COMMENT

IS JUDGE RAKOFF ASKING FOR TOO MUCH? THE NEW STANDARD FOR CONSENT JUDGMENT SETTLEMENTS WITH THE SEC

Amanda S. Naoufal*

In SEC v. Citigroup Global Markets, Inc., Judge Rakoff rejected a $285 million settlement between the Securities and Exchange Commission (“SEC” or “Commission”) and Citigroup. The complaint alleged that Citigroup failed to disclose its role in the selection of assets for a billion dollar collateralized debt obligation. Judge Rakoff rejected the consent judgment, concluding it was neither fair, nor reasonable, nor adequate, nor in the public’s interest. The critical issue in Judge Rakoff’s decision was the validity of the SEC’s “no admit/deny” policy, which is a policy that has long been accepted by courts. He objected to this policy because it required the court to employ its power without the parties providing him a factual basis, which constrained his ability to exercise his independent judgment. This decision has great implications for the SEC’s enforcement program. The SEC relied on courts’ longtime acceptance of a standard that produced an efficient and effective process with regards to consent judgments. This

* Associate Managing Editor, American University Business Law Review, Volume 2; J.D. Candidate, May 2013, American University, Washington College of Law; B.A., 2008, University of California, Irvine. I want to thank the entire American University Business Law Review staff for all of their hard work and dedication in preparing this Comment for publication. Many thanks to my editors, Ashley Teesdale, Jane Wetterau, and Jason Thelen for their patience and valuable insight. I would like to extend my gratitude to Professor Mary Siegel for her wonderful advice and feedback and Adeen Poster for her guidance throughout the research process. Finally, a special thank you to Michael for his constant encouragement and understanding, and most importantly, to my family for their unconditional love and support.
Comment analyzes the differences between the traditional standard and the Rakoff standard by illustrating the differences that each standard has on the outcome of consent judgments. Finally, this Comment recommends that a combination of both standards be used for future consent judgments to ensure greater enforcement, accountability, and transparency.

### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>185</td>
</tr>
<tr>
<td>I. Consent Judgments: Before and After Judge Rakoff</td>
<td>187</td>
</tr>
<tr>
<td>A. The Adoption of Consent Judgments and the Purpose of Consent Judgments in the SEC’s Enforcement Program</td>
<td>187</td>
</tr>
<tr>
<td>B. The Traditional Standard Used by Most Courts Involves a More Lenient Evaluation of Consent Judgments</td>
<td>189</td>
</tr>
<tr>
<td>C. The Rakoff Standard Involves a More Stringent Evaluation of Consent Judgments</td>
<td>191</td>
</tr>
<tr>
<td>II. The Two Standards and Their Different Impacts on Consent Judgments</td>
<td>194</td>
</tr>
<tr>
<td>III. A Combination of Both Standards Allows for Greater Enforcement and Transparency</td>
<td>202</td>
</tr>
<tr>
<td>Conclusion</td>
<td>206</td>
</tr>
</tbody>
</table>
The Securities and Exchange Commission (“SEC” or “Commission”) is authorized to bring a civil injunction action as a form of enforcement against violators of securities laws.¹ When the SEC brings a civil action in federal district court, it often requests an injunction against future violations of federal securities laws.² A consent judgment, or consent decree, is a civil settlement incorporated within a judicial order³ and is used in more than ninety percent of the SEC’s civil actions.⁴ Once a settlement is reached, the defendant consents to the entry of a judgment or order without admitting or denying the allegations.⁵ A judge then evaluates the proposed consent judgment with a limited source of information and, therefore, the entry of the consent judgment is often ministerial.⁶ Even though judicial inquiry is limited, the court is still required to exercise its independent judgment.⁷

The Supreme Court has long endorsed the use of consent judgments,⁸ and courts recognize consent judgments as an effective and efficient means of dispute resolution.⁹ The standard used to

---

¹. See Carmen Lawrence et al., Seeing Beyond the Deal: The Collateral Consequences of SEC Settlements, 1832 PRAC. LAW INST. 915, 917–18 (2010) (indicating that civil injunction actions are one of two basic enforcement actions that the SEC is authorized to bring against defendants).

². See id. at 917 (explaining the differences between a civil injunctive action and an administrative proceeding, the two possible enforcement actions the SEC can seek when enforcing federal securities laws).

³. See Linda Chatman Thomsen, The Expanding Role of Judges in Settlement and Beyond, 1918 PRAC. LAW INST. 487, 490 (2011) (indicating that in consent judgments, the court has jurisdiction to enforce the agreement).

⁴. See SEC v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983) (articulating that one of the reasons the SEC enters many consent judgments is because of the agency’s limited resources).

⁵. See generally 17 C.F.R. § 202.5(e) (2012) (amending the Code of Federal Regulations due to the SEC’s view that a refusal to admit an allegation is equivalent to a denial); Danne L. Johnson, SEC Settlement: Agency Self-Interest or Public Interest, 12 FORDHAM J. CORP. & FIN. L. 627, 650 (2007) (discussing the SEC’s position that a refusal to admit an allegation is equal to a denial unless the defendant agrees to neither admit nor deny the allegations).

