments

The SEC is responsible for regulating the national securities market.<sup>37</sup> The SEC monitors public companies and may initiate an enforcement proceeding if it suspects a violation of federal securities laws.<sup>38</sup> Before formally commencing a proceeding, the SEC conducts an investigation.<sup>39</sup> If the investigation yields information that provides grounds for a proceeding, SEC staff issue a “Wells notice” to the potential defendant to apprise her of the charges the staff may recommend.<sup>40</sup> The potential defendant may respond with a “Wells submission.”<sup>41</sup> The SEC and the potential defendant commonly engage in

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annexed hereto and incorporated herein . . . and, without admitting or denying the allegations contained in the Complaint,” agree to prescribed penalties); Final Judgment as to Defendant Goldman, Sachs & Co., SEC v. Goldman, Sachs & Co., 03 Civ. 2944 (S.D.N.Y. Oct. 31, 2003), *available at* <http://www.sec.gov/litigation/litreleases/judg18113.pdf> (entering a consent judgment containing a “no-admit” clause stating that the defendant “consented to entry . . . without admitting or denying the allegations of the Complaint”).

<sup>33</sup> See *Citigroup I*, 827 F. Supp. 2d at 335; Palazzolo, *supra* note 4.

<sup>34</sup> See *infra* notes 37–73 and accompanying text.

<sup>35</sup> See *infra* notes 74–86 and accompanying text.

<sup>36</sup> See *infra* notes 87–125 and accompanying text.

<sup>37</sup> COFFEE & SALE, *supra* note 30, at 55.

<sup>38</sup> Melanie Gray et al., *Striking the Right Balance: Public Versus Private Enforcement Laws—What Will We Learn from This Financial Meltdown?*, 60 SYRACUSE L. REV. 449, 449 (2010).

<sup>39</sup> Raymond L. Britton & N. Kimberly Bohannon, “Peep” Walk or Cake Walk? A Study of the S.E.C.’s Enforcement of the Securities Laws Through Agreed Settlements, 5 HOUS. BUS. & TAX L. J. 241, 254–55 (2005).

<sup>40</sup> See 17 C.F.R. § 202.5(c) (2012) (authorizing SEC staff to advise potential defendants of the nature of an investigation and the amount of time they may have to communicate with the SEC before the agency commences a legal proceeding); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4. A “Wells notice” informs a defendant that an investigation has taken place and that legal action by the SEC will likely ensue. Mark Koba, *Wells Notice—CNBC Explains*, CNBC (Nov. 28, 2012, 9:34 AM), <http://www.cnbc.com/id/45612974>.

<sup>41</sup> SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4. In a “Wells submission,” the defendant typically argues that the SEC should not prosecute the case against it. Koba, *supra* note 40.

negotiations during the Wells process.<sup>42</sup> If the defendant cannot persuade the SEC to forego legal action, the SEC will then initiate a proceeding, which may or may not lead to a consensual settlement proposal.<sup>43</sup>

The proceeding can take place either in court or within the agency itself.<sup>44</sup> When the SEC brings an administrative enforcement proceeding, it may seek to levy fines on certain professionals, issue cease and desist orders, or suspend trading.<sup>45</sup> Although a subsequent violation of an SEC cease and desist order is itself actionable in court, the SEC is forced to initiate an entirely new proceeding in court to seek this redress.<sup>46</sup> When the SEC files an enforcement action in court, it can pursue a variety of judicial remedies, including injunctions, civil penalties, employment restrictions, and disgorgement of profits.<sup>47</sup> A subsequent violation of a court order amounts to contempt of court, meaning that the SEC does not need to initiate an entirely new proceeding to compel the defendant to act.<sup>48</sup>

An SEC enforcement action filed in court usually results in a court-enforced settlement known as a “consent judgment.”<sup>49</sup> Under such a settlement, the defendant agrees to certain concessions, the SEC agrees not to pursue trial, and the court agrees to exercise continuing jurisdic-

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<sup>42</sup> See 17 C.F.R. § 201.240(a) (2012) (“Any person who is notified that a proceeding may or will be instituted against him or her, or any party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.”); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4.

<sup>43</sup> SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1; Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties*, 58 ALB. L. REV. 5, 21 (1994).

<sup>44</sup> Johnson, *supra* note 2, at 644–45.

<sup>45</sup> 2 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES LAW HANDBOOK §§ 36:31, 36:35, 36:42 (2011 ed.).

<sup>46</sup> *Id.* § 36:37.

<sup>47</sup> *Id.* §§ 36:12, 36:16, 36:20, 36:23.

<sup>48</sup> Mengler, *supra* note 14, at 292.

<sup>49</sup> Johnson, *supra* note 2, at 647. Sometimes, the SEC files its consent judgment proposal at the same time it files its complaint. Laby & Callcott, *supra* note 43, at 21. Consent judgments are also known as “consent orders” or “consent decrees” although, historically, consent decrees and consent orders have contained injunctive relief and consent judgments have not. See *Citigroup I*, 827 F. Supp. 2d at 331 (treating consent judgments and consent decrees in precisely the same manner); BLACK’S LAW DICTIONARY 471, 918 (9th ed. 2009) (defining consent judgments, consent orders, and consent decrees nearly identically); see also Mengler, *supra* note 14, at 291 n.1 (describing the historical distinctions among consent judgments, consent decrees, and consent orders).



tion over the case so that a violation of the consent judgment constitutes contempt of court.<sup>50</sup>

The parties in an SEC enforcement action agree to consent judgment proposals for a number of reasons.<sup>51</sup> The SEC can tout a consent judgment as a political victory by exacting at least some form of penalty.<sup>52</sup> Moreover, the agency can also avoid the time, expense, and opportunity costs of continuing litigation.<sup>53</sup> Importantly, the delay caused by continuing litigation can slow the compensation process.<sup>54</sup> Finally, a consent judgment eliminates the risk of a less-favorable litigation outcome.<sup>55</sup>

From the defendant's perspective, a consent judgment can be favorable because the defendant can obtain a relatively lenient penalty by forfeiting its challenge to the enforcement action.<sup>56</sup> Like the SEC, the defendant can also avoid the costs associated with further litigation.<sup>57</sup> And, if the defendant agrees to settle before an enforcement action is even filed, the defendant can elude the negative publicity that attends

<sup>50</sup> See *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (observing that a consent decree naturally embodies a compromise); Mengler, *supra* note 14, at 292 (indicating that a court that enters a consent judgment exercises continuing jurisdiction over a case and may hold a violator in contempt of court).

<sup>51</sup> *E.g.*, SEC v. Bank of Am. Corp. (*BoFA I*), 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009) (observing that, by requesting a consent judgment in a high-profile case, the SEC gets to claim that it exposed wrongdoing); Britton & Bohannon, *supra* note 39, at 256 ("Litigation is costly and time-consuming for both sides. In order to process its ever-increasing caseload, the Commission must rely heavily upon a high settlement rate. In [a] similar vein, companies under investigation wish to avoid the negative publicity that would attend a trial.").

<sup>52</sup> *BoFA I*, 653 F. Supp. 2d at 512.

<sup>53</sup> *Settlement Practices*, *supra* note 7, at 7 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (arguing that the SEC incurs opportunity costs when it devotes resources to litigating a case when, alternatively, it could be investigating other allegations of securities impropriety); Britton & Bohannon, *supra* note 39, at 256.

<sup>54</sup> *Settlement Practices*, *supra* note 7, at 7 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

<sup>55</sup> *Id.* at 3 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission). Additionally, the voluntary nature of a consent judgment may more effectively encourage compliance than the coercive nature of a non-consensual judgment. See Mengler, *supra* note 14, at 314.

<sup>56</sup> *Armour*, 402 U.S. at 681 (acknowledging that each party gives up something that it might have won through further litigation); Howard Sklar, *I Cannot Tell a Lie: I Neither Admit Nor Deny I Chopped Down the Cherry Tree*, FORBES (Jan. 4, 2012, 12:55 PM), <http://www.forbes.com/sites/howardsklar/2012/01/04/i-cannot-tell-a-lie-i-neither-admit-nor-deny-i-chopped-down-the-cherry-tree/> ("The 'neither admit nor deny' is a *huge* boon for the party settling the action. Rakoff wrote—and I agree—that settling this way has become the cost of doing business for regulated companies, and the market understands that no company wants to go twelve rounds with their regulator.").

<sup>57</sup> Britton & Bohannon, *supra* note 39, at 256.

litigation.<sup>58</sup> In the business context, these benefits are especially attractive because the prospect of trial may devalue company stock.<sup>59</sup>

A court must approve a proposed consent judgment before it becomes effective.<sup>60</sup> Courts have discretion to affirm or reject proposed consent judgments, subject to certain limits.<sup>61</sup> In exercising their discretion, courts must evaluate the fairness, reasonableness, and adequacy of a proposed consent judgment.<sup>62</sup> When a proposed consent judgment includes a permanent injunction, a court may also consider the public interest.<sup>63</sup>

To assess compliance with these standards, a court might analyze a variety of factors, including the strength of the case, the risks of pro-

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<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., *Morgan Stanley Shares Slide on Reports of SEC Investigation*, TELEGRAPH, May 13, 2010, [hereinafter *Morgan Stanley Shares Slide*] available at <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7717687/Morgan-Stanley-shares-slide-on-reports-of-SEC-investigation.html> (reporting that shares of Morgan Stanley dropped over two percent after the *Wall Street Journal* revealed that the SEC was investigating possible misconduct by the firm); Carolyn O’Hara, *SEC Charges Goldman Sachs with Fraud*, PBS NEWSHOUR, Apr. 16, 2010, [www.pbs.org/newshour/rundown/2010/04/sec-charges-goldman-sachs-with-fraud.html](http://www.pbs.org/newshour/rundown/2010/04/sec-charges-goldman-sachs-with-fraud.html) [hereinafter *SEC Charges Goldman Sachs*] (indicating that Goldman Sachs Group, Inc. stock values dropped ten percent within an hour after the SEC charged the firm with fraud).

<sup>60</sup> See Mengler, *supra* note 14, at 291–92.

<sup>61</sup> SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) (“The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge.” This discretion is not unbridled, however.” (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982))). Judicial discretion in accepting or rejecting consent judgment proposals helps to “tame, and thereby legitimate” agency power. Bryan Clark & Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can’t) Do to Limit Judicial Review*, 52 B.C. L. REV. 1687, 1687 (2011) (quoting M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2004)).

<sup>62</sup> *Randolph*, 736 F.2d at 528. Fairness, reasonableness, adequacy, and the public interest may be related. *Citigroup I*, 827 F. Supp. 2d at 331–32 (recognizing that the consent judgment approval factors inform each other). For instance, a consent judgment may need to be fair to the public as well as to the parties in the case. See *United States v. Trucking Emp’rs, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977) (treating both fairness to the public and fairness to the parties as parts of the fairness inquiry). Similarly, a consent judgment may need to be adequate to protect the public interest. See *Citigroup I*, 827 F. Supp. 2d at 331–32 (“[T]he settlement must be adequate to ensure that the public interest is protected.”). Additionally, courts analyze consent judgments in light of the governing statute’s goals. *Sys. Fed’n No. 91, Ry. Emp. Dept. v. Wright*, 364 U.S. 642, 651 (1961) (emphasizing the importance of honoring statutory objectives when deciding whether to enter or modify a consent judgment).

