FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS JOSEPH POWELL; BARRY D. ROMERIL; CHRISTOPHER A. NOVINGER; RAYMOND J. LUCIA; MARGUERITE CASSANDRA TOROIAN; GARY PRYOR; JOSEPH COLLINS; REX SCATES; MICHELLE SILVERSTEIN; REASON FOUNDATION; CAPE GAZETTE; NEW CIVIL LIBERTIES ALLIANCE, *Petitioners*, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Respondent*.	No. 24-1899 OPINION

On Petition for Review of an Order of the Securities and Exchange Commission

Argued and Submitted February 13, 2025
Honolulu, Hawaii

Filed August 6, 2025

Before: Sidney R. Thomas, Daniel A. Bress, and Ana de Alba, Circuit Judges.

Opinion by Judge Bress

SUMMARY*

Securities and Exchange Commission

The panel denied a petition for review of the Securities and Exchange Commission's denial of a request to amend SEC Rule 202.5(e), which reflects SEC policy that the agency will not settle a civil enforcement action unless the defendant agrees not to publicly deny the allegations against him.

The panel rejected petitioners' facial-type challenge to Rule 202.5(e) under the First Amendment. The panel clarified that petitioners' challenge before the court is that it violates the First Amendment for civil enforcement defendants to agree on a voluntary basis not to deny the allegations against them in return for the SEC agreeing to settle its securities law charges, with the limited remedy that, if the defendant does later publicly deny the allegations, the SEC may return to court.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Applying the Supreme Court's framework in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), for evaluating a voluntary relinquishment of First Amendment rights, the panel concluded that Rule 202.5(e) is not facially invalid under the First Amendment, even though legitimate First Amendment concerns could well arise in a more particularized, as-applied type of challenge. Accordingly, the panel upheld Rule 202.5(e) against the instant facial-type First Amendment challenge, without prejudice to future challenges on more particularized records.

Finally, the panel rejected petitioners' contention that the SEC's adoption of Rule 202.5(e) violated the Administrative Procedure Act. The panel held that the SEC had statutory authority to enact Rule 202.5(e), notice-and-comment rulemaking was not required, and the SEC provided a rational explanation for its determination not to amend Rule 202.5(e).

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OPINION

BRESS, Circuit Judge:

This is a petition for review of the Security and Exchange Commission's denial of a request to amend SEC Rule 202.5(e). *See* 17 C.F.R. § 202.5(e). That Rule reflects SEC policy, in place since 1972, that the agency will not settle a civil enforcement action with a defendant unless the defendant agrees not to publicly deny the allegations against him. If a defendant violates this provision of the settlement agreement, the SEC's remedy is to go back to the court that entered the consent judgment and ask for the case to be reopened. The petitioners claim Rule 202.5(e) violates the First Amendment.

We reject petitioners' challenge, although we do so on necessarily narrow grounds. This petition for review amounts to a facial-type challenge to Rule 202.5(e), and given longstanding precedent permitting the voluntary waiver of constitutional rights, including First Amendment rights, Rule 202.5(e) on its face is not per se unconstitutional. Petitioners do validly argue that in application, Rule 202.5(e) could impermissibly intrude on First Amendment rights, especially if it prevents civil enforcement defendants from criticizing the SEC. We do not minimize petitioners' concerns. But these concerns are properly addressed in as-applied challenges with defined records, whether during court approval of settlements, in a pre-enforcement posture, or in response to the SEC seeking to reopen a closed enforcement proceeding for an alleged breach of a settlement agreement.

I

The SEC investigates violations of the securities laws and may bring enforcement actions in federal court. 15 U.S.C. § 78u(d)(1). Sometimes, the SEC insists that defendants admit the allegations against them as a condition of settlement. *See, e.g.*, Press Release, SEC, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021), https://www.sec.gov/newsroom/press-releases/2021-262; Grubir S. Grewal, Director, SEC Div. of Enf't, Remarks at SEC Speaks 2021 (Oct. 13, 2021), https://tinyurl.run/KderJu; Dina ElBoghdady, *SEC to Require Admissions of Guilt in Some Settlements*, WASH. POST, (June 18, 2013), https://tinyurl.run/E1As8b. In 1972, the SEC announced that it would not settle civil enforcement actions unless defendants, at minimum, agree not to publicly deny the Commission's allegations. Consent Decrees in Judicial or Administrative Proceedings, 37 Fed. Reg. 25,224

(Nov. 29, 1972). Codified at 17 C.F.R. § 202.5(e), the SEC's settlement policy is as follows:

> The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

The SEC refers to this as the "no-deny provision" or the "no-admit, no-deny policy." The petitioners call it the "gag rule." We will refer to it as Rule 202.5(e), or "the Rule."

Neither the SEC nor Rule 202.5(e) mandate settlement. But in practice, the vast majority of civil enforcement defendants choose to settle with the SEC. If a defendant wishes to settle, he must acknowledge that his settlement is voluntary and agree to abide by Rule 202.5(e). Once a settlement is negotiated, the defendant signs a consent provision which typically says, among other things, that "Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e)." Where the SEC has filed an action in federal court, the settlement is incorporated into a final consent judgment, entered by the court. Compliance with Rule 202.5(e) does not prevent defendants from denying the allegations in other legal proceedings, such as separate civil litigation.

When settling with the SEC, defendants agree to waive various rights. Many consent judgments provide, consistent with Rule 202.5(e), that the defendant neither admits nor denies the SEC's allegations. If a defendant breaches the Rule 202.5(e) component of the consent judgment, the SEC's remedy is to petition the issuing court to vacate the final judgment and restore the case to its active docket. But the court may also deny this requested relief.

On October 30, 2018, the New Civil Liberties Alliance (NCLA) filed a petition requesting that the SEC amend Rule 202.5(e). Citing First Amendment concerns, the NCLA suggested that the SEC eliminate the language preventing a defendant from denying the SEC's allegations against him. This proposed change, as the SEC later described it, would "allow defendants to consent to a judgment while denying the allegations[,] with no recourse for the Commission to return to active litigation."

The SEC did not respond to the petition to amend for over five years. On December 20, 2023, the NCLA filed a renewed petition, adding various individuals as petitioners. On January 30, 2024, the SEC denied the petition to amend, providing a six-page letter ruling explaining why it was maintaining its policy. According to the SEC, Rule 202.5(e) "preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations." In the SEC's view, and because it "does not try its cases through press releases," the agency is "not required to choose a path whereby it waives its right to try a case while the defendant is free to publicly deny the allegations without any real ability for the Commission to respond in court." The SEC further rejected petitioners' First Amendment objections, explaining that "[t]here is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain."

SEC Commissioner Hester Peirce dissented from the Commission's denial of the petition to amend Rule 202.5(e). She concluded that "[t]he policy of denying defendants the right to criticize publicly a settlement after it is signed is unnecessary, undermines regulatory integrity, and raises First Amendment concerns." In Commissioner Peirce's view, there is "scant factual basis" for the SEC needing Rule 202.5(e), and if the SEC has concerns about defendants speaking out, this policy is "not the right way to protect the Commission's reputation."

After the SEC denied the petition to amend, twelve petitioners challenged the SEC's denial by filing a petition for review in this court. Nine of the petitioners are individuals, eight of whom entered settlements containing the Rule 202.5(e) obligation. The remaining three petitioners are organizations and entities. Petitioners challenge the Rule on its face, claiming that it violates the First Amendment. They also contend that the Rule was adopted in violation of the Administrative Procedure Act (APA).

We have jurisdiction under 15 U.S.C. § 78y(a)(1), which permits "[a] person aggrieved by a final order of the

Commission . . . [to] obtain review of the order in the United States Court of Appeals for the circuit in which he resides" or the D.C. Circuit. Although the SEC claims that many of the petitioners lack standing or fail to meet the jurisdictional prerequisites of § 78y(a)(1), the agency agrees that one petitioner, Raymond Lucia, can maintain this petition. Our independent review confirms the same.

The SEC charged Lucia with securities law violations in 2012, and he agreed to a settlement that requires him to abide by Rule 202.5(e). Lucia resides in the Ninth Circuit, and he joined the NCLA when it renewed its petition to amend. Under all these circumstances, Lucia was "aggrieved by" the SEC's denial of the request to amend Rule 202.5(e). 15 U.S.C. § 78y(a)(1). Because "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review," *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), and Lucia fits that bill, we proceed to the merits. *Cf. Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 907 n.2 (9th Cir. 2020) ("[R]egardless whether venue is improper as to three of the six . . . Petitioners, we can address the merits of the . . . petition.").

II

SEC Rule 202.5(e) has been in place for over five decades, much of that time seemingly without great fanfare. The record gives no indication that the SEC regularly returns to court to reopen judgments for claimed violations of Rule 202.5(e). The SEC also represented at oral argument that it is unaware of a court ever finding a defendant in contempt for violating a Rule 202.5(e) provision in a settlement agreement. Even so, in more recent years, Rule 202.5(e) has been the subject of criticism. The criticism is not necessarily uniform.