⁶. See Thomsen, supra note 3, at 490 (explaining that the only available sources of information are the complaint and the proposed order).

⁷. See id. at 491 (alluding to greater scrutiny because the consent judgment involves the judge’s signature); see also SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 331 (S.D.N.Y. 2011) (indicating that even though deference is given to a government agency, invoking a court’s independent judgment is an “indispensable attribute of the federal judiciary”).

⁸. See SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) (citing Swift & Co. v. United States, 276 U.S. 311, 325–26 (1928)).

⁹. See id. (presenting the benefits of consent judgments, including avoiding the risk and cost of litigation).
evaluate a consent judgment is whether the court finds the decree fair, adequate, reasonable, and in the public interest. A recent decision from the U.S. District Court for the Southern District of New York, however, used a different standard to evaluate consent judgments. The decision, if upheld, will likely have implications on the SEC’s enforcement program.

This critical decision was made on November 28, 2011, when Judge Jed Rakoff rejected a proposed $285 million settlement between the SEC and Citigroup Global Markets, Inc. (“Citigroup”). Contrary to the normal practice of a limited judicial role, Judge Rakoff expanded the role in reviewing consent judgments. He also placed a greater burden on the SEC to present more facts to justify the terms of the decree. Consequently, in SEC v. Citigroup Global Markets, Inc., Judge Rakoff opened the door to a new set of questions regarding consent judgments with federal agencies, causing fear that this decision will result in a stricter standard for consent judgment settlements.

10. See SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) (stating that the court will review the proposed consent judgment to determine that it is within the bounds of “fairness, reasonableness, and adequacy and, in certain circumstances, whether it services the public interest”).

11. See Yin Wilczek, Court Throws Out Proposed $285M Deal Between SEC, Citigroup; Sets Case for Trial, 43 SEC. REG. & L. REP. (BNA) 2395 (2011) (quoting the SEC Enforcement Director’s response to Judge Rakoff’s decision, in which the director indicated that the decision could hurt the SEC’s enforcement program). See generally Bradley Bondi & Douglas Fischer, Citigroup Ruling Has Serious Implications for SEC Settlements, JURIST-SIDEBAR (Jan. 16, 2012), http://jurist.org/sidebar/2012/01/bondi-fischer-sec-citigroup.php (explaining the SEC’s reluctance to now bring enforcement actions into court and the possibility of seeking other alternatives to consent decrees).

12. See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 332 (S.D.N.Y. 2011) (holding that the proposed consent judgment was “neither fair, nor reasonable, nor adequate, nor in the public interest”).

13. See Matthew Farrell, A Role for the Judiciary in Reforming Executive Compensation: The Implications of Securities and Exchange Commission v. Bank of America Corp., 96 CORNELL L. REV. 169, 191 (2010) (explaining that Judge Rakoff’s approach is different than the approach of other judges in similar cases). Compare Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 330 (stating that while the SEC is entitled to deference, the court must exercise its independent judgment in determining whether the consent decree serves the public interest), with Randolph, 736 F.2d at 529 (concluding that the lower court applied too strict a standard when evaluating the approval of a consent decree and should have deferred to the agency’s decision).

14. See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 335 (holding that a consent judgment that imposes penalties on the basis of unproven facts is neither fair nor reasonable).

15. Cf. SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 310 (S.D.N.Y. 2011) (granting a consent judgment while noting that the court reserves for the future “substantial questions of whether the Court can approve other settlements that involve the practice of ‘neither admitting nor denying’” any wrongdoing).
This Comment argues that ambiguity exists in the law regarding the standard used to evaluate consent judgments. The ambiguity is a result of some courts applying a lenient standard while others apply a more stringent standard, specifically that of Judge Rakoff’s. This Comment analyzes the standard previously used to grant consent judgments (“traditional standard”) and compares it to the stricter standard applied in Judge Rakoff’s court (“Rakoff standard”). Applying the Rakoff standard changes the meaning of what courts previously considered “fair, adequate, reasonable, and in the public’s interest.” To demonstrate that the application of each standard results in different outcomes, this Comment will apply each standard to a set of hypothetical facts involving a multibillion-dollar corporation, MG Global Corporation, that engaged in securities fraud and subsequently entered into a consent judgment with the SEC.

Part I of this Comment gives an overview of consent judgments and the adoption of such decrees in settlements with the SEC. Part I also discusses the interpretation of both the traditional standard and the Rakoff standard with an emphasis on three differences: (1) deference to federal agencies; (2) the “no admit/deny” provision in consent judgments; and (3) public knowledge of the underlying facts. Part II analyzes the two standards to show how each standard renders different outcomes when applied to the same set of hypothetical facts.

Part III recommends that courts adopt a combination of the traditional standard and the Rakoff standard in granting consent judgments to allow for greater transparency and ensure that consent decrees are meeting the standard of fair, reasonable, adequate, and in the public interest. Part IV concludes that there is ambiguity in the law regarding consent judgments and that a clear standard for granting consent judgments that is neither too stringent nor too lenient is needed.