<sup>63</sup> See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (requiring a plaintiff seeking a permanent injunction to prove that the injunction would not disserve the public interest). In at least one other area of law, the court must always consider the public interest. Antitrust Procedures & Penalties (Tunney) Act § 5, 15 U.S.C. § 16(e) (2006). Section 5 of the Tunney Act compels a court to consider the public interest when determining whether to enter a consent judgment that would settle an antitrust case brought under its provisions. *Id.*

longed litigation, the agreed-upon penalty, the extent of completed discovery, the stage of the proceedings, and the experience and views of counsel and the parties.<sup>64</sup> A court may reject a proposed consent judgment in certain special circumstances.<sup>65</sup> For example, a court will likely reject a proposed consent judgment when it would violate the law or the rights of third parties.<sup>66</sup> Additionally, a court may also reject a proposed consent judgment when, by calling on the court to referee a complex ongoing relationship between the parties for an indefinite period of time, the consent judgment would demand excessive judicial resources.<sup>67</sup> A court could also require further explanation from the parties when it cannot specifically determine its own obligations under the proposal.<sup>68</sup>

Nonetheless, the law generally favors settlement.<sup>69</sup> Moreover, agreements between sophisticated parties and executive agencies gen-

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<sup>64</sup> See *Officers for Justice*, 688 F.2d at 625. A court's inquiry into a consent judgment is, naturally, made on a case-by-case basis. See, e.g., *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85–86 (1st Cir. 1990) (interpreting the Comprehensive Environmental Response, Compensation, and Liability Act to require district courts to “treat each case on its own merits, recognizing the wide range of potential problems and possible solutions” (citing Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (1987))); *Randolph*, 736 F.2d at 529–30 (weighing the case's strength against approval of a settlement, but weighing litigation expense, one defendant's cooperation, and the settlement's terms themselves in favor of approval). The court will abuse its discretion in evaluating consent judgments when the court ignores an important factor, relies on an unimportant factor, or weighs factors inappropriately. *Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988).

<sup>65</sup> See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 609 (1984) (Blackmun, J., dissenting); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 268 (8th Cir. 2011); *In re United States*, 503 F.3d 638, 641 (7th Cir. 2007); *United States v. City of Hiialeah*, 140 F.3d 968, 983–84 (11th Cir. 1998).

<sup>66</sup> See *Kurtz*, 643 F.3d at 268 (remanding because the district court's consent judgment would violate local zoning laws); *City of Hiialeah*, 140 F.3d at 984 (permitting a district court to reject a consent judgment that would impair the rights of non-consenting employees under prior collective bargaining agreements).

<sup>67</sup> See *Stotts*, 467 U.S. at 609 (Blackmun, J., dissenting) (remarking that the implementation of a consent judgment often takes years); *In re United States*, 503 F.3d at 641 (noting that “a judge may reject a proposed consent decree in civil litigation if implementing the decree would create a drain on judicial resources”).

<sup>68</sup> *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461–62 (D.C. Cir. 1995) (permitting the district court's inquiry into replacement product lines covered by a consent judgment proposal because “the district judge who must preside over the implementation of the decree is certainly entitled to insist on that degree of precision concerning the resolution of known issues as to make his task, in resolving subsequent disputes, reasonably manageable”).

<sup>69</sup> *Cannons*, 899 F.2d at 84 (noting that “it is the policy of the law to encourage settlements”).

erally receive judicial deference.<sup>70</sup> Sophisticated parties are typically able to adequately defend their interests.<sup>71</sup> And agencies, in carrying out their missions, presumably promote the public interest.<sup>72</sup> Furthermore, because the Constitution grants the executive branch policy-making authority, courts must avoid dictating policy to executive administrative agencies.<sup>73</sup>

### B. “No-Admit” Clauses in SEC Consent Judgment Proposals

Most SEC consent judgment proposals contain a “neither admit nor deny” clause pursuant to which the defendant neither admits nor denies any of the allegations contained in the SEC’s complaint.<sup>74</sup> The “no-deny” aspect of the SEC’s “neither admit nor deny” consent judgment proposals has been relatively uncontroversial, but the “no-admit” aspect has proven highly contentious.<sup>75</sup> Unlike “no-deny” clauses, which leave open the possibility that misconduct *did* actually occur, “no-admit” clauses leave open the possibility that misconduct did *not* actually occur.<sup>76</sup> Thus, just as the SEC seeks “no-deny” clauses, defendants seek

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<sup>70</sup> *Id.* (“Respect for the agency’s role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table.”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (explaining that the policy of encouraging settlements “has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement”).

<sup>73</sup> *Citigroup II*, 673 F.3d at 163 (“It is not, however, the proper function of federal courts to dictate policy to executive administrative agencies. ‘[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.’” (quoting *Chevron*, 467 U.S. at 866)). A court usually will not reject an agency’s proposed consent judgment unless the agency acts with bad faith or malfeasance. *Sam Fox Publ’g Co. v. United States*, 366 U.S. 683, 689 (1961) (refusing to question a consent judgment proposed by the government in the absence of a claim of bad faith or malfeasance). Bad faith or malfeasance can arise when “consent” is involuntary or the proposed consent judgment fails to advance the objectives of the governing statute. M. Todd Henderson, *Impact of the Rakoff Ruling: Was the Judge’s Scuttling of the SEC/BofA Settlement Legally Pointless or Incredibly Important—or Both?*, WALL ST. LAW., Nov. 2009, at 5.

<sup>74</sup> *ABA Report*, *supra* note 7, at 1169 (noting that an SEC “neither admit nor deny” clause applies to each and every allegation the SEC asserts in its complaint); Johnson, *supra* note 2, at 647.

<sup>75</sup> See Britton & Bohannon, *supra* note 39, at 307 (asserting that defendants who do not have to admit to wrongdoing are not only willing, but also eager to settle); Eric Rieder et al., *Shifting Tides for SEC Settlements: A Sea Change in the Making?*, BUS. LAW TODAY, Mar. 2012, at 1, available at <http://apps.americanbar.org/buslaw/blt/content/2012/03/article-01-rieder-burns.shtml> (announcing that the SEC’s “neither admit nor deny” policy has come under fire in the courts, the press, and Congress).

<sup>76</sup> See *Citigroup I*, 827 F. Supp. 2d at 333 (declining to enter a proposed consent judgment because it contained a “no-admit” clause that would conceal the truth about the

“no-admit” clauses, even in cases in which misbehavior actually took place.<sup>77</sup>

“No-admit” clauses benefit defendants in a couple of important ways.<sup>78</sup> First, “no-admit” clauses protect defendants against collateral estoppel, which prevents a party from contradicting a fact that was established in prior litigation.<sup>79</sup> For instance, in its 2012 decision in *Richman v. Goldman Sachs Group, Inc.*, the United States District Court for the Southern District of New York implicitly applied principles of collateral estoppel when it held that the plaintiff successfully alleged culpability for material misrepresentation because the defendant acknowledged, in an SEC consent judgment, that it made a “mistake” in its marketing materials.<sup>80</sup> Alternatively, by including a “no-admit” clause, a defendant is able to ensure that any litigants it may face in the future will not be able to use the consent judgment as evidence of the defendant’s wrongdoing.<sup>81</sup> Second, “no-admit” clauses allow defendants to

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SEC’s allegations from the public). The SEC has promulgated a regulation regarding only the use of “no-deny” clauses; thus the SEC has left itself more flexibility in proposing “no-admit” clauses than in proposing “no-deny” clauses. See 17 C.F.R. § 202.5(e) (2012). Nevertheless, the SEC’s “neither admit nor deny” clauses contain both elements. See Johnson, *supra* note 2, at 647.

<sup>77</sup> See *Citigroup I*, 827 F. Supp. 2d at 333.

<sup>78</sup> See Britton & Bohannon, *supra* note 39, at 256 (explaining that defendants are eager to settle because litigation is costly and time-consuming and may generate negative publicity).

<sup>79</sup> *Citigroup I*, 827 F. Supp. 2d at 333; see *Richman v. Goldman Sachs Group, Inc.*, 868 F. Supp. 2d 261, 281 (S.D.N.Y. 2012) (sustaining the plaintiffs’ claim on principles of collateral estoppel because, in a prior consent judgment, the defendant admitted to making a “mistake” in its marketing materials). Generally, collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was “actually litigated and decided” and was “essential to the judgment.” 18 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 131.10 (Coquillette et al. eds., 3d ed. 2013). Arguably, even a consent judgment that does not contain a “no-admit” clause should not give rise to any collateral estoppel effects because the SEC’s allegations are not actually litigated and decided. James, *supra* note 21, at 179 (noting that in consent judgments, “[t]he parties have not litigated the matters originally put in issue; they have settled them”). And, arguably, even if a judge makes formal findings relating to the consent judgment, the judgment still should not have collateral estoppel effect because the judge’s findings are not essential to the judgment. *Id.* Nevertheless, a judge may give some collateral estoppel effect to a consent judgment proposal. See *infra* note 80 and accompanying text.

<sup>80</sup> 868 F. Supp. 2d at 281. The SEC’s consent judgment proposal contained a “no-admit” clause, but the court found that Goldman Sachs’s express concession rendered the clause inoperative. *Id.* at 278.

<sup>81</sup> *Settlement Practices*, *supra* note 7, at 6 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); Palazzolo, *supra* note 4. Defendants especially fear the use of consent judgments to support criminal liability. *Settlement Practices*, *supra* note 7, at 6 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

avoid the negative publicity that can accompany admissions.<sup>82</sup> This provides an important benefit because untempered negative publicity may reduce stock values and damage personal reputations.<sup>83</sup>

In turn, the SEC often incorporates “no-admit” clauses into its consent judgment proposals because, although such clauses produce no direct benefits to the SEC, they encourage defendants to settle.<sup>84</sup> Alternatively, if the absence of a “no-admit” clause forces a defendant to reject the proposed consent judgment, the SEC will lose the advantages that accompany a quick, non-litigious resolution.<sup>85</sup> Accordingly, a “no-admit” clause is often a major settlement term for both parties.<sup>86</sup>

### C. Recent Reactions

As SEC enforcement actions emanating from the 2008 financial crisis have largely resulted in “no-admit” consent judgments, the SEC’s practices in this area have faced escalating criticism.<sup>87</sup> Courts and commentators contend that “no-admit” consent judgments inadequately promote the public interest in deterring future misconduct and learning the full truth about the government’s allegations.<sup>88</sup>

Judge Rakoff’s decision in *Citigroup I* ignited much of the controversy.<sup>89</sup> In *Citigroup I*, Judge Rakoff rejected a consent judgment pro-

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<sup>82</sup> Britton & Bohannon, *supra* note 39, at 256.

<sup>83</sup> See *ABA Report*, *supra* note 7, at 1093–94; *Morgan Stanley Shares Slide*, *supra* note 59; *SEC Charges Goldman Sachs*, *supra* note 59.

<sup>84</sup> See *Settlement Practices*, *supra* note 7, at 6 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (“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.”).

<sup>85</sup> See *id.* (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

<sup>86</sup> See *id.* (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

<sup>87</sup> See, e.g., *Circa Direct III*, 2012 WL 3987610, at \*5–7 (agreeing to enter a consent judgment, but expressing disappointment in the SEC’s settlement terms); *BofA II*, 2010 WL 624581, at \*5–6 (entering a “no-admit” SEC consent judgment, but disapprovingly noting that the judgment did not seem to strongly serve the public interest).

<sup>88</sup> See, e.g., *Citigroup I*, 827 F. Supp. 2d at 332–33 (rejecting an SEC “no-admit” consent judgment proposal because it failed to promote the public interest in transparent financial markets and it failed to adequately punish wrongdoers). See generally Brief for Barbara Black et al. as Amici Curiae Supporting Respondents, *SEC v. Citigroup Global Mkts.*, No. 11-5227, 2011 WL 6937373 (2011) [hereinafter *Amici Curiae Brief*] (a brief filed by twenty law professors, opposing the SEC’s use of “no-admit” consent judgment proposals).