Some have suggested that Rule 202.5(e) goes too easy on civil enforcement defendants, in that it allows defendants to neither admit nor deny the SEC's allegations. Civil enforcement defendants presumably prefer "neither admit nor deny" over "admit," to prevent their settlements with the SEC from creating admissions that could later be used against them in private securities litigation. Yet some critics of Rule 202.5(e) would prefer the SEC to more frequently require admissions of wrongdoing as a condition of settlement, in the interest of greater securities law enforcement and public accountability. *See, e.g.*, *SEC v. Citigroup Glob. Markets Inc.*, 827 F. Supp. 2d 328, 332–35 (S.D.N.Y. 2011) (concluding that a consent decree that did not require the defendant to admit the SEC's allegations was "neither fair, nor reasonable, nor adequate, nor in the public interest"), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014); James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES, (June 21, 2013), https://tinyurl.run/3p3JHF; Grewal, *Remarks at SEC Speaks 2021*.

Coming at it from the other direction are those who believe that SEC Rule 202.5(e) is too heavy-handed. Motivated by concerns about administrative agency power generally, and the SEC's enforcement powers more specifically, these critics have argued that by preventing civil enforcement defendants from publicly denying the allegations against them as a condition of settlement, Rule 202.5(e) contradicts First Amendment values. *See, e.g.*, Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 WIDENER L. REV. 1 (2023); Aaron Gordon, *Imposing Silence Through Settlement: A First-Amendment Case Study of the New York Attorney General*, 84 ALB. L.

REV. 335 (2021); James Valvo, Notice & Comment, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, YALE J. ON REG. (Dec. 4, 2017); *see also SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring); *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *3–5 (S.D.N.Y. Oct. 28, 2022). The petitioners in this case, supported by various amici, take up this First Amendment mantle.

But as is often true when a problem of many dimensions is presented to a court, we are hemmed in by certain constraints inherent in judicial decision-making, including those arising from the type of challenge brought before us. It is not our role to second-guess the SEC's policy decisions or enforcement priorities. SEC Commissioner Peirce and others have challenged the wisdom of Rule 202.5(e), but the wisdom of regulatory policy lies outside our authority. Nor is it within our authority to decide what rules would most promote public confidence in the SEC.

Deciding whether an agency action violates the First Amendment is, of course, very much within our authority. But the challenge before us is a petition for review of the SEC's denial of a request to amend Rule 202.5(e). The petition does not seek relief as to any one civil enforcement defendant based on his or her facts and circumstances, the language of any particular consent judgment, or the threatened actions of the SEC as to that defendant. The petition for review instead maintains that Rule 202.5(e) is per se unconstitutional, that is, unconstitutional across the board. In this sense, the petition is properly analyzed as a facial challenge. For facial challenges in the First Amendment context, we ask "whether 'a substantial number of [the Rule's] applications are unconstitutional, judged in relation to the [Rule's] plainly legitimate sweep.'" *Moody* *v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (quoting *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021)); *see also, e.g.*, *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1115 (9th Cir. 2024).

Petitioners rightly point out that we should be concerned about any effort *by* the government to limit criticism *of* the government, including criticism offered by those whom the SEC claims violated the law. Those that the SEC has charged with securities law violations may have a particularly valuable perspective on government enforcement efforts, or at least one that is entitled to be considered in the marketplace of ideas. If the SEC utilized Rule 202.5(e) to prevent criticism of the agency, its officers, or its enforcement programs, the Rule would likely raise substantial First Amendment concerns in application. But what we have before us is a more discrete and stylized challenge, namely, that it assertedly violates the First Amendment for civil enforcement defendants to agree on a voluntary basis not to deny the allegations against them in return for the SEC agreeing to settle its securities law charges, with the limited remedy that, if the defendant does later publicly deny the allegations, the SEC may return to court with no guarantee that a court will reopen the case.

The law has long regarded the voluntary relinquishment of constitutional rights as permissible, so long as appropriate safeguards are attached. And when we apply the Supreme Court's and our court's framework for the voluntary waiver of rights, we conclude that Rule 202.5(e) is not facially invalid under the First Amendment, even though legitimate First Amendment concerns could well arise in a more particularized type of challenge.

III

A

The starting point for our analysis is that Rule 202.5(e) cannot be abstracted from the circumstances that bring the Rule into effect, namely, a defendant's voluntary decision to settle with the SEC and his voluntary agreement to abide by the Rule's requirements. Rule 202.5(e) is not simply a speech-restricting rule, but a rule that defendants voluntarily accede to in return for substantial benefits.

In proper circumstances, rights, including constitutional rights, can be waived. There is a "background presumption that legal rights generally . . . are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995). Indeed, "'in the context of a broad array of constitutional and statutory provisions,'" the Supreme Court has "articulated a general rule that presumes the availability of waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (quoting *Mezzanatto*, 513 U.S. at 201). And when a party by agreement has "waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

We frequently see these waivers of rights in the criminal context, especially for guilty pleas. A defendant "may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," including the right to a jury trial, the right to confront one's accusers, and so on. *Mezzanato*, 513 U.S. at 201 (citing *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)). Criminal suspects may likewise waive their right to remain silent and their right to counsel, so long as they have been properly informed of those rights. *See, e.g.*, *Davis v. United States*, 512 U.S. 452, 458, 460 (1994). As the Supreme Court has explained, "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Corbitt v. New Jersey*, 439 U.S. 212, 218 n.8 (1978) (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

Although there are limitations on the waiver of First Amendment rights—just as there are limitations and protections associated with the waiver of other rights—First Amendment rights can be waived. "The Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary[,] and intelligent." *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) (citing *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187 (1972)); *see also, e.g.*, *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021) ("[P]arties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings."); *Lake James Cmty. Volunteer Fire Dep't v. Burke Cnty., N.C.*, 149 F.3d 277, 280 (4th Cir. 1998); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1099 (3d Cir. 1988) ("[W]e know of no doctrine . . . providing a *per se* rule that constitutional claims, even [F]irst [A]mendment claims, may not be waived."); *Kausal v. George F. Nord Bldg. Corp.* (*In re George F. Nord Bldg. Corp.*), 129 F.2d 173, 176 (7th Cir. 1942).

Although we do not typically think of it in these terms, a guilty plea effects a certain inevitable infringement of First

Amendment rights, in that a criminal defendant agrees to say something about his guilt in return for a substantial benefit. Guilty pleas can also include provisions precluding the right to appeal—a form of First Amendment petitioning activity. *See, e.g.*, *United States v. Wells*, 29 F.4th 580, 585 (9th Cir. 2022). And pleading guilty to a crime can result in even further First Amendment infringements, considering that a guilty plea can lead to imprisonment, and in prison First Amendment rights are reduced. *See, e.g.*, *Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *Turner v. Safley*, 482 U.S. 78, 89–91 (1987).

We encounter waivers of the right to speak outside of the criminal context, as well. Government employees can agree to restrictions on their First Amendment rights as a condition of employment. *See, e.g.*, *Snepp v. United States*, 444 U.S. 507, 509 & n.3 (1980) (per curiam) (explaining that although "Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech," "[w]hen Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review"). Judicially enforceable non-disclosure and non-disparagement agreements are commonplace. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 665, 672 (1991); *Wright v. Eugene & Agnes E. Meyer Found.*, 68 F.4th 612, 621–22 (D.C. Cir. 2023); *Infogroup, Inc. v. DatabaseLLC*, 956 F.3d 1063, 1068 (8th Cir. 2020). And public sector employees who are not union members can agree to pay fees to a public sector union, thereby "waiving their First Amendment rights." *Janus v. American Fed'n of State, Cnty., & Mun. Emps. Council 31*, 585 U.S. 878, 930 (2018). No doubt there are other examples.

Our court and other circuits have held that a waiver of First Amendment rights should be analyzed under the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). *See Leonard*, 12 F.3d at 890; *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396–97 (9th Cir. 1991); *Lake James*, 149 F.3d at 280; *Erie Telecomms.*, 853 F.2d at 1099.

In *Rumery*, the Supreme Court upheld an agreement in which a defendant released his right to bring a civil rights action under 42 U.S.C. § 1983 in exchange for the prosecutor dismissing pending criminal charges against him. 480 U.S. at 389, 398. Observing that "it is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights," *Rumery* declined to establish "a *per se* rule of invalidity" for all waiver agreements. *Id.* at 393, 395. In "many cases," the Supreme Court explained, a defendant's "choice to enter" into a waiver agreement "will reflect a highly rational judgment that the certain benefits" of ending the litigation exceed the benefits of what he is giving up. *Id.* at 394. And that a waiver of rights could be "coercive" in some cases did not "justify invalidating *all* such agreements." *Id.* at 393; *see also id.* ("We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted.").