I. CONSENT JUDGMENTS: BEFORE AND AFTER JUDGE RAKOFF

A. The Adoption of Consent Judgments and the Purpose of Consent Judgments in the SEC’s Enforcement Program

The SEC’s aim is to protect investors and maintain a fair and efficient market. The SEC does this by investigating violations of

securities laws and deciding whether to settle with or litigate against the alleged violators. The SEC favors settlements because of their effective and efficient enforcement and the low risks involved. One type of settlement adopted by the SEC is the consent decree, a “judgment entered by consent of the parties whereby the defendant agrees to stop [the] alleged illegal activity without admitting guilt or wrongdoing.” The SEC adopted this standard long ago; however, it became concerned with defendants publicly denying wrongdoings following the entry of such judgments. As a result, settlements with the SEC are entered by consent whereby the defendants agree to the entry of a judgment while neither admitting nor denying the allegations. The validity of the “no admit/deny” provision had not been challenged until the Citigroup case.

Consent judgments positively impact the SEC’s enforcement of securities laws. This is largely due to the fact that the SEC seeks, in its consent judgments, injunctive relief forbidding future violations. Not only do SEC settlements affect market participants through these injunctions, they also serve as a means to create and accept new legal standards. Consent judgments offer a sense of security by enforcing the terms of an agreement as well as reducing risks and costs of litigation. Further, the SEC is able to save

http://www.sec.gov/about/whatwedo.shtml (last visited Dec. 16, 2012) (stating the SEC’s mission and how its enforcement authority is crucial to its effectiveness).


18. See SEC Memorandum of Law in Response to Questions Posed by the Court Regarding Proposed Settlement at 3, SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11 Civ. 7387 (JSR)), 2011 WL 5307417 [hereinafter SEC Mem. of Law] (noting that lower courts recognize the “importance of consent judgments to the SEC’s effective and efficient enforcement of federal securities laws”); id. at 4 (stating that the Second Circuit has observed a “strong federal policy favoring the approval and enforcement of consent decrees”).

19. See id. at 11.

20. See id. (explaining that defendants were not admitting to allegations but rather denying those allegations immediately after the consent judgment was entered).

21. See id. (explaining that the SEC amended its policy to prevent defendants from denying allegations in both the consent decree and elsewhere).

22. See Bondi & Fischer, supra note 11 (explaining that Judge Rakoff broke the tradition of granting “neither admit nor deny” settlements).

23. See SEC v. Clifton, 700 F. 2d 744, 748 (D.C. Cir. 1983) (contending that there is a balance of advantages and disadvantages, which the court is reluctant to upset, when the SEC chooses injunction over litigation).

24. See SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 331 (S.D.N.Y. 2011) (stating that the injunctive relief sought in most consent judgment cases is an injunction forbidding future violations and a request to enforce future preventative measures).

25. See Johnson, supra note 5, at 653 (maintaining that a single enforcement action can cause developments of internal controls, compliance functions, and supervisory procedures in other companies).
resources for additional enforcement actions. Consequently, courts often hesitate to deny consent judgments in fear that the balance of anticipated advantages and disadvantages will be destroyed.

B. The Traditional Standard Used by Most Courts Involves a More Lenient Evaluation of Consent Judgments

Historically, courts have given great deference to what the SEC believes is in the public interest. A consent decree should be granted unless a court finds the decree to be unfair, inadequate, or unreasonable. Therefore, the decision of what is in the public interest should be left with the government agency negotiating the consent decree. In evaluating a proposed consent judgment, the Second Circuit asserts that the parties to the settlement should be the ones to decide the terms of the consent judgment.

The traditional standard is not whether the court would have agreed to the proposed consent judgment, but whether the proposed consent judgment is fair and reasonable. The court is not to try and

26. See SEC v. Randolph, 736 F.2d 525, 529–30 (9th Cir. 1984) (stating that a consent judgment offers more security than a settlement agreement because it can be enforced by judicial sanctions, whereas breaching a settlement agreement simply results in another lawsuit); see also Johnson, supra note 5, at 671–72 (explaining that the Commission is motivated to settle because uncertain results associated with litigation are avoidable through settlements).

27. See Randolph, 736 F.2d at 529–30 (explaining that the SEC was able to allocate resources saved through consent judgments towards investigations of other securities laws violations).

28. See Clifton, 700 F.2d at 748 (discussing the benefits of settlements for the SEC, such as the ability to conserve its own judicial resources while still informing potential investors that a company or person has violated securities laws in the past).

29. Farrell, supra note 13, at 188; see Randolph, 736 F.2d at 529 (stating that courts should give deference to the public agency negotiating the proposed judgment); FTC. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987) (recognizing that while courts should not blindly follow an agency’s lead in entering a judgment, they should give substantial deference to the public agency entering into the negotiated consent decree).

30. See Randolph, 736 F.2d at 529 (applying the traditional standard because the lower court applied too strict a standard when it rejected the proposed consent judgment).

31. See SEC Mem. of Law, supra note 18, at 4 n.1 (explaining how the Ninth Circuit adopted the position that a court should defer to the agency’s decision on whether a settlement is within the public interest).