<sup>89</sup> Rieder et al., *supra* note 75, at 1. Judge Rakoff had caused similar controversy in 2009 when he rejected a major consent judgment proposal offered by the SEC and Bank of America Corp. *BofA I*, 653 F. Supp. 2d at 512. Similarly, in 2011 in *S.E.C. v. Vitesse Semiconductor Corp.*, Judge Rakoff criticized the SEC for its “confiden[ce] that the courts in this

posed by the SEC and Citigroup Global Markets, Inc. (“Citigroup”).<sup>90</sup> After a four-year investigation, the SEC filed a proposed consent judgment along with its complaint, which asserted that Citigroup lied to investors about the anticipated future value of its investment products.<sup>91</sup> Because the proposed consent judgment contained a “neither admit nor deny” clause, Citigroup neither admitted nor denied any of the SEC’s allegations.<sup>92</sup> The proposed consent judgment contained three primary features.<sup>93</sup> First, it required Citigroup to pay \$285 million to a compensatory fund.<sup>94</sup> Second, it enjoined Citigroup from violating section 17 of the Securities Act of 1933.<sup>95</sup> Finally, it obligated Citigroup to adopt internal measures designed to prevent such future violations.<sup>96</sup>

Judge Rakoff rejected the proposed consent judgment because he believed the settlement was unfair, unreasonable, and inadequate, and

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district were no more than rubber stamps” when the SEC proposed consent judgments “without so much as a word of explanation as to why the Court should approve these Consent Judgments.” 771 F. Supp. 2d 304, 306 (S.D.N.Y. 2011). Nevertheless, Judge Rakoff later entered a revised consent judgment in the *Bank of America* case, and he immediately approved the consent judgment in the *Vitesse Semiconductor* case. See *Vitesse Semiconductor*, 771 F. Supp. 2d at 310; *BofA II*, 2010 WL 624581, at \*1.

<sup>90</sup> See 827 F. Supp. 2d at 330. The defendant in *Citigroup I*, Citigroup Global Markets, Inc., is a subsidiary of Citigroup Inc. CITIGROUP GLOBAL MKTS. INC. AND SUBSIDIARIES, CONSOLIDATED STATEMENT OF FINANCIAL CONDITION 4 (2012), available at [http://www.citi.com/investorinfo/cgmi\\_sfc.pdf](http://www.citi.com/investorinfo/cgmi_sfc.pdf).

<sup>91</sup> See *Citigroup II*, 673 F.3d at 161; *Citigroup I*, 827 F. Supp. 2d at 329. The investment products at issue in *Citigroup I* are known as “collateralized debt obligations” (“CDOs”), which are created by pooling together various debt instruments. See C.Y. Cyrus Chu, *The Regulation of Structured Debts: Why? What? and How?*, 19 S. CAL. INTERDISC. L.J. 443, 446 (2010). These debt instruments are divided into different “tranches” according to their level of risk. *Id.* The SEC’s complaint alleged that Citigroup negligently misrepresented its CDOs as attractive investments and, therefore, violated 15 U.S.C. § 77q(a)(2)–(3). *Citigroup I*, 827 F. Supp. 2d at 330. According to the complaint, the CDOs actually consisted of high-risk securities backed by subprime mortgages. *Id.* at 329. In fact, the SEC claimed, Citigroup bet against those assets by selling them short. *Id.*; see BLACK’S LAW DICTIONARY 1456 (9th ed. 2009) (defining a short sale as the sale of a security that the seller does not yet own and explaining that short sales are usually made when the seller expects the security’s price to drop). The SEC also asserted that, although Citigroup told investors that an independent investment advisor selected the assets, Citigroup actually chose many of them itself. *Citigroup I*, 827 F. Supp. 2d at 329. When the subprime mortgage bubble burst, the fund’s value plummeted, and investors lost more than \$700 million. *Id.* Citigroup collected approximately \$160 million in profits. *Id.* at 330, 333.

<sup>92</sup> *Citigroup I*, 827 F. Supp. 2d at 330, 333.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* \$160 million represented the profits Citigroup earned from the fund. *Id.* \$30 million embodied interest. *Id.* The other \$95 million constituted a civil penalty. *Id.*

<sup>95</sup> *Id.* Section 17(a) is the same provision that the SEC alleged *Citigroup* to have violated in its complaint. See *supra* note 91 and accompanying text.

<sup>96</sup> *Citigroup I*, 827 F. Supp. 2d at 330.

failed to promote the public interest.<sup>97</sup> According to Judge Rakoff, the SEC failed to sufficiently justify its proposal.<sup>98</sup> Judge Rakoff reasoned that if Citigroup had actually violated the law, the settlement terms would have been unsatisfactory.<sup>99</sup> Moreover, Judge Rakoff concluded that the settlement would have had little deterrent value where Citigroup only viewed the monetary payment as a mere “cost of doing business,” and the internal measures Citigroup agreed to adopt would have been inexpensive.<sup>100</sup>

Additionally, Judge Rakoff took issue specifically with the consent judgment proposal’s “no-admit” clause.<sup>101</sup> He observed that, because Citigroup neither admitted nor denied the SEC’s accusations, the public would never learn the truth about Citigroup’s behavior.<sup>102</sup> This was an especially egregious flaw in the proposal, he explained, because the public has a strong interest in financial transparency in the aftermath of the 2008 financial crisis.<sup>103</sup> Furthermore, Judge Rakoff reasoned, the clause would prevent litigants from collaterally estopping Citigroup’s defenses to future claims.<sup>104</sup>

Although the Second Circuit stayed the proceeding in the district court until an appellate decision could be rendered, Judge Rakoff’s opinion has been persuasive to other courts considering proposed consent judgments.<sup>105</sup> Following *Citigroup I*, at least two district courts took

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<sup>97</sup> *Id.* at 332.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 333.

<sup>100</sup> *See id.* 333–34. Judge Rakoff was especially concerned about deterrence given Citigroup’s status as a recidivist. *Id.* Additionally, because the consent judgment did not require the SEC to distribute the money to defrauded investors, Judge Rakoff suspected that victims might not receive compensation for their losses. *Id.* at 334. In a subsequent appellate brief, however, the SEC indicated that it intended to distribute funds to injured investors once it obtained court permission. Brief of Petitioner-Appellant at 52, *SEC v. Citigroup Global Mkts Inc.*, 673 F.3d 158 (2d Cir. 2012) (No. 11-5227). In any event, Judge Rakoff observed, the value of compensation to investors would be negligible. *Citigroup I*, 827 F. Supp. 2d at 334.

<sup>101</sup> *Citigroup I*, 827 F. Supp. 2d at 330.

<sup>102</sup> *Id.* at 333.

<sup>103</sup> *See id.* at 335.

<sup>104</sup> *See id.* at 333. In March 2012, in *SEC v. Citigroup Global Markets Inc. (Citigroup II)*, the Second Circuit stayed the proceedings in the district court. *See* 673 F.3d at 169. The Second Circuit held that the district court may have wrongly concluded that the proposed consent judgment was not in the public interest, inappropriately prejudged Citigroup’s liability, improperly failed to defer to the SEC’s discretion on public policy issues, and foiled any chance of compromise. *Id.* at 163–66.

<sup>105</sup> *See, e.g.,* *FTC v. Circa Direct LLC (Circa Direct I)*, No. 11-2172, 2012 WL 589560, at \*2 (D.N.J. Feb. 22, 2012) (requesting a supplemental briefing regarding the parties’ consent judgment proposal in light of *Citigroup I*); *Letter from Judge Randa, supra* note 12, at 1



pause before accepting proposed consent judgments containing “no-admit” clauses.<sup>106</sup> In December 2011, in *SEC v. Koss Corp.*, the United States District Court for the Eastern District of Wisconsin solicited written justifications from the SEC for its proposed “no-admit” consent judgment.<sup>107</sup> Although the court did not specifically address the proposal’s “no-admit” clause, it drew significant attention by citing Judge Rakoff’s *Citigroup I* opinion.<sup>108</sup> After the parties responded, the court approved the proposal.<sup>109</sup>

Similarly, in February 2012, the United States District Court for the District of New Jersey in *FTC v. Circa Direct LLP (Circa Direct I)* requested answers to a number of questions before it would enter a “no-admit” consent judgment.<sup>110</sup> Specifically, the court was considering an enforcement action brought by the Federal Trade Commission (FTC) under the Federal Trade Commission Act alleging that the defendants falsely advertised the weight-loss capabilities of certain acai-berry-based products.<sup>111</sup>

Although the parties’ responses agreed that the four prongs of *Citigroup I*—fairness, reasonableness, adequacy, and the public interest—were appropriately satisfied, in June 2012 the court requested additional explanation as to how the proposed consent judgment was in the public interest.<sup>112</sup> Specifically, the court asked the FTC to explain whether the lack of an admission should factor into the court’s analysis regarding the public interest, and if there was anything the FTC could

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(citing *Citigroup I* and asking the SEC and the defendants to justify their consent judgment proposal).

<sup>106</sup> See *Circa Direct III*, 2012 WL 3987610, at \*1 (opining on the parties’ consent judgment proposal after having requested a supplemental briefing in light of *Citigroup I*); Edward Wyatt, *In Challenging S.E.C. Settlement, a Judge in Wisconsin Cites a Court in New York*, N.Y. TIMES, Dec. 28, 2011, at B4.

<sup>107</sup> *Letter from Judge Randa*, *supra* note 12, at 1; Wyatt, *supra* note 106 (describing the *Koss* case). The SEC accused the Koss Corporation and its chief executive of maintaining inaccurate financial statements and failing to maintain adequate financial controls. Wyatt, *supra* note 106.

<sup>108</sup> See *Letter from Judge Randa*, *supra* note 12, at 1. The *Koss* court was concerned that the injunctive elements of the consent judgment would be too vague to enforce if enforcement became necessary. *Id.* at 3.

<sup>109</sup> Order of February 22, 2012 at 5, *SEC v. Koss Corp.*, No. 2:11-cv-00991-RTR (E.D. Wis. Feb. 22, 2012); see Bryan B. House, *Case Study: SEC v. Koss*, LAW 360 (Feb. 8, 2012, 1:39 PM), <http://www.law360.com/articles/307376/case-study-sec-v-koss>.

<sup>110</sup> 2012 WL 589560, at \*1–2.

<sup>111</sup> *Id.* Although the FTC filed the enforcement action and not the SEC, the court observed that courts treat consent judgments brought under the Federal Trade Commission Act and federal securities laws similarly. *Id.* at \*2.

<sup>112</sup> *FTC v. Circa Direct LLP (Circa Direct II)*, No. 11–2172, 2012 WL 2178705, at \*3, \*5 (D.N.J. June 13, 2012).

do to address the court’s concerns without requiring the defendant’s admission.<sup>113</sup> The court observed that a settlement without an admission cannot provide the public with any additional information about the FTC’s allegations.<sup>114</sup>

Despite its concerns, the court deferred to the parties and ultimately approved a modified version of the proposed consent judgment.<sup>115</sup> Nevertheless, to promote public awareness of the FTC’s allegations, the court conditioned entry of the consent judgment on publication of the substance of the FTC’s allegations on the FTC’s website.<sup>116</sup>

At least one United States Senator has also weighed in on the “no-admit” consent judgment controversy.<sup>117</sup> On February 14, 2013, in her first hearing as a member of the U.S. Senate’s Banking, Housing and Urban Affairs Committee, Senator Elizabeth Warren of Massachusetts asked bank regulators, including the SEC, about the last time they had taken a major financial institution to trial.<sup>118</sup> Senator Warren opined that if banks could easily settle lawsuits brought against them, they would not have an incentive to follow the law and the public would lose out on days of enlightening testimony.<sup>119</sup> Although Thomas Curry, Comptroller of the Currency, responded that a large number of consent orders had been obtained, none of the bank regulators could identify the last time they had gone to trial against a major financial institution.<sup>120</sup> Senator Warren lamented, “I’m really concerned that

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<sup>113</sup> *Id.* at \*5, \*7.

<sup>114</sup> *Id.* at \*7. Additionally, the judge asked the parties to explain whether section 13(b) of the Federal Trade Commission Act applied to the case. *Id.* at \*4. Section 13(b) authorizes a court to order a permanent injunction only upon a showing of “proper proof” that the FTC is likely to succeed on the merits and that the injunction would be in the public interest. *Id.* Ultimately, however, the court agreed that section 13(b) did not apply. *Circa Direct III*, 2012 WL 3987610, at \*3.

<sup>115</sup> *Circa Direct III*, 2012 WL 3987610, at \*6.