Accordingly, *Rumery* held that in this context, "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 392; *see also id.* at 392 n.2 ("The threshold question is whether compelling a defendant to decide whether to waive constitutional rights impairs to an appreciable extent any of the policies behind the rights involved.") (brackets omitted) (quoting

McGautha, 402 U.S. at 213). In Rumery's case, he "voluntarily entered the agreement," and "enforcement of this agreement would not adversely affect the relevant public interests." *Id.* at 398. The Supreme Court thus recognized that the waiver of rights can be permissible, even when they force parties to make "difficult choices." *Id.* at 393.

We have applied *Rumery* in two key First Amendment cases: *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993), and *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991). In *Leonard*, we upheld a provision in a collective bargaining agreement, referred to as Article V, that required a public employee union to bear the costs of any new economic or benefit improvement endorsed or sponsored by the Union that caused "increased payroll costs" to the municipality. 12 F.3d at 886. The contractual language was originally proposed by the Union and then included in successive collective bargaining agreements. *Id.*

We first determined that the Union's waiver of "the full and unrestricted exercise of its First Amendment rights" in the collective bargaining agreement was "knowing, voluntary[,] and intelligent." *Id.* at 889–90. Although the Union informed the city during contract negotiations that Article V was unconstitutional, this objection did not make "the Union's execution of the agreement any less voluntary." *Id.* at 890. Indeed, we explained, "[i]f the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement." *Id.*

Because *Rumery* nominally involved the waiver of a "statutory remedy," *Davies*, discussed below, had earlier left open the possibility that "a stricter rule" may be appropriate in cases involving waivers of constitutional rights, 930 F.2d at 1397 (emphasis omitted). But *Leonard* applied the *Rumery* framework and expressly "decline[d] to adopt a stricter standard" in the constitutional context. 12 F.3d at 891 n.8. Under a *Rumery* analysis, we identified in *Leonard* two policies supporting enforcement of the waiver at issue: the "public interest in the stability and finality of collective bargaining agreements," and the "public interest in the finality of a compensation package between a city and a group of its employees." *Id.* at 891. But we also recognized the "public interest in the Union's unfettered ability to present its views to the state legislature." *Id.*

In upholding the waiver of presumed First Amendment rights, we found it significant that Article V of the collective bargaining agreement did "not ban *all* Union speech" and was "narrowly tailored to achieve the City's goal of budgetary predictability." *Id.* There was also a sufficient nexus between the "dispute resolved in the" collective bargaining agreement and the restriction placed on the Union's First Amendment rights. *Id.* at 891 n.10. And "[e]ven in those areas affected by Article V," the Union could "endorse benefit-increasing legislation if it fe[lt] that the benefits to be gained by passage of the bill [we]re more valuable than the salary foregone." *Id.* at 892. Accordingly, "[b]ecause Article V [wa]s a relatively narrow limitation on the Union's political speech," we could not "find that the public policy in favor of the Union's completely unfettered freedom of expression outweigh[ed] the public interests in the finality of collective bargaining and the predictability of municipal budgets." *Id.* The Union's constitutional arguments were relevant to our analysis, but they could not by themselves invalidate the waiver, because "[i]f constitutional arguments always outweighed ones grounded in other sources of law, then we could never enforce individuals' waivers of their constitutional rights, an outcome that would fly in the face of a long line of Supreme Court precedent." *Id.* at 892 n.12.

We applied the same *Rumery* methodology in *Davies*, although there we concluded that the waiver was invalid. 930 F.2d at 1392. Davies and his spouse, a teacher, sued the school district over a dispute relating to the spouse's employment. The parties settled. In exchange for monetary compensation, Davies and his spouse agreed not to seek employment or office within the district. *Id.* Davies later won an election for a seat on the district's board, and the district sought to enforce the settlement agreement, which would result in Davies's removal from public office. *Id.* at 1392–93. The district court granted the school district's motion to enforce the settlement and ordered Davies to resign his office immediately. *Id.* at 1393.

Applying the *Rumery* framework, we held that "the public policy favoring enforcement" of the contractual provision preventing Davies from running for office was "outweighed by the public policy served by its non-enforcement." *Id.* at 1392. The interest in non-enforcement was "of the highest order," "involv[ing] the most important political right in a democratic system of government: the right of the people to elect representatives of their own choosing to public office." *Id.* at 1397. This interest was "of critical importance" because the contractual provision not only prevented Davies from running for office but also "result[ed] in a limitation on the fundamental right to vote of every resident" in the district. *Id.* at 1398. The school district's interests in enforcement of the provision, meanwhile, were insufficient. Besides the general interest in settling litigation that would be present in every case, the district claimed that Davies's presence on the board would be detrimental to the district, a "startling" and "pernicious" rationale that reflected "a serious abuse of the power of incumbency." *Id.* at 1398–99.

The contractual provision preventing Davies from running for office was further impermissible because it lacked a sufficient connection to the underlying employment dispute that was the subject of the earlier settlement. We explained that "[b]efore the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement." *Id.* at 1399. And "[a] legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived." *Id.* In Davies's case, "the nexus between the individual right waived and the dispute that was resolved by the settlement agreement [was] not a close one" because "[t]he underlying dispute had little connection with Dr. Davies' potential future service on the Board." *Id.*

Cases from other circuits have also relied on *Rumery* when analyzing waivers of First Amendment rights. In *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), *cert. denied sub nom. Romeril v. SEC*, 142 S. Ct. 2836 (2022), the Second Circuit cited *Rumery* in rejecting a challenge to the same SEC Rule at issue here. In *Romeril*, one of the same petitioners in this case sought relief from his consent decree under Federal Rule of Civil Procedure 60(b)(4). *Id.* at 170. The Second Circuit held that Romeril's consent judgment "d[id] not violate the First Amendment because Romeril waived his right to publicly deny the allegations of the complaint." *Id.* at 172. Observing that "parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings," the Second Circuit saw no issue with Romeril's agreement: "A defendant who is insistent on retaining the right to publicly deny the allegations against him has the right to litigate and defend against the charges. Romeril elected not to litigate." *Id.*

Because SEC Rule 202.5(e) involves the waiver of rights by agreement, *Rumery* and the above precedents provide the proper legal framework for evaluating this petition for review. For that reason, we disagree with petitioners that Rule 202.5(e) should be analyzed as a traditional prior restraint or content-based restriction on speech, because every waiver of First Amendment rights can in some sense be described as a content-based prior restraint. We likewise disagree with petitioners that we can apply other First Amendment doctrines, like the compelled speech doctrine, without regard to the fact that the speech restriction here arises from a voluntary agreement. Although the nature of the agreed-upon speech restriction is central to the *Rumery* analysis, precedent directs that the *Rumery* framework is the proper one for evaluating a voluntary relinquishment of First Amendment rights.

B

Under the *Rumery* framework and our precedents, the specific challenge before us fails, although as we noted above, our decision is necessarily limited in nature.

To the extent the petitioners claim that *Rumery* cannot apply because defendants do not voluntarily agree to Rule 202.5(e), we disagree, at least as to the facial-type challenge presented to us. There is no basis to conclude that as to all or a substantial number of SEC defendants, their agreement to abide by Rule 202.5(e) is not "voluntary, knowing[,] and intelligent." *Davies*, 930 F.2d at 1394. Though the plaintiffs assert that the SEC possesses outsized power, frequently settles its cases, and makes defendants' agreement to Rule 202.5(e) non-negotiable, the record also reflects that defendants in SEC enforcement actions are often sophisticated players who are represented by counsel. And ultimately, the defendants in these cases chose to settle with the SEC rather than litigate further. *See Leonard*, 12 F.3d at 890 ("If the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement.").

We do not foreclose an individual defendant in any particular case from later claiming that his agreement to the terms of Rule 202.5(e) was involuntary or unknowing. But we also cannot say that generalized concerns about the SEC's powers or enforcement tactics justify a blanket conclusion that these agreements are always or very often improperly coercive. *See Rumery*, 480 U.S. at 393 (concluding that the "possibility" that "some release-dismissal agreements may not be the product of an informed and voluntary decision" given the "risk, publicity, and expense of a criminal trial" did not "justify invalidating *all* such agreements").