32. See In re Sony Corp. SXRD, 448 F. App’x 85, 87 (2d Cir. 2011) (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974)) (stating that the court should not evaluate a proposed consent judgment based on one that the court itself might have fashioned).

33. See United States v. Cannons Eng’g Corp., 899 F.2d 79, 84 (1st Cir. 1990) (stating that an agency’s role deserves heightened respect in situations where sophisticated players with sharply conflicting interests negotiate an agreement at arm’s length); Randolph, 736 F.2d at 529 (“Unless a consent decree is unfair, inadequate, or
resolve the facts of the case when evaluating a proposed consent judgment. To do so would “emasculate the very purpose for which settlements are made.” After all, a government agency has put the time and resources into investigating the violations and negotiating the terms of the decree; it is not the court’s role to decide if the best possible settlement was reached. Accordingly, when reviewing consent judgments, the courts should pay the parties deference.

In granting a consent judgment, there is no resolution of the issues presented; instead, the parties enter into a consent decree with the understanding that the defendant immediately cease the alleged illegal activity without admitting or denying guilt. With the “no admit/deny” provision, the Commission is able to resolve the matter and compensate the victims of the illegal act in a timely and reasonable manner. In these consent judgments, the SEC enters the provision to preclude a defendant’s subsequent denial of wrongdoing in order to avoid an assumption that the alleged conduct did not occur. Courts understand that findings of fact are something the Commission must give up in order to enter a consent judgment, and the SEC believes that without a defendant denying any wrongdoing, the Commission has essentially proven that the violations did in fact occur. This policy, according to the SEC, is necessary to

---

34. See United States v. Oregon, 913 F.2d 576, 582 (9th Cir. 1990) (“The reviewing court should not determine contested issues of fact that underlie the dispute.”).

35. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974) (explaining that the court is not to turn the evaluation of a settlement into a “rehearsal of the trial”).

36. See Randolph, 736 F.2d at 529.

37. See United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1436 (6th Cir. 1991) (finding a settlement fair based on the “legal posture of the parties” and “the nature of the negotiation process that led to the decree”).

38. SEC v. WorldCom, Inc., 273 F. Supp. 2d 431, 436 (S.D.N.Y 2003); see also Randolph, 736 F.2d at 529 (concluding that the court’s role is to ensure the consent judgment is reasonable).

39. See SEC Mem. of Law, supra note 18, at 11 (citing BLACK’S LAW DICTIONARY 410 (9th ed. 1990)) (defining consent judgments as judgments entered without admitting guilt).

40. See id. at 12–13 (explaining the advantages and disadvantages of including a “no admit/deny” provision in a consent judgment).

41. See 17 C.F.R. § 202.5(e) (stating that the refusal to admit wrongdoing is the same as a denial).

42. See SEC v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983) (stating that the SEC gives up a number of advantages in order to enter a consent decree, such as findings of fact and court opinions that set forth reasons for a particular holding).

successfully resolve cases involving securities violations. 44 Otherwise, without the strategic wording in the “no admit/deny” provision, companies would refuse to settle and the SEC would be unable to carry the costs of litigation. 45 Several courts recognize the benefits of the SEC’s “no admit/deny” policy and choose to grant consent decrees unless the consent judgments do not meet the standard of “fair, reasonable, and adequate.” 46

C. The Rakoff Standard Involves a More Stringent Evaluation of Consent Judgments

In SEC v. Citigroup Global Markets, Inc., Judge Rakoff rejected a $285 million settlement between the SEC and Citigroup. 47 The SEC alleged that Citigroup’s marketing materials were misleading because Citigroup failed to disclose its role in the selection of assets for a $1 billion collateralized debt obligation (“CDO”) portfolio. 48 Citigroup’s marketing materials for the CDO represented that an independent collateral manager would be selecting the portfolio of assets. 49 Citigroup, however, failed to disclose that it had a significant role and influence over the selection of the assets and even held a short position on those assets. 50 In the end, Citigroup


45. See id. (reporting that the SEC’s limited resources places it at a disadvantage in the battle against the companies).

46. See Clifton, 700 F.2d at 748 (holding that the court is reluctant to “upset this balance” of advantages and disadvantages brought by consent decrees). Cf. SEC v. Randolph, 736 F.2d 525, 530 (9th Cir. 1984) (granting a consent judgment with “no admit/deny” provision); SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 310 (S.D.N.Y. 2011) (granting a consent judgment with “no admit/deny” policy even though the court had reservations about the policy); United States v. Microsoft Corp., 56 F.3d 1448, 1461 (D.C. Cir. 1995) (stating that criticism of a consent decree that does not include an admission is “unjustified”).

