Blogs
November 10, 2016
The State of the SEC's Admissions Policy: Three Years Later

In June 2013, SEC Chair Mary Jo White announced a new SEC policy requiring admissions as part of settlements in certain types of cases. The criteria for admission cases, as stated by Chair White and an SEC staff memo, included the following factors:

- A large number of investors have been harmed or the conduct was otherwise egregious
- The conduct posed a significant risk to the market
- Admissions would aid investors in deciding whether to deal with a particular party in the future
- Disclosing the facts would send an important message to the market
- Intentional misconduct
- Obstruction of an investigation

In practice, the SEC has rarely required defendants to make admissions in settlements. In 2014, only 1.5% of the SEC's cases involved admissions (12 cases). In 2015, only 1.7% of the SEC's cases involved admissions (14 cases). In 2016, to date, the SEC has required admissions in only six cases. While some commentators have suggested that the SEC uses the threat of admissions to extract higher penalties, we are unaware of any specific case where that has occurred. At a recent SEC conference, SEC Associate Director Gerald Hodgkins firmly denied that the SEC engages in such a practice. Despite the rarity of admissions cases, if the policy criteria are applied to the conduct involved in SEC cases since June 2013, the SEC could have sought admissions in many more cases. That reality and the potential collateral consequences of admissions raise risks for entities in settlement discussions with the SEC. Thus, the question of whether the SEC will seek admissions in a particular case where the criteria may apply is a significant issue. If recent SEC admissions cases offer any guidance, such cases appear to be "message" cases, based on the policy factor that admissions can be required where disclosing the facts would send an important message to the market. In an action against Citigroup Global Markets, the SEC alleged that a computer coding error caused the firm to provide the agency with incomplete "blue sheet" information about trades it executed during a 15-year period. After discovering the error, Citigroup allegedly failed to report the incident to the SEC or take any steps to produce the omitted data until nine months later. Blue sheet data is critical to the SEC's investigations and examinations. Because all broker dealers are required by SEC rules to keep accurate transaction records, the SEC felt it important to reinforce the point that "[b]roker-dealers have a core responsibility to promptly provide the SEC with accurate and complete trading data for us to analyze during enforcement investigations." Reminding broker-dealers of the importance of safeguarding customer assets pursuant to the Customer Protection Rule, and the potential for harm in the event of another Financial Crisis, was the SEC's message in its action against Merrill Lynch in June 2016. In that case, the SEC alleged that Merrill Lynch misused customer cash to generate profits for the firm and failed to safeguard customer securities from the claims of its creditors. The SEC pointed out that because of the violations, customers would have been exposed to significant risk and uncertainty regarding their assets in the event that Merrill Lynch had collapsed. In conjunction with the case, the SEC announced a two-part initiative to uncover additional abuses of the Customer Protection Rule. The SEC also used the case to remind all entities of the SEC's whistleblower protection rules. The third most recent admissions case involved alleged misconduct relating to Credit Suisse's methodology for determining net new assets (NNA), a metric valued by investors in financial institutions to measure success in attracting new business. The SEC alleged that Credit Suisse, contrary to its publicly disclosed methodology, took a results-driven approach to determining NNA in order to meet certain targets established by senior management. The SEC emphasized the importance of the disclosure issue, the fact that employees most knowledgeable about NNA raised concerns but were ignored, and that investors were deprived of the opportunity to judge fairly the firm's success in attracting new money. The SEC's most recent admission cases did not involve many of the factors the SEC considers in its admissions policy, such as

obstruction, intentional misconduct, or a large number of investors being harmed. At the three-year mark, the trend is that the SEC uses admissions rarely and primarily where the SEC seeks to send an important message to the market.

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