Nor is Rule 202.5(e) facially invalid under the *Rumery* framework. Per Rule 202.5(e), a defendant who settles with the SEC may not publicly deny the SEC's allegations, and, if he does, the SEC may seek to reopen his case in order to proceed to litigation. The Rule in its purest form allows the SEC to return things to how they were before the settlement, potentially allowing the SEC to pursue its claims in court. It is as if the civil enforcement action remains subject to reopening at the defendant's election. Rule 202.5(e) essentially tells defendants that if they come to disagree with their original decision not to publicly deny the SEC's allegations, they may later have to defend against them. In this sense, there is a "close nexus" between "the specific interest the government seeks to advance in the dispute underlying the litigation involved"—proving the allegations supporting its enforcement actions—and "the specific right waived"—the defendant agreeing not to deny those same allegations. *Davies*, 930 F.2d at 1399. This is a far cry from a case like *Davies*, in which the restriction on Davies's ability to run for public office "had little connection" to the underlying settlement agreement. *Id.*

Indeed, the situation in the case before us is not so dissimilar from *Rumery* itself. In *Rumery*, "the criminal charges that had been filed against Rumery and Rumery's civil suit against the prosecutor involved the same incident." *Id.* (italics omitted). "In fact," as we later described it, "they were opposite sides of the coin." *Id.* "The two actions reflected the opposing parties' differing versions of what actually occurred," and "a full compromise of the dispute between the parties necessitated resolving both matters." *Id.*

Analogous in this respect to *Rumery*, any defendant who wishes to publicly deny the SEC's allegations wants to tell a different version of the story than the one reflected in his voluntarily entered settlement agreement. But instead of restricting an offsetting suit, as in *Rumery*, Rule 202.5(e) uses a different mechanism. It gives the defendant a choice: agree to "a full compromise of the dispute," *id.*, by declining to deny the SEC's version of what occurred, or speak out against the SEC's allegations and permit the SEC to attempt to litigate the facts in the same (reopened) case. This further confirms the closeness of the nexus between the government's interest and the right waived.

We also cannot say that the SEC's interest in Rule 202.5(e) is wholly illegitimate, to the point that the Rule should be struck down entirely on a petition for review. The SEC's interests are not so much weaker than the asserted interests we found sufficient in *Leonard*. *See* 12 F.3d at 891. And they do not compare to the "utterly unpersuasive" and "pernicious" anti-democratic justifications that we rejected in *Davies*. *See* 930 F.2d at 1398. The SEC explains that if it is to forego its decision to present evidence in court, the agency should have the opportunity to pursue that path if a defendant later decides to deny the SEC's allegations publicly. Accordingly, and because it does not "try its cases through press releases," the SEC maintains that its policy "preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations."

The SEC has some interest in determining how to try its cases and prove its allegations, and in deciding upon settlement terms that are most consistent with its preferred enforcement strategy. The SEC also has a related interest in offering defendants different options for addressing the SEC's allegations. The absence of a policy like Rule 202.5(e) could lead the SEC to requiring more outright admissions or settling fewer cases, which may not necessarily be in the interest of civil enforcement defendants. *See Rumery*, 480 U.S. at 394 (explaining that defendants' choice to waive rights in a settlement agreement can "reflect a highly rational judgment" about the benefits of avoiding prosecution); *Romeril*, 15 F.4th at 172. Provided that any limitation on speech remains within proper bounds, and given the background ability to waive First Amendment rights at least to some extent, the SEC has an interest in giving defendants the option to agree to a speech restriction as part of a broader settlement agreement.

However, to the extent the SEC's letter addressing NCLA's request to amend Rule 202.5(e) advances the broader rationale that it is necessary to silence defendants in order to promote public confidence in the SEC's work, this rationale would be improper. "'[W]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement' that it was adopted in part to 'protect the free discussion of governmental affairs.'" *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). A defendant who denies the SEC's allegations may well undermine confidence in the SEC's enforcement programs. But undermining confidence in the government is an inevitable result of our robust First Amendment protections for speech critical of the government. The SEC's valid interest in Rule 202.5(e) is thus more mechanical: that if a defendant wants to deny the allegations, the SEC wants to be able to prove those allegations in a particular forum, i.e., in court, with the benefits and protections of the judicial process.

At the same time, the SEC's interests are not so compelling that they would justify a broad restriction on speech, either. In this case, and critical to our *Rumery* analysis, is the fact that, on its face, SEC Rule 202.5(e) "is a relatively narrow limitation" on defendants' speech. *Leonard*, 12 F.3d at 891. By its terms, Rule 202.5(e) creates consequences for defendants only when they publicly deny the SEC's allegations. The Rule on its face sweeps no further than speech denying the allegations. And, critically, the consequence for violating the Rule is not speech suppression or the automatic undoing of the settlement agreement, but only that the SEC may seek to reopen the civil enforcement proceedings—which would in turn require a court to agree to that request, including over and above any First Amendment objections that the defendant could interpose at that time. *See Rumery*, 480 U.S. at 401 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "judicial supervision" creates "an important check against abuse" of voluntary agreements to waive rights). "Even in those areas affected by" Rule 202.5(e), defendants can later decide to deny the allegations against them "if [they] feel[] that the benefits to be gained . . . are more valuable than the [settlement] foregone," or, that is, potentially foregone, because a court must still agree to the SEC's request to reopen. *Leonard*, 12 F.3d at 892.

Although the SEC's asserted interest in Rule 202.5(e) is limited, the face of the Rule only imposes a limited speech restriction. And the remedy for a violation of Rule 202.5(e) is also limited, requiring court sign-off that, if granted, merely puts the parties back in the position they were in before the settlement. The result is that a defendant who agrees to a Rule 202.5(e) settlement faces the prospect of reopened proceedings, but he may conclude that agreeing to the SEC's allegations or litigating instead of settling are inferior options. We do not think the First Amendment forecloses the SEC from giving defendants the optionality reflected in Rule 202.5(e). On this basis, we narrowly reject petitioners' facial-type challenge.

We caution, however, that further restrictions on defendants' speech would require a different analysis under *Rumery*. The SEC assures us in its briefing that "[d]efendants who enter into settlements with the Commission remain free to speak about the Commission, enforcement actions, and a host of other topics so long as they do not publicly deny the Commission's allegations." Defendants who have settled with the SEC should therefore understand that they have full latitude in this regard, including when it comes to criticizing the SEC. At the same time, we question how easy the SEC's line will be to police in practice, should the SEC ever seek to enforce Rule 202.5(e). Our decision today resolves only whether an agreement allowing the SEC to seek to reopen proceedings upon a defendant's bare denial of allegations violates the First Amendment. And on that understanding of Rule 202.5(e), the Rule is not unconstitutionally vague, either. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (explaining that laws "must give fair notice of conduct that is forbidden or required"). But any broader rule would present different issues.

In this regard, we note evidence in the record of settlement agreements that could be read to sweep more broadly than Rule 202.5(e) itself. For example, we are informed that defendants agree not to make "any public statement denying, *directly or indirectly*, any allegation in the complaint or *creating the impression* that the complaint is without factual basis." (Emphasis added). Defendants also agree not to "permit" such statements to be made, an obligation that could be understood to extend to the speech of others.

No specific settlement agreement is before us in this petition for review. But insofar as the SEC's settlement agreements impose greater obligations than the face of Rule 202.5(e) itself, today's decision—which concerns the denial of a petition to amend Rule 202.5(e) itself—does not resolve whether such a settlement agreement could survive a *Rumery* or vagueness challenge. Courts considering such settlements may take up these questions in appropriate cases, whether when entering consent judgments or entertaining requests for relief from them. If defendants raise such challenges, courts should carefully consider them, mindful of the important values associated with permitting criticism of the government. Nor do we decide if it would be constitutional for the facial restrictions in Rule 202.5(e) to apply in perpetuity. It stands to reason that under a *Rumery* analysis, the government's interest may wane as time passes. Issues such as this will need to be addressed in individual cases.

For these reasons, we uphold Rule 202.5(e) against the instant facial-type First Amendment challenge, without prejudice to future challenges on more particularized records.

IV

We lastly consider petitioners' contention that the SEC's adoption of Rule 202.5(e) violates the APA. An agency's denial of a petition to amend a rule may be vacated if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996). Petitioners raise three arguments on this score. Each is unpersuasive.

First, we reject petitioners' argument that the SEC lacked statutory authority to enact Rule 202.5(e). Petitioners claim that the SEC's initial claimed sources of authority—"section 19 of the Securities Act of 1933, section 23(a) of the Securities Exchange Act of 1934, section 20 of the [now-repealed] Public Utility Holding Company Act of 1935, section 38 of the Investment Company Act of 1940 and section 211 of the Investment Adviser's Act of 1940," 37 Fed. Reg. 25,224 (Nov. 29, 1972)—only empower the agency to make internal housekeeping rules. According to petitioners, these statutes provide no authority for a rule that binds third parties that come before the agency.

But there is no dispute that the SEC has "discretionary authority to settle on a particular set of terms" with defendants, *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014), and the Commission could have informed each defendant individually about the settlement terms the agency would be willing to accept. Petitioners do not cite any authority suggesting that the SEC cannot publicly announce its policy more formally, and, in fact, petitioners' request to the SEC was premised on the idea that the SEC can have rules regarding settlements, with petitioners urging the SEC to amend its rule.