47. See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 332.


50. See id. at 329–30 (alleging that Citigroup knew in advance that selling the portfolio would be difficult if it disclosed its intention to get rid of the negatively projected assets).
realized $160 million in profits for the CDO, while investors lost hundreds of millions of dollars.\footnote{Id.}

In the complaint against Citigroup’s employee, Brian Stoker, the SEC alleged that Citigroup knew it could not place the liabilities of a “CDO-squared” if it disclosed how it had been put together.\footnote{Complaint at 10, SEC v. Stoker, No. 11-CIV-7388, 2011 WL 4965844 (S.D.N.Y. 2011).} The SEC, however, failed to include this information in the complaint against Citigroup.\footnote{See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 329–30 (noting that language from the Stoker complaint is missing from the Citigroup complaint).} Instead, the SEC chose to charge Citigroup with negligence only, even though the allegations appeared to be knowing and fraudulent, which normally result in scienter-based charges.\footnote{See id. at 334 n.7 (noting that the SEC charged Goldman Sachs with scienter-based violations for a factual scenario very similar to the one in Citigroup).}

The SEC filed a proposed consent judgment the same day it filed a complaint against Citigroup.\footnote{See SEC Mem. of Law, supra note 18, at 2.} The proposed consent judgment stipulated that Citigroup agree to the entry of an order enjoining them from future violations, “requiring the payment of $285 million, consisting of disgorgement of $160 million, prejudgment interest of $30 million, and a civil penalty of $95 million.”\footnote{See id. at 3.} Judge Rakoff found the proposed decree “neither reasonable, nor fair, nor adequate, nor in the public’s interest.”\footnote{See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 335 (concluding that the lack of a factual basis results in a consent judgment that does not meet the public interest standard).} Judge Rakoff then criticized the SEC’s long policy of allowing defendants to enter consent judgments without admitting or denying the allegations.\footnote{See id. at 322 (finding that the policy deprives the court of “the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact”).} He also emphasized the need for more facts to determine whether the proposed decree met the required standard.\footnote{See id. (concluding that more facts were needed to decide whether relief is justified).}

approve a settlement after the SEC alleged that Bank of America misled investors about billions of dollars in payments to former Merrill Lynch employees after Bank of America acquired Merrill Lynch. Judge Rakoff claimed that the settlement proposal “was a contrivance designed to provide the SEC with a façade of enforcement.” He also alluded to greater scrutiny because the SEC was asking the court to impose injunctive prohibitions against the defendant.

Through a combination of decisions on SEC settlements, Judge Rakoff focused on three main issues with consent judgments: deference given to the SEC in determining the public’s interest, the “no admit/deny” provision in consent judgments, and the lack of factual support for settlements. Judge Rakoff made clear his dissatisfaction with the SEC’s “no admit/deny” policy when he hesitantly approved a consent judgment in SEC v. Vitesse Semiconductor Corp. The policy, said Judge Rakoff in Vitesse, results in “confusion and hypocrisy,” leaving the public unaware of the actual truth. Judge Rakoff acknowledged the substantial deference given to the Commission, but also noted that the court determines whether the practice of not admitting or denying allegations is “unreasonable or contrary to the public interest as to warrant its disapproval.” Judge Rakoff therefore rejected the SEC’s position that when a defendant does not expressly deny the allegations, the public somehow knows the truth about those

---

62. Id. at 510 (concluding that the proposed consent judgment could not be found fair even under the most deferential review).
63. See id. at 508 (noting that because the SEC was asking the court to invoke its own contempt power, a closer review of the proposed consent decree was necessary).
64. Vitesse Semiconductor Corp., 771 F. Supp. 2d at 310 (expressing reservations for questions in future proceedings regarding the “no admit/deny” policy); Bank of Am. Corp., 2010 WL 624581, at *1, *5–6 (recognizing that the updated, proposed consent judgment contained a better developed statement of facts and providing that the court must defer to the SEC, but that deference should never be absolute).
65. See Vitesse Semiconductor Corp., 771 F. Supp. 2d at 310 (stating that the consent judgment was approved only due to unusual circumstances, such as parallel criminal proceedings in which defendants admitted their guilt and the company’s financial difficulties).
66. See id. at 309 (noting that the public will never know whether the charges brought by the SEC are true if the defendant refuses to admit the allegations and the SEC refuses to provide enough facts to prove the allegations).
67. But see id. at 310 (explaining that this case presented a unique set of facts that resulted in admissions of three of the four defendants in parallel criminal proceedings).
allegations. A consent judgment, according to Judge Rakoff, is not evidence of anything; instead, it is viewed as the cost of doing business. The judge further expressed concern that abiding by a process that involves no factual basis precludes the court from exercising its own appropriate judgment.

II. THE TWO STANDARDS AND THEIR DIFFERENT IMPACTS ON CONSENT JUDGMENTS

After the headlining opinion issued in SEC v. Citigroup Global Markets, Inc., it is difficult to tell which standard courts will apply in granting consent judgments moving forward. Judge Rakoff’s decision can thus change the way the SEC brings future enforcement cases. Some may call him a hero for demanding greater accountability in cases of alleged Wall Street fraud. Others, however, see his decision as a dangerous shift that requires the SEC to spend more time and money on litigation, ultimately reducing the number of cases it can effectively pursue, which decreases its effectiveness as an agency.


69. See id. (stating that the allegations have no evidentiary value and cannot be used in subsequent litigation).

70. See id. at 333 (citing Memorandum on Behalf of Citigroup Global Markets, Inc. in Support of the Proposed Final Judgment and Consent at 6, SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11 Civ. 7387(JSR), 2011 WL 5386583) (explaining that Citigroup’s board members exercised “their business judgment” in deciding to settle the case and avoid litigation against the SEC and other consequences that would result).