<sup>116</sup> *Id.* at \*7. The court required that the website state, “The FTC had alleged that the Defendants falsely marketed certain acai-berry based products as promoting rapid and substantial weight loss when, in fact, they do not.” *Id.* The court also required that the website list the FTC’s allegations, summarize the documentary evidence supporting the allegations, describe the science that backed the FTC’s claims, and include an electronic link to a declaration by the FTC’s nutritionist. *Id.*

<sup>117</sup> Grim, *supra* note 25. In addition, on May 17, 2012, the U.S. House of Representatives’ Committee on Financial Services heard testimony regarding the SEC’s settlement practices from the Director of the SEC’s Division of Enforcement, Robert Khuzami. *See Settlement Practices*, *supra* note 7, at 1 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

<sup>118</sup> Grim, *supra* note 25.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

‘too big to fail’ has become ‘too big for trial.’”<sup>121</sup> Despite Senator Warren’s concerns, Congress has not responded with legislation that would require the SEC—or any other financial regulator—to change any of its current settlement policies.<sup>122</sup>

The SEC also reacted after Judge Rakoff’s *Citigroup I* decision.<sup>123</sup> On January 6, 2012, the agency announced that it would no longer allow defendants who had admitted to wrongdoing in a criminal case to refuse to admit wrongdoing in an SEC enforcement action arising from the same conduct.<sup>124</sup> Some commentators, however, observed that the change would have little practical impact because civil admissions do not generate any effects that criminal admissions do not produce themselves.<sup>125</sup>

## II. SETTLING FOR “NO-ADMIT” SETTLEMENT: JUDICIARY-CENTRIC AND EXECUTIVE- CENTRIC PERSPECTIVES

Since Judge Rakoff’s decision in the 2011 United States District Court for the Southern District of New York case of *SEC v. Citigroup Global Markets Inc.* (*Citigroup I*), the role of the judiciary in approving or rejecting “no-admit” consent judgment proposals has received considerable attention.<sup>126</sup> Four primary judiciary-centric models characterize the different methods by which courts evaluate proposed consent judgments.<sup>127</sup> These include the contract model, the judicial act model, the hybrid model, and the functional model.<sup>128</sup> These models support varying levels of judicial deference or scrutiny.<sup>129</sup>

<sup>121</sup> *Id.*

<sup>122</sup> *Cf. id.* (expressing concern that “‘too big to fail’ has become ‘too big for trial’”).

<sup>123</sup> See Robert Khuzami, *Public Statement by SEC Staff: Recent Policy Change*, U.S. SEC. & EXCH. COMM’N (Jan. 7, 2012), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1365171489600#.Uiuk8bToOfQ> [hereinafter *SEC Public Statement*]; Joe Palazzolo, *SEC Changes ‘Neither Admit Nor Deny’ Policy*, WALL ST. J.L. BLOG (Jan. 6, 2012, 3:34 PM), <http://blogs.wsj.com/law/2012/01/06/sec-changes-neither-admit-nor-deny-policy/>.

<sup>124</sup> *SEC Public Statement*, *supra* note 123.

<sup>125</sup> See Palazzolo, *supra* note 123 (interviewing practitioners who explain that the change has little—if any—practical significance because companies that have admitted to criminal wrongdoing have already exposed themselves to civil liability).

<sup>126</sup> See Rieder et al., *supra* note 75, at 1; *SEC v. Citigroup Global Mkts. Inc. (Citigroup I)*, 827 F. Supp. 2d 328, 332, 335 (S.D.N.Y. 2011)

<sup>127</sup> See Mengler, *supra* note 14, at 294–95, 309–10, 327.

<sup>128</sup> *Id.*; see *infra* notes 139–179 and accompanying text (discussing the contract, judicial act, hybrid, and functional models of consent judgments).

<sup>129</sup> See Mengler, *supra* note 14, at 294–95, 309–10, 327.

In contrast, an executive-centric perspective takes a different approach.<sup>130</sup> Rather than examining the circumstances under which a court should enter a particular consent judgment, the executive-centric perspective directly examines what terms an agency should or should not include in its consent judgment proposals.<sup>131</sup>

Section A of this Part outlines the four major judiciary-centric views on consent judgments and their varying degrees of deference or scrutiny.<sup>132</sup> Section B then describes the executive-centric perspective.<sup>133</sup>

### A. *The Judiciary-Centric Perspective*

There are four primary judiciary-centric views on consent judgments.<sup>134</sup> Subsection 1 describes the contract model.<sup>135</sup> Subsection 2 explains the judicial act model.<sup>136</sup> Subsection 3 details the hybrid model.<sup>137</sup> Finally, Subsection 4 discusses the functional model.<sup>138</sup>

#### 1. The Contract Model

The contract model argues for highly deferential treatment of parties’ agreements.<sup>139</sup> Under this model, a court is encouraged to simply “rubber stamp” a proposed consent judgment because the court is viewed merely as a vehicle to expeditiously enforce a contract between the parties.<sup>140</sup>

The contract model asserts that such judicial deference will reduce the parties’ enforcement costs, thereby facilitating settlement.<sup>141</sup> Set-

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<sup>130</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (elucidating the process by which the SEC makes enforcement-action decisions); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4 (describing how the SEC investigates violations of the securities laws, files enforcement actions, and settles with defendants).

<sup>131</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4.

<sup>132</sup> See *infra* notes 134–179 and accompanying text.

<sup>133</sup> See *infra* notes 180–214 and accompanying text.

<sup>134</sup> See Mengler, *supra* note 14, at 294–95, 309–10, 327 (discussing the contract, judicial act, hybrid, and functional models of consent judgments).

<sup>135</sup> See *infra* notes 139–150 and accompanying text.

<sup>136</sup> See *infra* notes 151–164 and accompanying text.

<sup>137</sup> See *infra* notes 165–171 and accompanying text.

<sup>138</sup> See *infra* notes 172–179 and accompanying text.

<sup>139</sup> Mengler, *supra* note 14, at 292.

<sup>140</sup> See *id.*

<sup>141</sup> *Id.* at 313–14.

tlements enjoy a number of advantages over continued litigation.<sup>142</sup> First, the parties and the courts accrue savings from foregone litigation.<sup>143</sup> Second, parties foreclose legal uncertainty associated with their disputes.<sup>144</sup> Third, the voluntary nature of settlements might promote compliance more effectively than the involuntary nature of nonconsensual judgments.<sup>145</sup> Finally, in complex, multifaceted disputes, settlements can produce more synergistic resolutions than courts might be able to fashion.<sup>146</sup>

Moreover, because parties' agreements depend heavily on the expected outcome of litigation, the contract model asserts that compliance with the law is built into parties' consent judgment proposals.<sup>147</sup> Presumably, a party would refuse to settle on terms that do not reflect the strengths of its legal position.<sup>148</sup> Thus, according to the contract model, the compromises embodied by consent judgments not only provide significant benefits to the parties, they also respect the law.<sup>149</sup> Consequently, a court that adopts the contract model will only reject an obviously unjust consent judgment proposal that, for example, embodies an illegal scheme.<sup>150</sup>

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<sup>142</sup> *Id.* at 314; *infra* notes 143–146 and accompanying text.

<sup>143</sup> See *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 749 (E.D.N.Y. 1984) (reasoning that the settlement of Vietnam War veterans' Agent Orange claims would be beneficial because it would save the parties from litigation expenses).

<sup>144</sup> See Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 22 (explaining that the parties often settle because they cannot be sure of the court's decision if litigation continued).

<sup>145</sup> See Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 11 (1984) (describing the results of a statistical study that found that defendants were twice as likely to comply with settlement agreements than with adjudicatory orders regardless of the particular case's characteristics).

<sup>146</sup> Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 487 (1985) (suggesting that parties who settle can tailor solutions to their "polycentric needs").

<sup>147</sup> Easterbrook, *supra* note 144, at 19 ("The process of settlement is like the process of compliance with the law.")

<sup>148</sup> See *id.* (explaining that each party to a settlement predicts how the court will apply the law and adopts a compromise reflecting those predictions).

<sup>149</sup> See Mengler, *supra* note 14, at 314 (stating that, according to the contract model, "a consent decree offers the advantages of private settlement backed by the court's enforcement powers, and none of the disadvantages").

<sup>150</sup> *Id.* at 316.

## 2. The Judicial Act Model

The judicial act model construes consent judgments much differently than does the contract model.<sup>151</sup> The judicial act model asserts that a court should rigorously scrutinize all consent judgment proposals because the consent judgment makes the court an active participant in the parties' dispute.<sup>152</sup>

Although many proposals will still pass muster under this model, the court will be better equipped to ensure, through close examination, that it will not compromise its integrity or embroil itself in a long, complicated relationship with the parties.<sup>153</sup> This is important because by entering a consent judgment, a court commits itself to implementing the solution embodied by the judgment.<sup>154</sup> Accordingly, a court will waste its own time and resources in the future if it approves consent judgments that will entangle it in complex relationships.<sup>155</sup> To avoid this concern, the judicial model requires that the plain terms of the judgment do not impose excessive costs on the judicial system.<sup>156</sup> Moreover, under this model, the judgment's terms cannot be ambiguous.<sup>157</sup> Ambiguous terms may inadequately define the court's future role and can lead to costly and time-consuming secondary disputes.<sup>158</sup>

This model also asserts that as it is the judiciary's job to uphold the law, courts must strive to protect their own integrity.<sup>159</sup> Therefore, under this model, a court should not approve a consent judgment proposal that has the potential to violate the law and harm third parties.<sup>160</sup>

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<sup>151</sup> *Id.* at 294–95 (contrasting the contract model and the judicial act model of consent judgments).

<sup>152</sup> *See id.* at 315, 320 (acknowledging that a court could become heavily involved in a long and drawn-out dispute between the parties and indicating that a court that enters a consent judgment inherently throws its support behind the parties' agreement).

<sup>153</sup> *Id.*

<sup>154</sup> *See* *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 609 (1984) (Blackmun, J., dissenting) (remarking that the implementation of a consent judgment often takes years).

<sup>155</sup> Mengler, *supra* note 14, at 315, 320.

<sup>156</sup> *See id.* at 315 (maintaining that judicial enforcement taxes judicial resources).

<sup>157</sup> *Id.* at 336 (recommending that a court resolve ambiguities in the parties' compromise before entering a consent judgment).

<sup>158</sup> *Id.* at 329.

<sup>159</sup> Ronald D. Rotunda, *The Public Interest Appellant: Limitations on the Right of Competent Parties to Settle Litigation Out of Court*, 66 Nw. U. L. Rev. 199, 223 (1971) (arguing that a court should take its own integrity into account when evaluating a consent judgment proposal).

<sup>160</sup> *See, e.g., Stotts*, 467 U.S. at 572–73 (refusing to extend a consent judgment that included affirmative action hiring and promotion decisions to lay-off decisions, which would have affected the job retention of incumbent firefighters); *Kasper v. Bd. of Election Comm'rs of the City of Chi.*, 814 F.2d 332, 341 (7th Cir. 1987) (rejecting a proposed con-

Under the judicial act model, a court should also refuse to approve a consent judgment that does not further the purposes of the law underlying the complaint's allegations.<sup>161</sup> Similarly, the judicial act model might require that a court reject a consent judgment that inadequately approximates the probable outcome of litigation.<sup>162</sup> A consent judgment that compromises the court's integrity in any of these ways could be especially problematic when it is published, as it may serve to guide third parties' behaviors.<sup>163</sup> Such published consent judgments could also prove troublesome when courts consider them for their precedential value.<sup>164</sup>

### 3. The Hybrid Model

The hybrid model is unique in that it varies between treating consent judgments under contract model principles and judicial act model principles.<sup>165</sup> Hence, pursuant to the hybrid model, the level of judicial deference warranted for a particular proposed consent judgment will vary.<sup>166</sup>

In 1975, in *United States v. ITT Continental Baking Co.*, the U.S. Supreme Court adopted the hybrid model when it explained that consent

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sent judgment that would have patently contravened a statute governing the practices of the City of Chicago's election commission); *Duran v. Elrod*, 760 F.2d 756, 759, 763 (7th Cir. 1985) (ordering the modification of a consent judgment between pretrial detainees and officials of Cook County, Illinois, that had forbidden "double bunking" county prison inmates because the public later developed a significant interest in expanding the prison's capacity).