In addition, when denying the petition, the SEC explained that Rule 202.5(e) "implements and aids in the execution of the Commission's enforcement powers under [15 U.S.C. § 78u] and other enforcement-related provisions." In other words, the SEC premises its ability to request certain terms of settlement on its powers to enforce the securities laws through enforcement actions. We understand the SEC's latest explanation of the basis for the Rule as simply a further elaboration of its original grounds from 1972. And the SEC's enforcement powers provide sufficient authority for the Rule. *See* 15 U.S.C. § 78w(a) (authorizing the SEC "to make such rules and regulations as may be necessary or appropriate . . . for the execution of the functions vested in them" under the Securities Exchange Act of 1934).

Second, petitioners argue that Rule 202.5(e) fails because it was not adopted through notice-and-comment rulemaking. But under the APA, notice-and-comment rulemaking is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Rule 202.5(e) simply announces the Commission's settlement policy, and it is only enforced if a defendant signs a consent agreement that contains a no-deny provision. The Rule is best viewed as one of policy, procedure, or practice, which is exempt from the notice-and-comment requirements.

Finally, petitioners argue that the SEC failed to provide a rational explanation for its determination not to amend Rule 202.5(e). But judicial review of an agency's "refus[al] to exercise its discretion to promulgate proposed regulations" is "'extremely limited' and 'highly deferential.'" *Compassion Over Killing v. FDA*, 849 F.3d 849, 854 (9th Cir. 2017) (quoting *Massachusetts*, 549 U.S. at 527–28). In this case, the SEC's explanation for not amending its Rule survives our deferential review. Although petitioners disagree with it, the SEC's six-page letter adequately explains the SEC's reasoning.

* * *

For the foregoing reasons, the petition for review is

DENIED.

U.S. Securities and Exchange Commission

PRESS RELEASE

JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges

Firm also agrees to implement significant improvements to its compliance controls

FOR IMMEDIATE RELEASE | 2021-262

Washington D.C., Dec. 17, 2021 —The Securities and Exchange Commission today announced charges against J.P. Morgan Securities LLC (JPMS), a broker-dealer subsidiary of JPMorgan Chase & Co., for widespread and longstanding failures by the firm and its employees to maintain and preserve written communications. JPMS admitted the facts set forth in the SEC's order and acknowledged that its conduct violated the federal securities laws, and agreed to pay a $125 million penalty and implement robust improvements to its compliance policies and procedures to settle the matter.

"Since the 1930s, recordkeeping and books-and-records obligations have been an essential part of market integrity and a foundational component of the SEC's ability to be an effective cop on the beat. As technology changes, it's even more important that registrants ensure that their communications are appropriately recorded and are not conducted outside of official channels in order to avoid market oversight," said SEC Chair Gary Gensler. "Unfortunately, in the past we've seen violations in the financial markets that were committed using unofficial communications channels, such as the foreign exchange scandal of 2013. Books-and-records obligations help the SEC conduct its important examinations and enforcement work. They build trust in our system. Ultimately, everybody should play by the same rules, and today's charges signal that we will continue to hold market participants accountable for violating our time-tested recordkeeping requirements."

As described in the SEC's order, JPMS admitted that from at least January 2018 through November 2020, its employees often communicated about securities business matters on their personal devices, using text messages, WhatsApp, and personal email accounts. None of these records were preserved by the firm as required by the federal securities laws. JPMS further admitted that these failures were firm-wide and that practices were not hidden within the firm. Indeed, supervisors, including managing directors and other senior supervisors – the very people responsible for implementing and ensuring compliance with JPMS's policies and procedures – used their personal devices to communicate about the firm's securities business.

JPMS received both subpoenas for documents and voluntary requests from SEC staff in numerous investigations during the time period that the firm failed to maintain required records. In responding to these subpoenas and requests, JPMS frequently did not search for relevant records contained on the personal devices of its employees. JPMS acknowledged that its recordkeeping failures deprived the SEC staff of timely access to evidence and potential sources of information for extended periods of time and in some instances permanently. As such, the firm's actions meaningfully impacted the SEC's ability to investigate potential violations of the federal securities laws.

"Recordkeeping requirements are core to the Commission's enforcement and examination programs and when firms fail to comply with them, as JPMorgan did, they directly undermine our ability to protect investors and preserve market integrity," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "We encourage registrants to not only scrutinize their document preservation processes and self-report failures such as those outlined in today's action before we identify them, but to also consider the types of policies and procedures JPMorgan implemented to redress its failures in this case."

"As today's order reflects, JPMorgan's failures hindered several Commission investigations and required the staff to take additional steps that should not have been necessary," said Sanjay Wadhwa, Deputy Director of Enforcement. "This settlement reflects the seriousness of these violations. Firms must share the mission of investor protection rather than inhibit it with incomplete recordkeeping."

JPMS agreed to the entry of an order in which it admitted to the SEC's factual findings and its conclusion that JPMS's conduct violated Section 17(a) of the Securities Exchange Act of 1934 and Rules 17a-4(b)(4) and 17a-4(j) thereunder, and that the firm failed reasonably to supervise its employees with a view to preventing or detecting certain of its employees' aiding and abetting violations. JPMS was ordered to cease and desist from future violations of those provisions, was censured, and was ordered to pay the $125 million penalty. JPMS also agreed to retain a compliance consultant to, among other things, conduct a comprehensive review of its policies and procedures relating to the retention of electronic communications found on personal devices and JPMS's framework for addressing non-compliance by its employees with those policies and procedures.

As a result of the findings in this investigation, the SEC has commenced additional investigations of record preservation practices at financial firms. Firms that believe that their record preservation practices do not comply with the securities laws are encouraged to contact the SEC at BDRecordsPreservation@sec.gov.

Separately, the Commodity Futures Trading Commission announced a settlement with JPMS and affiliated entities for related conduct.

The SEC's investigation, which is continuing, has been conducted by Joshua Brodsky, Zachary Sturges, Theresa Gue, Andrew Dean, Osman Nawaz, Adam Grace, John Enright, and Thomas P. Smith, Jr. of the New York Regional Office, and Laura K. Bennett, Christopher G. Margand, Margaret Y. Rubin, Sonia G. Torrico, and David A. Becker of the Home Office. The case is being supervised by Mr. Wadhwa, Richard R. Best, and Carolyn Welshhans.

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Last Reviewed or Updated: Dec. 17, 2021

RESOURCES

- **SEC Order**

U.S. Securities and Exchange Commission

SPEECH

Remarks at SEC Speaks 2021

Gurbir S. Grewal, Director, Division of Enforcement (/about/division-office-directors/gurbir-grewal)

Washington D.C. | Oct. 13, 2021

Thank you for that introduction and good morning everyone. It's an honor and privilege to speak with both my SEC colleagues and so many from the securities industry and defense bar about a topic that affects all of us: trust. More specifically, the decline in trust in our financial markets and what we can do to restore it. But before I begin, as you heard me say yesterday, I'll remind you that these views are my own.[1]

Many Americans' trust in our institutions is faltering. From Congress to law enforcement to the courts, no sector is immune from this trend. According to a recent Gallup poll, only a small percentage of Americans have any significant level of confidence in banks, technology companies, or big business.[2] These levels, in fact, are near historic lows.[3]

This decline in trust is bad for everyone. When it comes to the financial markets, it undermines the investor confidence needed for the fair, efficient, and orderly operation of our capital markets. Put simply, if the public doesn't think the system is fair, at a minimum, they are not going to invest their hard-earned money. This hurts all those companies, professionals, and other market participants who are playing by the rules and doing the right thing every day. And all of this has the potential to be detrimental to our economy.

While there's no single cause for this decline when it comes to our financial institutions, part of it is due to repeated lapses by large businesses, gatekeepers, and other market participants, coupled with the perception that we — the regulators — are failing to hold them appropriately accountable, or worse still, the belief by some that there are two sets of rules: one for the big and powerful and another for everyone else.

Each day, however, the Enforcement Division's staff work tirelessly to enhance that trust and make clear that there is only one set of rules by prosecuting the bad actors who break them, without fear or favor. Despite the challenges of a once in a lifetime pandemic, they did so over the last fiscal year by bringing more standalone enforcement actions than the prior year, including cases involving auditor misconduct, insider trading, bribery schemes, and misleading claims surrounding SPAC transactions.[4]

But of course, the risks we protect against are not fixed and what's important to investors and the market can evolve over time. That's why the Division is – as it always has – taking proactive steps to police those issues as well by bringing a number of first of their kind enforcement actions. For example, in the crypto space, the Commission recently brought the first enforcement action involving securities using decentralized finance, or "DeFi," technology;[5] took enforcement actions against trading platforms that illegally facilitate or tout trading in crypto securities;[6] and charged the promoters of a fraudulent $2 billion digital asset securities offering.[7] We also brought the first enforcement action involving Regulation Crowdfunding[8] and the first enforcement action against an alternative data provider, where we charged App Annie and its co-founder and former CEO with engaging in deceptive practices.[9]

I'm proud of the dedication of our team in Enforcement and believe that by both continuing these types of proactive enforcement efforts and sharpening our focus in additional areas, we will enhance Americans' trust in our financial institutions. And it's those additional areas of focus that I want to turn to next. They include emphasizing corporate responsibility, gatekeeper accountability and appropriate remedies, particularly prophylactic ones.