71. Cf. Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 333 (finding that without knowledge of the facts, the court becomes a “handmaiden” to a negotiated settlement).

72. See Bondi & Fischer, supra note 11 (stating that other judges have begun to question SEC settlements); Felix Salmon, Judge Rakoff’s Fraught Decision, REUTERS BLOG (Nov. 28, 2011), http://blogs.reuters.com/felix-salmon/2011/11/28/jed-rakoffs-fraught-decision/ (noting that in light of Judge Rakoff’s decision, it is unclear what happens next).

73. See id. (“If the SEC is unable to impose penalties and obtain injunction in federal court without an admission of wrongdoing by the defendant, the SEC will be forced either to enter into settlements outside of the judiciary’s purview, to obtain wrongdoings from defendants, or to prove its allegations at trial.”); see also Wilczek, supra note 11 (reporting that attorneys, in response to Judge Rakoff’s decision, believe that the judgment may cause changes in enforcement actions, including more administrative cases).


75. See, e.g., Wilczek, supra note 11 (noting that critics of Judge Rakoff’s decision believe that detailed statements of facts or an admission to wrongful conduct may hurt the SEC’s enforcement program and divert resources used for the investigation of other frauds); Hilzenrath, supra note 74 (describing Judge Rakoff as a “headline chaser”).
Consider the following hypothetical scenario: MG Global Corporation (“MG Global”) is a renowned subprime lender with a market value of $25 billion. On February 25, 2012, the SEC filed a complaint alleging that MG Global engaged in misrepresentation in the sale of mortgage-backed securities by misrepresenting the quality of the underlying mortgages. The misrepresentation resulted in losses to investors in the amount of $3 billion and a net profit for MG Global of at least $110 million. The SEC charged MG Global with negligence in violation of Section 17(a)(2) and (3) of the Securities Act of 1933. Individual suits were brought against MG Global’s chief executive officer and chief financial officer, alleging that they were behind the misrepresentation of the mortgages.

On the same day, MG Global consented to the entry of a consent judgment without admitting or denying the allegations of the complaint. The consent judgment permanently enjoined MG Global from engaging in future violations of securities laws, required MG Global to pay a disgorgement of $110 million and a civil penalty of $63 million, and required MG Global to undertake certain internal measures for a period of five years. The latter requirement was designed to improve corporate governance. When applied to these facts, the traditional standard and the Rakoff standard can cause diverging results.


If a court applies the traditional standard to the facts of MG Global, the proposed consent judgment will likely be approved. To determine whether the terms of the decree between the SEC and MG Global are reasonable, adequate, and in the public interest, a court reviews the circumstances in which the decree is proposed.77

Reasonableness relates to the relative strength of the parties litigating.78 The reasonableness of a proposed settlement must

---

76. See Subprime Lender Definition, INVESTOPEDIA, http://www.investopedia.com/terms/s/subprimelender.asp#axzz2581hp1rb (last visited Dec. 16, 2012) (“[A] type of lender that specializes in lending to borrowers with a tainted or limited credit history.”).
78. See United States v. Cannons Eng’g Corp., 899 F.2d 79, 89 (1st Cir. 1990) (explaining how courts are to determine the reasonableness of a consent decree).
account for foreseeable risks of losses to the Commission.\textsuperscript{79} MG Global paid $63 million in penalties even though its misrepresentation resulted in $3 billion in losses to investors. However, a settlement that results in less than full recovery of the losses caused by the defendant’s actions can still be reasonable.\textsuperscript{80} Here, the $63 million penalty, which is approximately two percent of the total amount of losses suffered by MG Global’s shareholders, resembles fines paid (on a percentage basis) in previously approved consent judgments.\textsuperscript{81}

An evaluation of a consent judgment is not a chance for the court to “reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made.”\textsuperscript{82} Here, the SEC used its own judgment in charging MG Global with negligence and reaching the $63 million penalty through its investigative efforts.\textsuperscript{83} Because the SEC is responsible for educating and informing potential and current investors of securities laws violations,\textsuperscript{84} one may ask how potential investors know what securities laws MG Global actually violated when the court and the public do not have proof of what actually happened. While this is a legitimate question, the court is not to turn the review of a consent judgment into a trial.\textsuperscript{85} The total payment of $63 million in civil penalties was the result of a comprehensive investigation and “reasonably reflects the monetary relief likely to be available to the Commission if successful at trial on the merits.”\textsuperscript{86}

\textsuperscript{79} See id. at 89–90 (explaining that determining the reasonableness of a consent decree includes whether the settlement compensates the public for the cost of response measures and takes into consideration the relative strength of the parties).

\textsuperscript{80} See id. at 90 (stating that even if the government has a strong case against a defendant, success at trial still requires time and money, making settlements a preferred option).

\textsuperscript{81} See, e.g., WorldCom, Inc., 273 F. Supp. 2d at 435 (granting a consent judgment with a penalty of 1.125% of the total amount of losses suffered by shareholders).