<sup>161</sup> See *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968) (recognizing that a trial court has a responsibility to achieve the Sherman Act's objectives when deciding whether to approve or reject a consent judgment that would settle an enforcement action brought under the Act).

<sup>162</sup> See Mengler, *supra* note 14, at 295.

<sup>163</sup> See *id.* at 317 ("Through publication as a court order, a consent decree may have deterrent effect on others in a way that would be impossible if the parties had resolved their dispute privately.").

<sup>164</sup> *ABA Report*, *supra* note 14, at 1093 ("[S]ettlement releases . . . have articulated a body of new 'law.' . . . When one examines the origin of the rules of law articulated in these releases, however, it becomes apparent that their subsequent application as binding precedent is problematic.").

<sup>165</sup> See *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236–37 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees. . . . Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.").

<sup>166</sup> See *id.* (declaring that consent judgments should be treated like contracts for some purposes and like judicial acts for other purposes); Mengler, *supra* note 14, at 294–95 (contrasting the contract and judicial act models).

judgments should be treated differently for different purposes.<sup>167</sup> Unfortunately, the Supreme Court has not lucidly applied its *Continental Baking* jurisprudence in the decades since.<sup>168</sup> Instead, the Court has arguably utilized both the contract model and the judicial act model in approval, interpretation, and modification cases alike.<sup>169</sup> The Court has been inconsistent in its application of a particular model, even when the parties before the Court were the same.<sup>170</sup> Because a workable for-

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<sup>167</sup> See 420 U.S. at 236–37 n.10.

<sup>168</sup> Mengler, *supra* note 14, at 309–10.

<sup>169</sup> *Id.* at 296–310. The Supreme Court has adopted both the contract and judicial models when approving consent judgments. See *Maryland v. United States*, 460 U.S. 1001, 1001–02 (1983); *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 685–86, 689 (1961). For example, in 1961 in *Sam Fox Publishing Co. v. United States*, the U.S. Supreme Court implicitly embraced the contract model for approval purposes by refusing to allow a small music publisher to intervene in a consent judgment settlement between the government and the American Society of Composers, Authors and Publishers (ASCAP), which arguably permitted large music publishers to restrain competition by controlling ASCAP board positions. See 366 U.S. at 685–86, 689. The Court reasoned that intervention was inappropriate because the parties settled voluntarily and the consent judgment did not prevent the small publisher from challenging ASCAP's behavior itself. *Id.* at 689. Nevertheless, in 1983 in *Maryland v. United States*, the Supreme Court summarily affirmed a consent judgment where the district court had entered its judgment only after mandating alterations geared toward the public interest. See 460 U.S. at 1001–02 (Rehnquist, J., dissenting).

Moreover, the Supreme Court has adopted both the contract and judicial models when interpreting consent judgments. See *Stotts*, 467 U.S. at 572–73; *Cont'l Baking*, 420 U.S. at 225–26; *United States v. Armour & Co.*, 402 U.S. 673, 678 (1971). For example, in 1971 in *United States v. Armour & Co.*, the Supreme Court implicitly endorsed the contract model of consent judgments for interpretation purposes when the Court read a consent judgment narrowly because the parties did not contemplate the situation at hand. See 402 U.S. at 678. Similarly, in 1984 in *Firefighters Local Union No. 1784 v. Stotts*, the Supreme Court refused to extend a consent judgment that instituted affirmative action in the hiring, promotion, and lay-offs of Memphis firefighters. 467 U.S. at 572–73. In contrast, in 1975 in *United States v. ITT Continental Baking Co.*, the Supreme Court arguably adopted the judicial act model when it levied severe sanctions on a party for its "continuing failure or neglect to obey" a consent judgment. See 420 U.S. at 225. The Court's decision to levy such sanctions was striking because the Court chose such sanctions over the lighter penalties available under the Clayton Act and the FTC Act for a single consent judgment violation. See *id.*

Furthermore, the Supreme Court has adopted both the contract and judicial models when modifying consent judgments. See *Chrysler Corp. v. United States*, 316 U.S. 556, 562–64 (1942); *United States v. Swift & Co.*, 286 U.S. 106, 109–10, 120 (1932). For example, in 1932 in *United States v. Swift & Co.*, the Supreme Court implicitly accepted the contract model for modification purposes by refusing to modify the same consent judgment at issue in *Armour*. See *Swift*, 286 U.S. at 109–10, 120; see also *Armour*, 402 U.S. at 678 (describing the consent judgment which prohibited *Armour & Co.* from dealing in food retail). But in 1942 in *Chrysler Corp. v. United States*, the Supreme Court implicitly adopted the judicial act model when it permitted the modification of a consent judgment between Chrysler Corporation and the government in light of the judgment's basic purpose. See 316 U.S. at 562–64.

<sup>170</sup> Mengler, *supra* note 14, at 310. For example, the Justice Department was a party to the consent judgments in both *Armour* and *Continental Baking*. *Id.* Nevertheless, the Su-



mulation of the hybrid model has not yet emerged, lower courts have considerable leeway to decide appropriate levels of deference or scrutiny.<sup>171</sup>

#### 4. The Functional Model

Unlike the other three models, the functional model spurns the contract and judicial act paradigms altogether and endorses a moderate level of deference and scrutiny.<sup>172</sup> The functional model asserts that the contract model underestimates the resources a court may need to expend to enforce a consent judgment while also largely disregarding the rights of third parties.<sup>173</sup> This model also finds weakness in the judicial act model because it tends to sacrifice the benefits of settlement.<sup>174</sup>

The functional model requires a more moderate level of deference in between the two poles staked by the contract model and the judicial act model.<sup>175</sup> Under the functional model, a court should take into account all the risks and rewards of a potential consent judgment.<sup>176</sup> Accordingly, to ensure that the court does not devote excessive resources to a complex relationship between the parties, the court should demand unambiguous terms that do not require substantial judicial involvement.<sup>177</sup> Such judiciary-centric models only consider a proposed consent judgment as it is perceived by a court.<sup>178</sup> It is necessary to adopt an executive-centric approach to consider a proposed consent judgment as it is perceived by an executive government agency.<sup>179</sup>

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preme Court utilized contractual concepts in *Armour*, but judicial act concepts in *Continental Baking*. See *Con'l Baking*, 420 U.S. at 225–26; *Armour*, 402 U.S. at 677–79.

<sup>171</sup> Mengler, *supra* note 14, at 311 (suggesting that lower courts could apply one model or the other whenever they so see fit).

<sup>172</sup> See *id.* at 327.

<sup>173</sup> See *id.*

<sup>174</sup> *Id.* at 321.

<sup>175</sup> Compare *supra* notes 139–140 and accompanying text (explaining the high level of deference given to the parties' agreement under the contract model), with *supra* notes 152–154 and accompanying text (describing the exacting level of scrutiny under which a court must analyze the parties' agreement under the judicial act model).

<sup>176</sup> See Mengler, *supra* note 14, at 321.

<sup>177</sup> Mengler, *supra* note 14, at 336.

<sup>178</sup> See *Duran*, 760 F.2d at 759 (“When an equity decree affects other people besides the parties to it, the judge must take account of the interest of those people—the public interest—in his decision whether to grant or deny equitable relief.”); Mengler, *supra* note 14, at 336.

<sup>179</sup> See Mengler, *supra* note 14, at 336 (cautioning against revising parties' agreements “on the basis of some unharnessed concept of justice”).

## B. A Different Approach: The Executive-Centric Perspective

Unfortunately, each of the four judiciary-centric models has its limits.<sup>180</sup> Most obviously, such judiciary-centric models only consider a proposed consent judgment when it appears in court.<sup>181</sup> When a proposed consent judgment appears before an executive government agency, however, it will be necessary to adopt an executive-centric approach.<sup>182</sup>

Subsection 1 defines the limits of the judiciary-centric perspective.<sup>183</sup> Subsection 2 then describes the executive-centric perspective.<sup>184</sup>

### I. Limitations of the Judiciary-Centric Perspective

The judiciary-centric perspective only considers a circumscribed domain.<sup>185</sup> A judiciary-centric viewpoint only identifies the types of consent judgments a court will or will not approve.<sup>186</sup> Such a perspective does not, however, identify specific terms that a party, in light of the various factors that influence its decision to settle, considers in constructing its agreement.<sup>187</sup> In other words, although a judiciary-centric perspective speaks to the terms that a court may accept, it is not indicative of the terms that a party may be willing to negotiate in the first instance.<sup>188</sup>

For example, although the contract model almost completely delegates the selection of terms to the discretion of the parties, the parties may only be willing to agree to a narrow set of potential consent judg-

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<sup>180</sup> See SEC v. Bank of Am. Corp. (*BofA II*), Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581, at \*5–6 (S.D.N.Y. Feb. 22, 2010) (approving a settlement between the SEC and the Bank of America despite misgivings); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4 (explaining that the Commission, Division Director, or Secretary must authorize all SEC settlements).

<sup>181</sup> See, e.g., SEC v. Citigroup Global Mkts. Inc. (*Citigroup II*), 673 F.3d 158, 163 (2d Cir. 2012) (propounding a limited judicial role in evaluating a proposed consent judgment); *Citigroup I*, 827 F. Supp. 2d at 335 (embracing a more expansive judicial role in evaluating a proposed consent judgment).

<sup>182</sup> See, e.g., *ABA Report*, *supra* note 7, at 1169 (typifying the executive-perspective by advocating changes to SEC settlement practices without focusing on court requirements).

<sup>183</sup> See *infra* notes 185–202 and accompanying text.

<sup>184</sup> See *infra* notes 203–214 and accompanying text.

<sup>185</sup> See *BofA II*, 2010 WL 624581, at \*5–6 (determining that an SEC consent judgment proposal contains serious problems, but reluctantly approving it anyway).

<sup>186</sup> See Mengler, *supra* note 14, at 294–95 (showing that the contract model and the judicial act model merely represent different approaches to the role of the judiciary).

<sup>187</sup> See *id.*

<sup>188</sup> See *BofA II*, 2010 WL 624581, at \*6 (acknowledging a court's limited ability to influence consent judgment proposals).

ments in the first instance.<sup>189</sup> And although the judicial act model limits the realm of consent judgments that are acceptable to the court, the parties may be willing to agree to a wide range of settlements even within that court's approved realm.<sup>190</sup> The hybrid model fails in these same ways, as it simply mimics the contract model or the judicial act model, depending on the situation.<sup>191</sup> The functional model also leaves untouched the terms that the parties are unwilling to agree to because a court acting under this model gives the parties discretion to negotiate.<sup>192</sup>

The judiciary-centric perspective falls short of omniscience because, even if a court is intimately familiar with the details of a case, the court is not necessarily privy to all the considerations that affect a party's settlement decision.<sup>193</sup> For example, the court may not understand

<sup>189</sup> See Mengler, *supra* note 14, at 294 (observing that the contract model advocates judicial deference); *supra* notes 139–140 and accompanying text (describing the way in which the contract model encourages a court to “rubber stamp” the parties’ proposed consent judgments).

<sup>190</sup> See Mengler, *supra* note 14, at 295 (indicating that, under the judicial act model, a court rigorously scrutinizes a proposed consent judgment); *supra* notes 152–153 and accompanying text (describing how the judicial act model calls for a high level of judicial scrutiny).

<sup>191</sup> See *Cont'l Baking*, 420 U.S. at 236–37 n.10; Mengler, *supra* note 14, at 294–95; *supra* notes 165–166 and accompanying text (describing how the hybrid model corresponds with both the contract model and judicial act model in different circumstances and explaining how the level of deference given under the hybrid model will vary).

<sup>192</sup> See Mengler, *supra* note 14, at 327 (stating that the functional model requires that a court defer less substantially to the parties than under the contract model while also mandating that a court scrutinize the parties’ agreement less rigorously than under the judicial act model); *supra* notes 175–179 and accompanying text (noting the degree of deference with which a court should review consent judgment proposals under the functional model). The contract, judicial act, and hybrid models also give the parties room to negotiate. See *supra* notes 139–171 and accompanying text (outlining the approaches to the contract, judicial act, and hybrid models).