Corporate Responsibility

With respect to corporate responsibility, Congress has enacted many laws and the SEC has adopted many rules to ensure that corporations are being responsible and playing fair. But too often, they ignore these rules and fail to implement sufficient controls or procedures to ensure compliance. In some cases, firms are practically inviting fraud or waiting for misconduct to occur; in others, they are actively covering it up or minimizing it. All of this serves to undermine public trust and confidence. Enhancing it will require, among other things, robust enforcement of laws and rules concerning required disclosures, misuse of nonpublic information,[10] violation of record-keeping obligations,[11] and obfuscation of evidence from the SEC or other government agencies.[12]

We'll consider all of our options when this sort of misconduct occurs prior to or during our investigations. For example, if we learn that, while litigation is anticipated or pending, corporations or individuals have not followed the rules and maintained required communications, have ignored subpoenas or litigation hold notices, or have deliberately used the sort of ephemeral technology that allows messages to disappear, we may well conclude that spoliation of evidence has occurred and ask the court for adverse inferences or other appropriate relief. These rules are not just "check the box" exercises for compliance departments; they are important to ensure that the SEC and other law enforcement agencies can understand what happened and make appropriate prosecutorial decisions. When that doesn't happen, there can and should be consequences.

And with respect to disclosures, timely and accurate disclosures of material events are essential to investor protection and enhancing trust and confidence in the markets. They not only enable average investors to make informed investing decisions, but also ensure that informed investors are able to hold management and boards accountable when they fall short. As an example, cybersecurity is a critical issue in our securities markets and our economy as a whole. And we have been vigilant in both ensuring that market participants safeguard essential data and systems[13] and pursuing public companies that do not reasonably disclose material cybersecurity incidents. This includes charging public companies for misleading disclosures about cybersecurity events, or for inadequate controls related to such disclosures.[14]

Gatekeeper Accountability

But restoring trust requires more than SEC enforcement actions. We must all work together to ensure that companies are following the rules. And this leads me to my second point: the essential role that gatekeepers like so many of you play.

When gatekeepers are living up to their obligations, they serve as the first lines of defense against misconduct. But when they don't, investors, market integrity, and public trust all suffer. Encouraging your clients to play in the grey areas or walk right up to the line creates significant risk. It's when companies start testing those lines that problems emerge and rules are broken. And even if that's not the case, the public loses faith in institutions that appear to be trying to get away with as much as they can. That's why gatekeepers will remain a significant focus for the Enforcement Division, as evidenced by some of our recent actions.

For example, the Commission recently charged an attorney with playing a critical role in the unregistered sale of millions of shares of securities by two groups engaged in securities fraud.[15] This kind of behavior is an abuse of the public trust, and has no place in the legal profession.

But it's not just the lawyers. We have also brought number of enforcement actions involving significant misconduct by audit partners at major accounting firms.[16] It's also not just the cases with salacious facts that warrant our attention. The Commission recently charged an accountant with failing to register his firm with the Public Company Accounting Oversight Board and comply with PCAOB auditing standards in his audit of a public company client.[17] These basic requirements are essential to the gatekeeping function.

Crafting Appropriate Remedies

Finally, in addition to punishing misconduct, our remedies must deter it from happening in the first place. If the public understands that our decisions are motivated by these principles, it also increases their trust that institutions are playing by the rules and being held accountable when they do not.

When it comes to accountability, few things rival the magnitude of wrongdoers admitting that they broke the law, and so, in an era of diminished trust, we will, in appropriate circumstances, be requiring admissions in cases where heightened accountability and acceptance of responsibility are in the public interest. Admissions, given their attention-getting nature, also serve as a clarion call to other market participants to stamp out and self-report the misconduct to the extent it is occurring in their firm.

Officer and director bars, likewise, are a critical tool in our efforts. The authority to impose them in cases involving scienter-based violations is broad and there is no legal requirement that the individual be an officer or director of a public company, or indeed a public company employee at all, for a bar to be appropriate.[18] Rather, when considering whether to recommend seeking a bar, we generally think about whether the individual is likely to have an opportunity to become an officer or director of a public company in the future. We also think about a number of factors that courts have laid out, although as courts have made clear, those factors are "neither mandatory nor exclusive."[19]

My point here is this: if there is egregious conduct and a chance the person could have the opportunity to serve at the highest levels of a public company, we may well seek an officer and director bar to keep that person from being in a position to harm investors again.

Another related tool we have to help prevent future misconduct is the conduct based injunction, which enjoins a defendant from engaging in specific conduct in the future. Conduct based injunctions can apply to a wide variety of areas, including restrictions on stock trading and participating in securities offerings. In the case I mentioned a moment ago against the attorney who facilitated the unregistered sales of securities by fraudsters, the settlement included a five-year conduct based injunction that restricts his ability to prepare opinion letters.[20] This sort of conduct-specific relief is key to preventing bad actors from repeating their misconduct.

Undertakings are also an important remedy aimed at future compliance with the securities laws. In certain cases, our settlements include undertakings that are tailored to address the underlying violations and affect future compliance, which can include limiting the activities, functions, or operations of a company. In addition, the Commission can require the settling party to hire an independent compliance consultant to review policies and procedures and to determine improvements that can prevent future misconduct. Where we see misconduct that has harmed investors, we will look hard at whether undertakings will be required to prevent that conduct – or similar conduct – from happening again.

You should expect to see us recommend aggressive use of these prophylactic tools to protect investors and the marketplace, and relatedly the public's trust that all institutions and individuals are playing by the same rule set. And we'll take a particularly hard look at whether we need to deploy these tools if the specific offender is a recidivist. When a firm repeatedly violates our laws or rules, they should expect that the remedial relief we seek will take that repeated misconduct into account.

Trusting and Empowering SEC Staff

Before I close, I want to address another area where trust is key. And that is the trust that my Deputy Director, Sanjay Wadhwa, and I have in our colleagues. The SEC's Enforcement staff are extraordinarily talented and possess great experience and judgment. Sanjay and I want to empower them by, among other things, adjusting certain substantive decision-making processes around the Division. Sanjay will talk about some of these changes in more detail, but one that I'll mention relates to Wells meetings.

While I appreciate the importance of the Wells process, there are ways we can make that process more streamlined and efficient for everyone, starting with the Wells meeting itself. There are certainly cases that present novel legal or factual questions, or raise significant programmatic issues. In those cases the Director or Deputy should be directly participating in the Wells meeting, and there should be robust engagement. But many cases do not present such issues, and in those cases, I don't believe that it is a productive use of anyone's time for the Director or Deputy Director to sit in on a second or third meeting with defense counsel at the end of an investigation. In those circumstances, it is more efficient and appropriate for the Associate Director or Unit Chief to take the Wells meeting and engage in a dialogue, alongside the staff who are best positioned to assess the record.

Sanjay and I will still review Wells submissions, and we will, of course, still provide them to the Commission in connection with the related recommendations, but don't expect a meeting in each and every case. And when we do take a Wells meeting, there are certain things that will make those meetings more productive and efficient for everyone, as Sanjay will discuss in a moment.

There are also some well-established – but not always observed – rules about Wells submissions themselves that can lead to their rejection by the staff, such as attempts to limit their use or admissibility, or attempts to include a settlement offer, as you'll hear more about from Jonathan Hecht later in this panel's discussion.

* * *

The decline in public trust in our institutions is real and it hurts everyone. And it's our shared responsibility to address it. I've outlined the many steps that we're taking to do so, but I am confident that together we can do even more. Thank you for joining us today and I look forward to working with each of you on this collective endeavor.

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[1] The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or Commissioner. This speech expresses the author's views and does not necessarily reflect those of the Commission, the Commissioners, or other members of the staff.

[2] See "Americans' Confidence in Major U.S. Institutions Dips" (July 14, 2021), available at https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx (https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx) (finding that, in 2021, 33% of respondents have "a great deal" or "quite a lot" of confidence in banks; 29% in technology companies; and 18% in big business).

[3] See "Confidence in Institutions," available at https://news.gallup.com/poll/1597/confidence-institutions.aspx (https://news.gallup.com/poll/1597/confidence-institutions.aspx).