\textsuperscript{82} United States v. Microsoft Corp., 56 F.3d 1448, 1459 (D.C. Cir. 1995).

\textsuperscript{83} See SEC Mem. of Law, supra note 18, at 19 (explaining that the penalty sought by the SEC reflects consideration of impact and a number of other factors).

\textsuperscript{84} See SEC v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983) (describing the means in which the agency protects the public’s interest); see also The Investor Advocate, supra note 16 (stating that the SEC’s mission is to protect investors and maintain the markets).

\textsuperscript{85} See United States v. Oregon, 913 F.2d 576, 582 (9th Cir. 1990) (explaining that when a court reviews a consent decree, the court is not to attempt to resolve the factual disputes of the case); see also SEC Mem. of Law, supra note 18, at 15 (claiming that requiring a factual resolution of the allegations in the interest of transparency goes against the Second Circuit’s definition of settlements).

\textsuperscript{86} See SEC Mem. of Law, supra note 18, at 19.
Courts applying the traditional standard rarely question or challenge consent judgments when determining the adequacy or fairness of the decree.\textsuperscript{87} In applying the traditional standard, courts are likely to place a stamp of approval regardless of the lack of factual basis and the presence of a “no admit/deny” provision.\textsuperscript{88} Here, MG Global consented to the judgment without admitting or denying the allegations, so a court would not likely challenge the consent judgment.

Proceeding with an action by injunction rather than litigation requires the SEC to give up a number of advantages.\textsuperscript{89} One of the most significant advantages the SEC must give up is the findings of fact and court opinions that clearly set forth all the reasons for a particular result.\textsuperscript{90} When a consent decree is brought to a district judge, because it is a settlement, there are no findings that the defendant has actually engaged in illegal practices.\textsuperscript{91} Further, remedies that appear to be less than what is deserved might reflect the weaknesses in the government’s case, and it is “unwarranted” for a judge to assume that any allegations made in the complaint have been proven.\textsuperscript{92} Requiring MG Global to admit to the allegations made in the complaint in order to make the consent judgment more adequate or fair would be “unjustified.”\textsuperscript{93}

In order to serve the public interest, actions brought by an agency require greater flexibility and deference to the agency’s expertise.\textsuperscript{94} The duties placed on the Commission to monitor securities make it responsible for serving the public interest.\textsuperscript{95} In the hypothetical, the

\footnotesize{
\textsuperscript{87} See, e.g., Bondi & Fischer, supra note 11 (stating that the SEC has entered into such consent judgments for nearly forty years without any objection); see also SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 310 (S.D.N.Y. 2011) (granting a consent judgment with a “no admit/deny” policy even though the court had reservations about the policy).

\textsuperscript{88} See, e.g., Hilzenrath, supra note 74 (describing Judge Rakoff as a “rare authority” and his position in Citigroup as “novel”).

\textsuperscript{89} See Clifton, 700 F.2d at 748.

\textsuperscript{90} Id.


\textsuperscript{92} See United States v. Microsoft Corp., 56 F.3d 1448, 1461 (D.C. Cir. 1995) (explaining that a judge is not to measure remedies as if they were fashioned after trial).

\textsuperscript{93} See id. (stating that the question is whether the defendant agrees to the terms of the consent judgment and not whether it will admit wrongdoing).


\textsuperscript{95} See id.; see also SEC Mem. of Law, supra note 18, at 8 (citing Microsoft Corp., 56 F.3d at 1459) (stating that giving deference to a public agency when evaluating consent judgments has constitutional underpinnings).}
parties entered an agreement waiving their rights to litigate the issues involved in the case. The SEC negotiated the terms of the settlement and was in the best position to determine why and to what degree the settlement with MG Global advanced the public’s interest.96

Courts typically give great deference to the SEC and do not question the kinds of policies that have long defined the SEC’s enforcement program.97 As a result, courts tend to defer to an agency’s decision that a decree is in the public’s best interest.98 For that reason, a presumption of fairness, adequacy, and reasonableness attaches to the settlement,99 and a judge applying the traditional standard would approve the proposed consent judgment between the SEC and MG Global.


Under the Rakoff standard, a court would find the consent judgment between the SEC and MG Global inadequate and not in the public interest.100 Specifically, a court using the Rakoff standard would reject the MG Global proposed consent judgment because the fines are inadequate, there is little to no factual basis, and the public interest would not be served.

When fines are insignificant and do little to deter violators, a consent judgment is inadequate and cannot be granted.101 There is little deterrence if all a defendant must do after getting caught for

96. See SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984) (maintaining that the court’s role is to ensure the decree is reasonable, not to determine that a decree is appropriate).

97. See SEC v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983) (indicating that courts rarely challenged the SEC’s policy until Judge Rakoff’s decision).

98. See Randolph, 736 F.2d at 529–30 (explaining that the agency is to decide that a judgment is appropriate and the court is to ensure that proposed judgment is reasonable).


100. See, e.g., SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 334 n.7 (S.D.N.Y. 2011) (opining that Citigroup received the minimum sanctions when compared to previous violations made by other defendants who paid more in penalties); SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 511–12 (S.D.N.Y. 2009) (rejecting a consent judgment due to the low monetary penalty imposed).