<sup>193</sup> See *Citigroup II*, 673 F.3d at 164. In its 2012 *Citigroup II* decision, the Second Circuit observed:

The numerous factors that affect a litigant’s decision whether to compromise a case or litigate it to the end 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. In the case of a public executive agency such as the S.E.C., the factors include also an assessment of how the public interest is best served. These are precisely the factors that the Supreme Court has recognized as making a discretion agency decision unsuitable for judicial review.

*Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831–32(1985)).

the party’s budgetary situation or historical litigation success.<sup>194</sup> These factors, however, could shape the party’s entire settlement strategy.<sup>195</sup>

Moreover, even if a court is confident that it could unilaterally fashion a consent judgment that the parties would have proposed on their own, practically, it could not do so.<sup>196</sup> A court does not propose consent judgments to itself, but can only respond to the proposals that the parties present to the court.<sup>197</sup> Consequently, a court cannot pick and choose the terms it wants the parties to negotiate and select in the first instance.<sup>198</sup> Of course, by rejecting certain consent judgment proposals, a court may indirectly influence the negotiation process or settlement schemes.<sup>199</sup> After all, prudent parties will limit their negotiations to solutions the court might approve.<sup>200</sup> But otherwise, the parties enjoy free reign.<sup>201</sup> The court plays a purely reactive role.<sup>202</sup>

## 2. The Executive-Centric Perspective

The executive-centric perspective considers issues left unexplored by the judiciary-centric perspective in that it evaluates consent judgments from the perspective of an executive agency—rather than a court—and ascertains the terms that the agency would be willing to

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<sup>194</sup> See *id.*; *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (indicating that in making a settlement decision the SEC will analyze the strength of the case, the delay in returning funds to investors, and the resources the SEC has available).

<sup>195</sup> See *Citigroup II*, 673 F.3d at 164; *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

<sup>196</sup> See SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1 (noting that “while the Commission has delegated certain authority to the Division Director or the Secretary, most settlements of previously authorized enforcement actions . . . require Commission authorization”).

<sup>197</sup> See *BofA II*, 2010 WL 624581, at \*6 (acknowledging that a court does not approve an SEC consent judgment de novo, but rather must evaluate it as the SEC has presented it); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1.

<sup>198</sup> See *BofA II*, 2010 WL 624581, at \*6 (acknowledging that a court does not approve an SEC consent judgment de novo, but rather must evaluate it as the SEC has presented it); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1.

<sup>199</sup> See Rieder et al., *supra* note 75, at 4 (remarking that the SEC will have to adjust its settlements with defendants if courts begin to reject SEC consent judgments as currently formulated).

<sup>200</sup> See *id.*

<sup>201</sup> See *BofA II*, 2010 WL 624581, at \*6 (approving a consent judgment although the court would have recommended a different one).

<sup>202</sup> See *id.*

negotiate.<sup>203</sup> As such, the executive-centric perspective evaluates settlement terms based on the information available to the agency rather than the information available to the court.<sup>204</sup> Additionally, the executive-centric perspective also assumes the decision-making position of one of the parties that proactively crafts the proposal that ultimately ends up before the bench.<sup>205</sup>

The information the agency has available extends beyond the evidence the agency has amassed for use in a particular enforcement action.<sup>206</sup> Specifically, the agency inherently knows the funds at the agency's disposal, the other opportunities the agency may wish to pursue, and the agency's historical success in similar enforcement actions.<sup>207</sup> Thus, the agency is able to make decisions regarding a potential consent judgment proposal by analyzing the entire landscape in which that consent judgment proposal would be situated.<sup>208</sup> The agency can see how the inclusion or omission of particular terms impacts other aspects of the agency's practice.<sup>209</sup> For example, the SEC may recognize that the removal of a "no-admit" clause would be detrimental in that its removal would discourage favorable settlements, increase litigation, and

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<sup>203</sup> See, e.g., *ABA Report*, *supra* note 7, at 1169 (exemplifying the executive-centric perspective by recommending changes to SEC consent judgment proposals without focusing on the minimum standard a court might require).

<sup>204</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (disclosing the various items the SEC considers when drawing up consent judgment proposals).

<sup>205</sup> See SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1.

<sup>206</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (stating that the SEC gathers evidence, discusses investigative and legal proceedings with the defendant, evaluates the strength of the evidence, and takes into account its available resources); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4 (describing the Wells process, by which the SEC communicates with potential defendants); COFFEE & SALE, *supra* note 30, at 55 (discussing how the SEC has regulated the national securities markets since 1934).

<sup>207</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55.

<sup>208</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55.

<sup>209</sup> See *Settlement Practices*, *supra* note 7, at 6 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) ("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.").

drain resources from other endeavors.<sup>210</sup> Alternatively, the SEC could conclude that a “no-admit” clause actually impairs its overall goal of promoting the public interest.<sup>211</sup>

The executive-centric perspective also views the decision-making process from the vantage point of a party that devises the consent judgment proposal, in the first instance, before it is considered by a court.<sup>212</sup> Unlike a court, an agency can pick and choose the terms it wants to include or omit in its proposal.<sup>213</sup> Although wise parties will consider the standards utilized by a court in deciding to effectuate a proposed consent judgment, the executive-centric approach recognizes that parties may nevertheless propose any settlement scheme they so desire.<sup>214</sup>

### III. A VIEW THROUGH THE EXECUTIVE-CENTRIC PERSPECTIVE INDICATES THAT THE SEC SHOULD CHANGE ITS APPROACH TO “NO-ADMIT” CONSENT JUDGMENT PROPOSALS

The judiciary-centric perspective of consent judgments is not the ideal method to evaluate the SEC’s “no-admit” consent judgment proposals.<sup>215</sup> Such a perspective fails to illuminate all the factors that truly influence the SEC’s settlement decisions, and it assumes the position of a reactive actor instead of a proactive actor.<sup>216</sup> To ascertain whether the SEC should change its approach to “no-admit” consent judgment proposals, an executive-centric perspective should be adopted.<sup>217</sup> The executive-centric perspective indicates that the SEC should make some significant changes to its settlement practices by refusing to settle on a

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<sup>210</sup> See *id.*; *supra* notes 53–54 and accompanying text (explaining the benefits of “no-action” clauses from an SEC perspective).

<sup>211</sup> See Palazzolo, *supra* note 123 (reporting that the SEC unilaterally amended its settlement policy to provide that defendants would be required to admit allegations that had been proven in a prior criminal proceeding).

<sup>212</sup> See SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1.

<sup>213</sup> See *id.*

<sup>214</sup> See *id.*; Rieder et al., *supra* note 75, at 4.

<sup>215</sup> Compare SEC v. Bank of Am. Corp. (*BoFA II*), Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581, at \*6 (S.D.N.Y. Feb. 22, 2010) (entering a proposed consent judgment in spite of its putative flaws), with *ABA Report*, *supra* note 7, at 1169 (proposing alterations to SEC consent judgment practices without considering court-imposed standards).

<sup>216</sup> See SEC v. Citigroup Global Mkts. Inc. (*Citigroup II*), 673 F.3d 158, 163 (2d Cir. 2012) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 387, 866 (1984)) (holding that courts should not make policy choices for executive agencies); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1 (indicating that the SEC has sole authority to settle its enforcement actions).

<sup>217</sup> Compare *BoFA II*, 2010 WL 624581, at \*6 (entering a proposed consent judgment despite the court’s displeasure), with *ABA Report*, *supra* note 7, at 1169 (recommending changes to SEC consent judgment practices without regard to court requirements).

“no-admit” basis in some cases, limiting the scope of its “no-admit” clauses in other cases, and providing thorough explanations for its consent judgment proposals in all cases.<sup>218</sup>

Section A of this Part contends that SEC “no-admit” consent judgment proposals should be analyzed from an executive-centric perspective.<sup>219</sup> Section B then argues that the SEC should exclude “no-admit” clauses in some cases, narrow their scope in others, and fully explain their use or disuse in all cases.<sup>220</sup>

A. *The Executive-Centric Perspective Provides a Superior Vantage Point from Which to Assess the SEC’s Consent Judgment Proposals*

When analyzing SEC “no-admit” consent judgment proposals, the executive-centric perspective offers distinct advantages over a judiciary-centric perspective.<sup>221</sup> Whereas a judiciary-centric perspective can only discern the most egregious defects in consent judgment proposals, an executive-centric perspective can pinpoint discrete deficiencies.<sup>222</sup> Additionally, whereas criticism levied from the judiciary-centric perspective exerts an indirect effect on settlement terms, an executive-centric critique speaks directly to term selection.<sup>223</sup>

The SEC is in a better position than a court to evaluate the proper terms of a consent judgment because the SEC enjoys a greater wealth of information about the consequences that those terms may produce.<sup>224</sup> A court generally only has access to the evidence presented to

<sup>218</sup> See SEC v. Citigroup Global Mkts. Inc. (*Citigroup I*), 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) (suggesting that the SEC should provide more thorough justifications for its proposed consent judgments); *ABA Report*, *supra* note 7, at 1169 (contending that the SEC should limit the breadth of its “neither admit nor deny” clauses); James, *supra* note 21, at 193 (arguing that parties should convey how they intend to be bound by a consent judgment in order to obtain the collateral estoppel effects they desire); Johnson, *supra* note 2, at 679 (recommending that the SEC refuse to settle novel cases).

<sup>219</sup> See *infra* notes 221–241 and accompanying text.

<sup>220</sup> See *infra* notes 242–297 and accompanying text.

<sup>221</sup> See *BofA II*, 2010 WL 624581, at \*6 (holding that the court could not reject a poorly crafted consent judgment because the SEC had the primary responsibility for enforcing the securities laws); *ABA Report*, *supra* note 7, at 1169 (suggesting improvements to the SEC’s use of “neither admit nor deny” clauses irrespective of court approval or disapproval).

<sup>222</sup> Compare *BofA II*, 2010 WL 624581, at \*6 (determining that an SEC consent judgment proposal contains serious problems, but reluctantly approving it anyway), with *ABA Report*, *supra* note 7, at 1169 (suggesting specific improvements to the scope of SEC “neither admit nor deny” clauses at the drafting stages).

<sup>223</sup> See SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1 (demonstrating that the SEC always authorizes the settlement of an enforcement action).

<sup>224</sup> See *BofA II*, 2010 WL 624851, at \*6 (observing that the SEC has been charged with regulating the national securities markets and, therefore, its decisions deserve some level

it in a particular case.<sup>225</sup> The SEC, however, conducts the investigation that leads to the filing of an enforcement action; negotiates with the defendant; knows what resources the agency has available to allocate to its various ventures; and has extensive experience in its regulatory field.<sup>226</sup> Consequently, the breadth of the information at the SEC’s disposal far surpasses the breadth of information at the court’s disposal.<sup>227</sup> To the extent the court disagrees with the terms contained in an SEC consent judgment proposal, it disagrees with an extremely knowledgeable and experienced party.<sup>228</sup> Although a consent judgment proposal may warrant a court’s repudiation, it must raise significant concerns before the court can confidently identify impropriety.<sup>229</sup> Indeed, even a relatively exacting court may grant the SEC considerable discretion over its settlement arrangements in some instances.<sup>230</sup> Judge Rakoff, for instance, has grudgingly acknowledged that the SEC—not the judiciary—shoulders the primary responsibility for regulating the securities market.<sup>231</sup> Thus, the executive-centric perspective can turn a more ex-

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of deference); *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (detailing the processes by which the SEC enforces the securities laws); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4 (describing the Wells process); COFFEE & SALE, *supra* note 30, at 55 (indicating that the SEC has regulated the national securities markets for almost eighty years).

<sup>225</sup> See *Citigroup I*, 827 F. Supp. 2d at 332 (lamenting that the court did not have enough information to make an educated decision respecting the SEC’s proposed consent judgment).

<sup>226</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55.