[4] See Press Release 2021-144, SEC Charges Ernst & Young, Three Audit Partners, and Former Public Company CAO with Audit Independence Misconduct (Aug. 2, 2021), available at https://www.sec.gov/news/press-release/2021-144 (https://www.sec.gov/news/press-release/2021-144); Press Release 2021-56, Auditor Charged for Failure to Register with PCAOB and Multiple Audit Failures (Apr. 5, 2021), available at https://www.sec.gov/news/press-release/2021-56 (https://www.sec.gov/news/press-release/2021-56); Press Release 2021-32, SEC Charges Two Former KPMG Auditors for Improper Professional Conduct During Audit of Not-for-Profit College (Feb. 23, 2021), available at https://www.sec.gov/news/press-release/2021-32 (https://www.sec.gov/news/press-release/2021-32); Press Release 2021-203, SEC Charges Investment Bank Compliance Analyst with Insider Trading in Parents' Accounts and Obtains Asset Freeze (Sept. 29, 2021), available

at https://www.sec.gov/news/press-release/2021-203 (https://www.sec.gov/news/press-release/2021-203); Press Release 2021-181, SEC Charges Former Pharmaceutical Global IT Manager in $8 Million Insider Trading Scheme (Sept. 17, 2021), available at https://www.sec.gov/news/press-release/2021-181 (https://www.sec.gov/news/press-release/2021-181); Press Release 2021-158, SEC Charges Netflix Insider Trading Ring (Aug. 18, 2021), available at https://www.sec.gov/news/press-release/2021-158 (https://www.sec.gov/news/press-release/2021-158); Press Release 2021-103, Six Charged in Silicon Valley Insider Trading Ring (June 15, 2021), available at https://www.sec.gov/news/press-release/2021-103 (https://www.sec.gov/news/press-release/2021-103); Press Release 2021-112, SEC Charges Amec Foster Wheeler Limited With FCPA Violations Related to Brazilian Bribery Scheme (June 25, 2021), available at https://www.sec.gov/news/press-release/2021-112 (https://www.sec.gov/news/press-release/2021-112); Press Release 2021-124, SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination (July 13, 2021), available at https://www.sec.gov/news/press-release/2021-124 (https://www.sec.gov/news/press-release/2021-124).

[5] Press Release 2021-145, SEC Charges Decentralized Finance Lender and Top Executives for Raising $30 Million Through Fraudulent Offerings (Aug. 6, 2021), available at https://www.sec.gov/news/press-release/2021-145 (https://www.sec.gov/news/press-release/2021-145).

[6] See Press Release 2021-147, SEC Charges Poloniex for Operating Unregistered Digital Asset Exchange (Aug. 9, 2021), available at https://www.sec.gov/news/press-release/2021-147 (https://www.sec.gov/news/press-release/2021-147); Press Release 2021-125, ICO "Listing" Website Charged With Unlawfully Touting Digital Asset Securities (July 14, 2021), available at https://www.sec.gov/news/press-release/2021-125 (https://www.sec.gov/news/press-release/2021-125).

[7] Press Release 2021-172, SEC Charges Global Crypto Lending Platform and Top Executives in $2 Billion Fraud (Sept. 1, 2021), available at https://www.sec.gov/news/press-release/2021-172 (https://www.sec.gov/news/press-release/2021-172); Press Release 2021-90, SEC Charges U.S. Promoters of $2 Billion Global Crypto Lending Securities Offering (May 28, 2021), available at https://www.sec.gov/news/press-release/2021-90 (https://www.sec.gov/news/press-release/2021-90).

[8] Press Release 2021-182, SEC Charges Crowdfunding Portal, Issuer, and Related Individuals for Fraudulent Offerings (Sept. 20, 2021), available at https://www.sec.gov/news/press-release/2021-182 (https://www.sec.gov/news/press-release/2021-182).

[9] Press Release 2021-176, SEC Charges App Annie and its Founder with Securities Fraud (Sept. 14, 2021), available at https://www.sec.gov/news/press-release/2021-176 (https://www.sec.gov/news/press-release/2021-176).

[10] See, e.g., 15 U.S.C. § 80b-4a.

[11] See, e.g., 15 U.S.C. § 78q(a).

[12] See, e.g., Fed. R. Civ. P. 37(e).

[13] See, e.g., Press Release 2021-169, SEC Announces Three Actions Charging Deficient Cybersecurity Procedures (Aug. 30, 2021), available at https://www.sec.gov/news/press-release/2021-169 (https://www.sec.gov/news/press-release/2021-169).

[14] See, e.g., Press Release 2021-154, SEC Charges Pearson plc for Misleading Investors About Cyber Breach (Aug. 16, 2021), available at https://www.sec.gov/news/press-release/2021-154 (https://www.sec.gov/news/press-release/2021-154); Press Release 2021-102, SEC Charges Issuer With Cybersecurity Disclosure Controls Failures (June 15, 2021), available at https://www.sec.gov/news/press-release/2021-102 (https://www.sec.gov/news/press-release/2021-102).

[15] See Litigation Release No. 25199, SEC Charges Attorney with Participation in Illegal, Unregistered Securities Offerings (Sept. 8, 20201), available at https://www.sec.gov/litigation/litreleases/2021/lr25199.htm (https://www.sec.gov/litigation/litreleases/2021/lr25199.htm).

[16] See Press Release 2021-144, SEC Charges Ernst & Young, Three Audit Partners, and Former Public Company CAO with Audit Independence Misconduct (Aug. 2, 2021), available at https://www.sec.gov/news/press-release/2021-144 (https://www.sec.gov/news/press-release/2021-144); Press Release 2020-115, SEC Charges Three Former KPMG Audit Partners for Exam Sharing Misconduct (May 18, 2020), available at https://www.sec.gov/news/press-release/2020-115 (https://www.sec.gov/news/press-release/2020-115).

[17] See Press Release 2021-56, Auditor Charged for Failure to Register with

PCAOB and Multiple Audit Failures (Apr. 5, 2021), available at https://www.sec.gov/news/press-release/2021-56 (https://www.sec.gov/news/press-release/2021-56).

[18] See 15 U.S.C. § 77t(e); 15 U.S.C. § 78u(d)(2).

[19] SEC v. Bankosky, 716 F.3d 45, 48 (2d Cir. 2013).

[20] See Litigation Release No. 25199, SEC Charges Attorney with Participation in Illegal, Unregistered Securities Offerings (Sept. 8, 2021), available at https://www.sec.gov/litigation/litreleases/2021/lr25199.htm (https://www.sec.gov/litigation/litreleases/2021/lr25199.htm).

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SEC to require admissions of guilt in some settlements; The SEC moved away from its neither-admit-nor-deny policy for some settlements.

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Body

The Securities and Exchange Commission will begin requiring admission of guilt in certain types of civil settlements, a major departure from the agency's routine use of a boilerplate clause that allows defendants to pay fines without acknowledging liability.

SEC Chairman Mary Jo White had signaled at a recent hearing that she was reviewing the -neither-admit-nor-deny policy, which has been harshly criticized by some judges. On Tuesday, White said some misconduct warrants wringing out an admission.

"We are going to, in certain cases, be seeking admissions going forward," White said at a Wall Street Journal CFO Network conference. "Public accountability in particular kinds of cases can be quite important, and if you don't get them, you litigate them."

In an e-mail sent to the SEC staff earlier this week, the co-directors of the enforcement division said that cases in which the defendant engaged in "egregious intentional misconduct" may justify requiring an admission, as would the obstruction of an SEC investigation or "misconduct that harmed large numbers of investors." The officials asked the agency's staff to assess how this thinking might apply to ongoing investigations.

The SEC has previously argued that most defendants would refuse to settle if they had to admit wrongdoing. Many companies and executives would rather fight in court than admit liability and expose themselves to lawsuits, agency officials had said. The legal battles would delay compensation to harmed investors - if the SEC even wins its case.

For all those reasons, the neither-admit-nor-deny settlement model would continue to be a "major, major tool" in the SEC's arsenal, and will be applied in most cases, White said on Tuesday. But the SEC will make exceptions, she said.

Early last year, the SEC had tweaked its settlement model by mandating admissions in cases involving defendants who had already entered guilty pleas in related criminal settlements.

Fierce debate about the boilerplate language began about two years ago, when Judge Jed S. Rakoff rejected a $285 million settlement that the SEC negotiated with Citigroup, in part because the deal included neither-admit-nor-deny language. The SEC has appealed, and the case is pending before a panel of the U.S. Second Circuit Court of Appeals.

Citigroup had agreed to settle allegations that it misled investors into buying deteriorating assets in a weakening housing market. But Rakoff ruled that because Citigroup did not admit or deny wrongdoing, he had no way of knowing if the settlement size he was asked to approve was too little or too much.

SEC to require admissions of guilt in some settlements The SEC moved away from its neither-admit-nor-deny policy for some settlements.

Since then, a handful of other judges have voiced their discomfort with allowing defendants to pay fines without admitting liability.

In April, U.S. District Judge Victor Marrero in Manhattan held off on final approval of a $602 million insider trading settlement between the SEC and SAC Capital Advisors because he questioned whether SAC should have to acknowledge wrongdoing.

Marrero said he would only approve the deal if it complies with the court's findings in the Citigroup appeal, which should determine whether Rakoff exceeded his authority in rejecting the Citigroup deal.

"Under the circumstances, the most prudent course the Court sees open to it would be to approve the settlement subject to a condition that it would become final upon a definitive determination in the Citigroup appeal," Marrero wrote in his 34-page decision.

Earlier this year, a federal judge in Colorado initially refused to approve a settlement involving an alleged $16 million Ponzi scheme run by Bridge Premium Finance, citing the SEC's failure to get an admission of wrongdoing from that company.

And in December 2011, a federal judge in Wisconsin scrutinized a settlement between the SEC and Koss Corp. and cited Rakoff's decision. Officials at the Milwaukee-based firm were accused of accounting fraud, but did not admit or deny misdeeds.

In both cases, the judges eventually approved the settlements.

All these cases preceded White's arrival at the SEC. But on Tuesday, White said that the SEC has made "good use" of the neither-admit-nor-deny model. In the e-mail to the agency's staff, the heads of the SEC's enforcement division - George Canellos and Andrew Ceresney - said they would "continue to strongly defend our discretion to reach such settlements in response to inquiries from courts."

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COMMON SENSE

S.E.C. Has a Message for Firms Not Used to Admitting Guilt

By James B. Stewart

June 21, 2013

The days of cop-out settlements in big securities cases may be waning.

In a departure from long-established practice, the recently confirmed chairwoman of the Securities and Exchange Commission, Mary Jo White, said this week that defendants would no longer be allowed to settle some cases while “neither admitting nor denying” wrongdoing.

“In the interest of public accountability, you need admissions” in some cases, Ms. White told me. “Defendants are going to have to own up to their conduct on the public record,” she said. “This will help with deterrence, and it’s a matter of strengthening our hand in terms of enforcement.”

In a memo to the S.E.C. enforcement staff announcing the new policy on Monday, the agency’s co-leaders of enforcement, Andrew Ceresney and George Canellos, said there might be cases that “justify requiring the defendant’s admission of allegations in our complaint or other acknowledgment of the alleged misconduct as part of any settlement.”

They added, “Should we determine that admissions or other acknowledgment of misconduct are critical, we would require such admissions or acknowledgment, or, if the defendants refuse, litigate the case.”

Ms. White said that most cases would still be settled under the prevailing “neither admit nor deny” standard, which, she said, has been effective at encouraging defendants to settle and speeding relief to victims.

The policy change follows years of criticism that the S.E.C. has been too lenient, especially with the large institutions that were at the center of the financial crisis. Bank of America, Goldman Sachs, Citigroup and JPMorgan Chase were among the defendants that settled charges related to the financial crisis while neither admitting nor denying guilt, although Goldman was required to admit that its marketing materials were incomplete.

That this approach became such a heated public issue is in large part because of the provocative efforts of Judge Jed S. Rakoff of Federal District Court, who has twice threatened to derail settlements with large financial institutions that neither admitted nor denied the government's allegations.

In late 2011, he ruled that he couldn't assess the fairness of the agency's settlement with Citigroup in a complex mortgage case without knowing what, if anything, Citigroup had actually done. In his ruling, he said that settling with defendants who neither admit nor deny the allegations is a policy "hallowed by history but not by reason."

He described the settlement, which was for $285 million, as "pocket change" for a giant bank like Citigroup. Other judges have followed Judge Rakoff's lead, and an appeal of his Citigroup ruling is pending before the Court of Appeals for the Second Circuit.

The new policy would seem to vindicate Judge Rakoff, at least in spirit, but Ms. White said the decision was rooted in her experience as United States attorney in New York, where defendants in criminal cases are almost always required either to enter a guilty plea or go to trial.

"Judge Rakoff and other judges put this issue more in the public eye, but it wasn't his comments that precipitated the change," she said. "I've lived with this issue for a very long time, and I decided it was something that we should review, and that could strengthen the S.E.C.'s enforcement hand." (Judge Rakoff, who is presiding over a trial in Fresno, Calif., said he couldn't comment, citing the appeal of his Citigroup ruling.)

Those concerned that Ms. White, who before her confirmation as chairwoman of the S.E.C. was head of the litigation department at the prominent corporate law firm Debevoise & Plimpton, might be too cozy with the big banks and corporations that were formerly her clients, can breathe easier. Even some of the S.E.C.'s harshest critics were at least somewhat mollified.

"It's an important step in the right direction," said John Coffee, a professor at Columbia Law School and a vocal critic of S.E.C. settlements he deems too lenient. "There's clearly a public hunger for accountability. Mary Jo White has shown she is sensitive to this."

Ms. White agreed. "There's no question I share the desire for more accountability in cases where that is warranted," she said. "I do think there are situations where public accountability is particularly important, and that will be our focus. I don't want to overstate this — no admit, no deny will still be the way most cases are resolved — but I think it's an important change."

There's little doubt that extracting admissions of wrongdoing gives the S.E.C. enormous new leverage, and not just because defendants want to avoid the damage to their reputation that comes with admitting misconduct. Any admission is likely to be seized upon by private litigants in civil lawsuits, including class actions, with potentially devastating financial consequences.

Judge Jed S. Rakoff has criticized the S.E.C. as too lenient. Justin Maxon/The New York Times

“If they admit culpability to the S.E.C., plaintiffs will cite that in their cases, and that could mean hundred of millions or billions in damages,” Professor Coffee said. “It’s not just the stigma they’re worried about.”

Those concerned that the S.E.C. already has too much power, including many corporate defense lawyers, were critical.

"I don't like this at all," said Brad Karp, a litigator and chairman of Paul, Weiss, Rifkind, Wharton & Garrison who represented Citigroup in its settlement talks with the S.E.C. "It gives them enormous leverage. A financial institution cannot fight a primary regulator and win. They have you. They have complete leverage over you. Even if you fight and win over a year, the damage will outweigh any litigation result."

But Ms. White's emphasis on public accountability suggests that she sees admissions of guilt as far more than a bargaining chip to extract bigger settlements. In the type of prominent cases cited by the enforcement staff, the S.E.C. may be unwilling to negotiate over an admission of wrongdoing and will force defendants to go to trial.

That could cut two ways. Some corporate defendants have settled cases, even when they believed they were innocent, to avoid the cloud of litigation, and treated any fines simply as a cost of doing business. Now, if the S.E.C. takes a case to trial, it will be forced to prove its case.

"If they take a hard line where admissions are an inevitable cost of resolving the case, it will force defendants to trial," Mr. Karp said. Defendants will "try to find every way possible to avoid that outcome. If they can negotiate around it, there will be early settlements. But if not, they'll go to trial."

Citigroup has said that if Judge Rakoff's ruling is upheld and its settlement is overturned, it will go to trial rather than admit wrongdoing.

Ms. White said that "our aim is to apply this policy in appropriate cases, and we'll do this in the public interest." She continued: "Will this lead to more cases going to trial? It's hard to say going in, but it might. We have to be prepared to go to trial, and we have to make people believe we're prepared."

That may be a tall order. Defense lawyers and judges have raised questions about the S.E.C.'s trial competence in complex cases. The S.E.C. responded that of its last 11 cases that went to trial, it prevailed in eight.

An important test of that litigation capacity is likely to come next month, when Fabrice Tourre, a former Goldman Sachs trader who is accused of misleading clients in a complex mortgage deal, is scheduled to go on trial.

Exactly which cases, and how many, will result in admissions of wrongdoing remain to be seen.

"It will be very interesting to see how this plays out in six months or a year," Mr. Karp said.

The S.E.C. memo cites three criteria: "misconduct that harmed large numbers of investors or placed investors or the market at risk of potentially serious harm"; "egregious intentional misconduct"; or "when the defendant engaged in unlawful obstruction of the commission's investigative processes."

Relatively few of the financial crisis cases, including the big mortgage fraud cases settled by Citigroup, JPMorgan and Goldman Sachs, would seem to meet those criteria, because the purported misconduct wasn't that egregious, the evidence in some cases was ambiguous and the victims were limited to a few sophisticated financial institutions rather than large numbers of the investing public.

Ms. White declined to comment on any specific cases, but said: "No one case precipitated this. From this point forward, we'll be looking for appropriate cases in which to apply the policy. Most will still be resolved on a no admit, no deny basis. But we'll be scrutinizing this."

Professor Coffee said the agency should go even further, by identifying and holding more individuals responsible.

Still, he said, "You have to give Mary Jo credit: She has shown she is less tone deaf" to public demands for accountability. "The S.E.C. may have to bring fewer cases and pursue them harder," he added. "But that could be a good thing."

A version of this article appears in print on , Section B, Page 1 of the New York edition with the headline: The S.E.C. Has a Message for Firms Not Used to Admitting Guilt