<sup>227</sup> Compare *Citigroup I*, 827 F. Supp. 2d at 332 (noting the lack of information provided to the court), with *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (detailing the processes by which the SEC enforces the securities laws), SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4 (describing the Wells process), and COFFEE & SALE, *supra* note 30, at 55 (indicating that the SEC has regulated the national securities markets for almost eighty years).

<sup>228</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55.

<sup>229</sup> See *BofA II*, 2010 WL 624581, at \*6 (expressing dissatisfaction with a consent judgment proposal, but ultimately deferring to the SEC’s settlement decision because the SEC bears the principal responsibility for enforcement of the securities laws).

<sup>230</sup> See, e.g., *id.* (noting that the SEC has the primary responsibility for regulating the securities markets).

<sup>231</sup> See *id.* In 2010, in the U.S. District Court for the Southern District of New York case of *SEC v. Bank of American Corporation*, Judge Rakoff wrote:



acting eye on consent judgments than can the judiciary-centric perspective.<sup>232</sup>

Furthermore, the SEC plays a more direct role in term selection than a court because the SEC—not the court—negotiates with defendants to formulate consent judgment proposals.<sup>233</sup> A court cannot impose its own settlement terms on the parties.<sup>234</sup> Accordingly, the executive-centric perspective, with its focus directly on the agency, reviews the actions of the party that takes the most proactive role in crafting a consent judgment proposal.<sup>235</sup>

Of course, the SEC may not always choose to submit a consent judgment proposal that best serves the public interest.<sup>236</sup> The SEC might prefer a “quick headline” to prolonged litigation, even if prolonged litigation would better promote the public interest.<sup>237</sup> Additionally, SEC officials might be biased toward financial institutions, and therefore willing to offer defendants settlement terms that a well-informed public would find too lenient.<sup>238</sup> Or the SEC might simply suffer from administrative inertia.<sup>239</sup> These possibilities, however, only

So should the Court approve the proposed settlement as being fair, reasonable, adequate, and in the public interest? If the Court were deciding that question solely on the merits—*de novo*, as the lawyers say—the Court would reject the settlement as inadequate and misguided. But as both parties never hesitate to remind the Court, the law requires the Court to give substantial deference to the S.E.C. as the regulatory body having primary responsibility for policing the securities markets, especially with respect to matters of transparency.

*Id.*

<sup>232</sup> See *Citigroup I*, 827 F. Supp. 2d at 332; *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55.

<sup>233</sup> See SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4 (elucidating the Wells process and stating that the SEC authorizes all enforcement-action settlements).

<sup>234</sup> See *BofA II*, 2010 WL 642581, at \*6 (disapproving the terms of a consent judgment between the SEC and Bank of America Corporation, but ultimately entering the consent judgment as an act of judicial restraint).

<sup>235</sup> See SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.5.1 (demonstrating that the SEC always authorizes the settlement of an enforcement action).

<sup>236</sup> See, e.g., *Citigroup I*, 827 F. Supp. 2d at 333 (rejecting a consent judgment proposal because it did not include any confessions of wrongdoing even though the public would have benefited from such confessions).

<sup>237</sup> *Id.*

<sup>238</sup> ROGER G. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 41 (1971) (suggesting that some regulators have a pro-industry bias).

<sup>239</sup> MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 87 (1955) (arguing that as an agency matures it must rely more heavily upon its settled procedures and resists substantial change).

highlight the importance of executive-centric problem solving.<sup>240</sup> If improper considerations enter into the SEC's decision-making process, the executive-centric proposal can more accurately identify and remedy the issue than can the judiciary-centric perspective because the executive-centric perspective is better equipped to recognize the problem and implement a solution.<sup>241</sup>

### B. *The SEC Should Change Its Approach to "No-Admit" Consent Judgment Proposals*

An executive-centric perspective reveals that the SEC should refine its use of "no-admit" consent judgment proposals.<sup>242</sup> The SEC's track record is clear.<sup>243</sup> The agency settles most of the enforcement actions it files, and the vast majority of those settlements are effectuated by "no-admit" consent judgments.<sup>244</sup> SEC "no-admit" clauses extend to the entirety of the SEC's allegations, and they fail to specify the collateral effects they are intended to prevent.<sup>245</sup> Moreover, the SEC does not always provide ample justification for its "no-admit" consent judgment proposals.<sup>246</sup> The SEC should change these practices.<sup>247</sup>

Collectively, this Section argues that the SEC can adopt changes in its practices that would deter future wrongdoing and establish past wrongdoing, all with transparency and candor, thereby promoting the

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<sup>240</sup> See *supra* notes 224–235 and accompanying text.

<sup>241</sup> See *supra* notes 224–235 and accompanying text.

<sup>242</sup> See, e.g., *Citigroup I*, 827 F. Supp. 2d at 332 (expressing disappointment in the evidentiary basis for an SEC consent judgment proposal); Johnson, *supra* note 2, at 679 (encouraging the SEC to exempt novel cases from settlement).

<sup>243</sup> See *Citigroup I*, 827 F. Supp. 2d at 332; *ABA Report*, *supra* note 7, at 1169; Johnson, *supra* note 2, at 647.

<sup>244</sup> Johnson, *supra* note 2, at 647.

<sup>245</sup> See *ABA Report*, *supra* note 7, at 1169 (asserting that the SEC could restrict the scope of its "neither admit nor deny" clauses).

<sup>246</sup> See *Citigroup I*, 827 F. Supp. 2d at 332. For instance, in the 2011 U.S. District Court for the Southern District of New York decision in *SEC v. Citigroup Global Markets Inc.*, Judge Rakoff opined that "the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest. Most fundamentally, this is because it does not provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified under any of these standards." *Id.*

<sup>247</sup> See *id.* at 332 (recommending that courts require the SEC to fully litigate novel cases); *ABA Report*, *supra* note 7, at 1169 (contending that the SEC should limit the breadth of its "neither admit nor deny" clauses); James, *supra* note 21, at 193 (arguing that parties should convey how they intend to be bound by a consent judgment in order to obtain the collateral estoppel effects they desire); Johnson, *supra* note 2, at 679 (recommending that the SEC refuse to settle novel cases).

public interest and achieving optimal results.<sup>248</sup> Subsection 1 argues that the SEC should require defendants to admit to wrongdoing in large, novel, and high-profile cases or, alternatively, omit “no-admit” clauses in those types of cases.<sup>249</sup> Subsection 2 argues that when some aspects of a case prove more important than others, the SEC should limit the “no-admit” clauses it utilizes to narrower sets of allegations and collateral estoppel effects.<sup>250</sup> Finally, Subsection 3 argues that the SEC should provide a court with a thorough explanation for its decision to include or exclude a “no-admit” clause.<sup>251</sup>

### 1. The Use Of “No-Admit” Clauses in Large, Novel, and High-Profile Cases

The SEC should require admissions of misconduct in large, novel, and high-profile enforcement actions because the public will benefit greatly from the clear and conclusive establishment of wrongdoing in such cases.<sup>252</sup> In a large case where a defendant’s behavior has harmed a broad swath of the public, an admission may deter future misbehavior that could cause widespread damage.<sup>253</sup> An admission could also expose the defendant to collateral estoppel effects, making it unnecessary for future claimants to reestablish misdeeds.<sup>254</sup> In novel cases, an admission would provide persuasive evidence that the defendant’s conduct was legally impermissible.<sup>255</sup> Consequently, the admission would

<sup>248</sup> See *infra* notes 252–297 and accompanying text.

<sup>249</sup> See *infra* notes 252–273 and accompanying text.

<sup>250</sup> See *infra* notes 274–280 and accompanying text.

<sup>251</sup> See *infra* notes 281–297 and accompanying text.

<sup>252</sup> See Johnson, *supra* note 2, at 679 (proposing that the SEC not settle novel cases). See generally *Citigroup I*, 827 F. Supp. 2d 328 (criticizing the SEC’s “no-admit” consent judgment proposals).

<sup>253</sup> See *Citigroup I*, 827 F. Supp. 2d at 333 (reasoning that a “no-admit” consent judgment would “settle[] what it states was a broad-ranging four-year investigation by the S.E.C. of Citigroup’s mortgage-backed securities offerings” and explaining that “[i]f the allegations of the Complaint are true, this is a very good deal for Citigroup; and, even if they are untrue, it is a mild and modest cost of doing business”).

<sup>254</sup> See *Richman v. Goldman Sachs Group, Inc.*, 868 F. Supp. 2d 261, 281 (S.D.N.Y. 2012) (holding that the plaintiff successfully alleged the defendant’s culpability for material misrepresentation because the firm admitted, in an SEC consent judgment, to making a “mistake” in its marketing materials); James, *supra* note 21, at 179 (noting that courts have applied collateral estoppel to issues that were the subject of consent judgments).

<sup>255</sup> See *Citigroup I*, 827 F. Supp. 2d at 335 (opining that “if [the court’s judgment] does not rest on facts—cold, hard, solid facts, established either by admissions or by trials—it serves no lawful or moral purpose . . . .”); Johnson, *supra* note 2, at 657 (arguing that SEC settlements create precedent because other actors take cues from them).

deter others from imitating the defendant’s dubious behavior.<sup>256</sup> It would also provide the public with definitive information about a new form of deviancy.<sup>257</sup> Finally, an admission in a high-profile case would advance the public interest by deterring misconduct and putting other parties on notice that such wrongdoing will not go unpunished.<sup>258</sup>

Alternatively, in large, novel, and high-profile cases, the SEC could simply omit “no-admit” clauses from its consent judgment proposals.<sup>259</sup> The omission of “no-admit” clauses would deter wrongdoing by removing a settlement term that defendants desire.<sup>260</sup> The absence of such clauses would ensure that subsequent complainants could attempt to base their claims on the SEC’s allegations, and could rely on the terms of the consent judgment for its preclusive effect.<sup>261</sup>

If a defendant in a large, novel, or high-profile enforcement action is unwilling to admit to misbehavior or omit a “no-admit” clause, the SEC should take the case to trial.<sup>262</sup> Trial, like an admission, can clearly and conclusively establish the defendant’s guilt—or lack thereof.<sup>263</sup> Moreover, trial testimony might identify additional details about the

<sup>256</sup> See Johnson, *supra* note 2, at 657 (contending that SEC settlements influence third parties’ behavior, but arguing that the SEC should still allow the judiciary to create precedent by taking cases trial).

<sup>257</sup> See *Citigroup I*, 827 F. Supp. 2d at 335. In *Citigroup I*, Judge Rakoff expounded:

Finally, in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth. In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers. Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges . . . .

*Id.*

<sup>258</sup> See *generally id.* (declaring repeatedly that the SEC should consider the public interest, especially in important cases that “touch[] on the transparency of the financial markets whose gyrations have so debilitated our lives”).

<sup>259</sup> See *id.* at 332 (criticizing the SEC’s use of “neither admit nor deny” clauses as “hallowed by history, but not by reason”).

<sup>260</sup> See *id.* (disparaging the SEC’s use of “no-admit” consent judgments and observing that mere allegations cannot serve as the basis for collateral estoppel); see also *Settlement Practices*, *supra* note 7, at 6 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (supporting the use of “no-admit” consent judgments by insisting that defendants would refuse to settle in the absence of “no-admit” clauses).

<sup>261</sup> See *Citigroup I*, 827 F. Supp. 2d at 333 (criticizing a “no-admit” consent judgment because it could not be used for collateral estoppel purposes).

<sup>262</sup> See *id.* at 335 (preferring that admissions or trials prove the truth or falsity of the SEC’s allegations).

<sup>263</sup> See *id.*

defendant's conduct.<sup>264</sup> And, in any event, the judicial system would gain an opportunity to build on its own precedent and develop the particular field of law at issue.<sup>265</sup> Players in the securities market, including the SEC, would receive more insight on full-scale litigation, and they could shape their behavior accordingly.<sup>266</sup>

In small, ordinary, and low-profile cases, though, eradicating “no-admit” clauses may not serve the public interest strongly enough to jeopardize the possibility of settlement.<sup>267</sup> In such cases, the public's interest in speedy dispute resolution may outweigh its interest in clearly and conclusively establishing wrongdoing.<sup>268</sup> The harm caused by the defendants may not be so widespread, so unprecedented, or so generally compelling to justify the costs of fully litigating these cases.<sup>269</sup>

Nevertheless, requiring admissions or removing “no-admit” clauses from SEC consent judgment proposals in large, novel, and high-profile cases should, in fact, satisfy judiciary-oriented critics as well as like-minded executive-oriented observers.<sup>270</sup> It would, as explained, satisfy the public interest by deterring future misconduct and establishing past misconduct when those objectives are paramount.<sup>271</sup> The solution simply carries more force when advanced from an ex-

<sup>264</sup> See Grim, *supra* note 25 (stating that “every time there’s a settlement, and not a trial, it means that we didn’t have those days and days and days of testimony about what those financial institutions had been up to”).

<sup>265</sup> See Johnson, *supra* note 2, at 657, 679 (maintaining that the SEC should settle fewer cases to allow the judiciary to develop legal precedent).

<sup>266</sup> See *id.* at 657, 679.

<sup>267</sup> See *Settlement Practices*, *supra* note 7, at 3, 7 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (noting that “settlements return funds to harmed investors with increased speed and certainty [but] requiring admissions as a condition of settlement would likely result in longer delays before victims are compensated . . . and the expenditure of significant SEC resources that could instead be spent stopping the next fraud”).

<sup>268</sup> See *id.*

<sup>269</sup> Compare *Citigroup I*, 827 F. Supp. 2d at 335 (denigrating the SEC’s “no-admit” consent judgment proposals because they fail to advance the public interest), with *Settlement Practices*, *supra* note 7, at 3, 7 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (defending the SEC’s “no-admit” consent judgment proposals on grounds of cost and uncertainty).

<sup>270</sup> See *FTC v. Circa Direct LLC (Circa Direct III)*, No. 11-2172, 2012 WL 3987610, at \*1 (D.N.J. Feb. 22, 2012) (concerned that an FTC “no-admit” consent judgment would not establish the truth of the FTC’s allegations); *Citigroup I*, 827 F. Supp. 2d at 332 (expressing disapproval of the SEC’s policy to settle enforcement actions on a “no-admit” basis); *Letter from Judge Randa*, *supra* note 12, at 1 (citing *Citigroup I* in his request for further information regarding a proposed consent judgment).

<sup>271</sup> See *Citigroup I*, 827 F. Supp. 2d at 332–33; *Settlement Practices*, *supra* note 7, at 6 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission).

ecutive-centric perspective.<sup>272</sup> The SEC has the requisite information to determine whether a case is large, novel, or high-profile enough to necessitate the removal of a “no-admit” clause, and it can proactively craft the consent judgment proposals that will be considered by the court.<sup>273</sup>

## 2. Limiting the Scope of a “No-Admit” Clause Within a Particular Action

The SEC should change the way it approaches “no-admit” consent judgment proposals even in less weighty enforcement actions.<sup>274</sup> When certain aspects of a case prove more important than others, the SEC should limit the reach of any “no-admit” clause by expressly restricting its scope to a subset of allegations.<sup>275</sup> For example, when an otherwise ordinary enforcement action involves a novel but subsidiary issue, the SEC should exclude the issue from the reach of any “no-admit” clause.<sup>276</sup> Similarly, when the defendant fears criminal prosecution, the SEC should specify that a “no-admit” clause will prevent collateral estoppel only in criminal cases.<sup>277</sup> Particularized “no-admit” clauses, then, could give the parties more flexibility in reaching a compromise that best serves the public interest.<sup>278</sup>

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<sup>272</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55.

<sup>273</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55.

<sup>274</sup> See *ABA Report*, *supra* note 7, at 1169 (advising the SEC to limit the scope of its “no-admit” clauses); James, *supra* note 21, at 193 (maintaining that the parties to a consent judgment should specify the collateral effects they intend it to entail).

<sup>275</sup> See *ABA Report*, *supra* note 7, at 1169 (contending that the allegations to which the SEC’s “neither admit nor deny” clauses apply should be limited); James, *supra* note 21, at 193 (remarking that the parties to a consent judgment can specify the collateral effects they intend the judgment to entail).

<sup>276</sup> See *ABA Report*, *supra* note 7, at 1169; see also Johnson, *supra* note 2, at 679 (recommending that the SEC exempt novel cases from settlement).

<sup>277</sup> See James, *supra* note 21, at 193; see also *Settlement Practices*, *supra* note 7, at 6 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission) (claiming that defendants are especially fearful of agreeing to a consent judgment that will be used against them in criminal proceedings). Defendants would still face collateral estoppel effects in civil cases. See James, *supra* note 21, at 193.

<sup>278</sup> *ABA Report*, *supra* note 7, at 1169 (noting that, by restricting a “neither admit nor deny” clause to certain allegations, the SEC could serve both its own legitimate interests and the legitimate interests of the defendant while enhancing perceived fairness to third parties).

Even critics who have assumed a judiciary-centric position should agree that limiting the scope of the SEC's "no-admit" clauses is, at the very least, a step in the right direction.<sup>279</sup> Moreover, the SEC is the actor in the best position to determine when and how to narrow the scope of "no-admit" clauses and put a plan to do so into action.<sup>280</sup>

### 3. Requiring Explanations for a Proposed Consent Judgment's Provisions

In all proposed consent judgments, the parties should be required to provide thorough explanations for their agreements.<sup>281</sup> Such explanations would enhance transparency, diminish appearances of impropriety, and give the courts more information by which to make educated approval decisions.<sup>282</sup> Comprehensive explanations would enhance transparency by providing the public with detailed information about the SEC's allegations and the reasons for settlement.<sup>283</sup> As Judge Rakoff has observed, the public has a strong interest in financial transparency following the 2008 financial crisis.<sup>284</sup> Furthermore, because administrative inertia, bias, or an agency's desire for a "quick headline" might conflict with the public interest, detailed explanations would diminish appearances of impropriety.<sup>285</sup> If the SEC has good reasons to settle, providing an explanation for its settlement could quell any fears that the SEC was influenced by improper motives.<sup>286</sup> Finally, courts are more likely to enter consent judgments when they are accompanied by com-

<sup>279</sup> See *Citigroup I*, 827 F. Supp. 2d at 332; Palazzolo, *supra* note 4. For instance, one would expect Judge Rakoff to be pleased that court judgments would rest on at least some "cold, hard, solid facts, established by . . . admissions." See *Citigroup I*, 827 F. Supp. 2d at 335. Similarly, the scholars who have spoken out in the *Citigroup* litigation would likely appreciate defendants' increased candor. See *Amici Curiae Brief*, *supra* note 88, at 9–16.

<sup>280</sup> See *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra* note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55.

<sup>281</sup> See *Citigroup I*, 827 F. Supp. 2d at 332 (stating that the SEC did not provide a sufficient evidentiary basis for a consent judgment proposal).

<sup>282</sup> See *id.* at 332–35 (stating that the parties to a consent judgment proposal did not provide an adequate evidentiary basis for the court to make an informed approval decision, describing the public's strong interest in transparency following the 2008 financial crisis, and suspecting that the greatest benefit to emerge from the parties' proposal was a "quick headline").

<sup>283</sup> See *id.* at 335.

<sup>284</sup> *Id.*

<sup>285</sup> See *id.* at 333–34.

<sup>286</sup> *Cf. id.* (surmising that if the SEC had fully expressed its reasons for choosing the terms it included in a consent judgment proposal, the proposal would have been even more clearly inappropriate).

plete explanations.<sup>287</sup> If the SEC can better explain the basis for its consent judgment proposals, it will be able to avoid the delays and litigation expenses that attend court scrutiny and possible rejection.<sup>288</sup>

Indeed, thorough explanations for consent judgment proposals should delight judiciary-oriented critics.<sup>289</sup> Detailed, reasoned expositions would expand the information available to all interested actors, including both the public and the courts.<sup>290</sup> The public would learn more about the defendant's misconduct and the SEC's decision-making process.<sup>291</sup> And although courts might never gain access to the SEC's full wealth of knowledge or develop the ability to craft entire consent judgments on their own, the SEC serves few legitimate interests by retaining information that could have been shared with the judiciary.<sup>292</sup>

In sum, the SEC should make a number of adjustments to its current settlement practices.<sup>293</sup> In large, novel, and high-profile enforcement actions, the SEC should require defendants to admit to wrongdoing, or else it should simply refuse to settle on a "no-admit" basis.<sup>294</sup> In other cases, the SEC should limit the allegations to which its "no-admit" clauses apply, and it should specify the collateral estoppel effects its "no-admit" clauses are intended to prevent.<sup>295</sup> In all cases, the SEC should provide complete explanations for its decision to submit a "no-admit" or "admit" consent judgment proposal.<sup>296</sup> These changes would address judiciary-centric as well as executive-centric concerns while avoiding inexact or ineffective scrutiny.<sup>297</sup>

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<sup>287</sup> *Citigroup I*, 827 F. Supp. 2d at 332 (rejecting a consent judgment proposal by parties that did not provide the court with a sufficient evidentiary foundation for the court to make an informed approval decision); *BoFA II*, 2010 WL 624581, at \*6 (approving a consent judgment proposal after the parties fully articulated the rationale for the terms they included in the proposal).

<sup>288</sup> *Compare Citigroup I*, 827 F. Supp. 2d at 332, 335 (rejecting a consent judgment proposal after the parties failed to justify it and ordering the parties to prepare for trial), *with BoFA II*, 2010 WL 624581, at \*6 (approving a consent judgment proposal that the parties adequately justified, thereby avoiding trial).

<sup>289</sup> *See Citigroup I*, 827 F. Supp. 2d at 332.

<sup>290</sup> *See id.*

<sup>291</sup> *See id.*

<sup>292</sup> *See id.*

<sup>293</sup> *See id.* at 332; *ABA Report*, *supra* note 7, at 1169; James, *supra* note 21, at 193; Johnson, *supra* note 2, at 679.

<sup>294</sup> *See Johnson*, *supra* note 2, at 679.

<sup>295</sup> *See ABA Report*, *supra* note 7, at 1169; James, *supra* note 21, at 193.

<sup>296</sup> *See Citigroup I*, 827 F. Supp. 2d at 332.

<sup>297</sup> *See Circa Direct III*, 2012 WL 3987610, at \*1; *Citigroup I*, 827 F. Supp. 2d at 332; *Settlement Practices*, *supra* note 7, at 2 (statement of Robert Khuzami, Director of the Division of Enforcement, Securities and Exchange Commission); SEC ENFORCEMENT MANUAL, *supra*



## CONCLUSION

The vast majority of SEC consent judgments contain a “no-admit” clause, pursuant to which a defendant refuses to confess to the SEC’s allegations. In the wake of the 2008 financial crisis, courts have become increasingly critical of the SEC’s use of “no-admit” clauses. These clauses, they assert, provide inadequate deterrent value and insufficiently inform the public about the truth of the SEC’s claims. The SEC, however, occupies a much more advantageous position than a court to weigh the costs, benefits, and risks of a litigation decision and implement a plan of action. The executive-centric perspective, therefore, provides a better vantage point from which to evaluate SEC “no-admit” proposals than does the judiciary-centric perspective. A view through the executive-centric perspective reveals that the SEC overuses “no-admit” consent judgment proposals, applies “no-admit” clauses too broadly, and may provide scanty support for its settlement proposals. In large, novel, and high-profile cases, the SEC should eliminate “no-admit” clauses from its consent judgment proposals; in other cases, it should narrow the scope of its “no-admit” clauses; and in all cases, the SEC should fully justify its particular settlement proposals. In adopting these recommendations, the SEC would promote the public interest by deterring future violations of the securities laws and providing the public with information about past violations. Executive-centric critics and judiciary-centric critics alike should applaud such measures, which would ensure that the SEC fulfills its obligations to the public and holds wrongdoers accountable.

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note 16, § 2.4; COFFEE & SALE, *supra* note 30, at 55; *Letter from Judge Randa, supra* note 12, at 1.