101. See Bank of Am. Corp., 653 F. Supp. 2d at 511–12 (rejecting the consent judgment due to the insufficient monetary penalty).
violating securities laws is give back what he gained in profits. In the hypothetical, the consent judgment required a payment of $173 million, consisting of disgorgement of $110 million and a $63 million penalty; yet the actual losses suffered by investors amounted to $3 billion. Moreover, if the allegations are true, the penalty imposed is insufficient when compared to MG Global’s wealth and power. Furthermore, without more facts and an admission or a denial, there is no way to determine what really happened and if the remedies sought actually fit the violations.

According to the Rakoff standard, consent judgments that ask the court to impose injunctive relief on the basis of unsupported allegations cannot be granted. Allowing defendants to enter into consent judgments without admitting or denying the underlying allegations deprives the court of the most minimal assurance that the injunctive relief sought has any factual basis. In the hypothetical, MG Global did not admit to any of the violations. All the court has are allegations of negligence. The court reviewing the consent judgment is entitled to know if the misrepresentation MG Global made was due to negligence or fraud to determine the reasonability of the proposed consent agreement. If guilt is neither admitted nor denied, the ultimate effect of the consent agreement on the company

102. Cf. id. (concluding that the injunctive relief is pointless because the amount is trivial compared to the company’s worth, and because the ones who actually suffer are the victims, not the violators).

103. See id. at 512.

104. See, e.g., SEC v. Moran, 944 F. Supp. 286, 297 (S.D.N.Y. 1996) (finding a lesser penalty more appropriate because “there is an unmistakable difference between conduct which negligently operates as a fraud when compared to conduct engaged in with intent to defraud”); see also Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 332 (stating that the court is deprived of any assurance that the relief sought is justified); SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 310 (S.D.N.Y. 2011).


106. See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 332 (explaining that the court is merely a handmaiden to a privately negotiated settlement if the court has no knowledge of some of the underlying facts).

107. See, e.g., Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 330 (stating that the SEC chose to charge Citigroup with negligence even though it appears that the allegations are knowing and fraudulent). But see Moran, 944 F. Supp. at 297 (finding a lesser penalty more appropriate because “there is an unmistakable difference between conduct which negligently operates as a fraud when compared to conduct engaged in with intent to defraud”).
is insignificant, seeing that it appears that there was really no wrongdoing on the part of the defendants.

The SEC argues that the truth about a defendant’s actions becomes known, and in turn the public interest served, through the litigation the SEC brings against individuals involved in the violations. Consequently, according to the SEC, if the factual disputes are not resolved in the consent judgment between the SEC and the company, the allegations will certainly be resolved in any parallel proceedings. In the hypothetical, individual suits were brought against MG Global’s chief executive officer and chief financial officer; however, despite the SEC’s assertion, parallel proceedings cannot always resolve the factual allegations. For instance, in SEC v. Vitesse Semiconductor Corp., which the SEC uses to support its argument, the same charges were brought against all defendants who were part of the proposed consent judgment. The individual defendants admitted to guilt in parallel criminal proceedings. Judge Rakoff noted the significance of these admissions in informing the public of the truth of the allegations made against the defendants. In the hypothetical, there have not been any admissions of guilt in any parallel proceedings.

The facts surrounding the consent judgment with MG Global are more similar to the facts in Citigroup, where Citigroup was charged only with negligence, even though the SEC alleged in the Stoker complaint fraudulent intent on the part of Citigroup. In Citigroup,

---

108. See Prial, supra note 44.
109. Id. ("[V]ery few companies that agree to settle SEC allegations of wrongdoing should be able to hide behind the ‘neither admitted nor denied guilt’ phrase."); see Bank of Am. Corp., 2010 WL 624581, at *5 (criticizing the lack of directed responsibility to specific individuals and noting that the punitive and compensatory measures are likely to have a modest impact on corporate practice).
110. See SEC Mem. of Law, supra note 18, at 15.
111. See, e.g., id. (noting that the ongoing litigation in the Stoker complaint will “provide a vehicle for resolution of the Commission’s allegations”).
112. See id. (citing SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304 (S.D.N.Y. 2011)) (stating that the SEC’s allegations against Citigroup will be resolved through the parallel proceedings against the individual defendant).
114. Id. at 310.
115. Id. ("[T]he public is not left to speculate about the truth of the essential charges here brought against [defendants], for they have already admitted those charges in another public forum.").
116. Compare SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 321–30 & 329 n.1 (S.D.N.Y. 2011) (noting that the allegations made against Citigroup and the individual employee, Brian Stoker, are different), with Vitesse Semiconductor Corp., 771 F. Supp. 2d at 306 (noting that Vitesse and individual defendants were held responsible for the same fraudulent practices).
the individual defendant and company were not both included as parties to the consent judgment. Further, the allegations against each defendant appeared differently based on the language used in each complaint. Thus, an admission by one defendant may not answer questions about allegations made against another. As such, parallel proceedings do not always result in a resolution of factual disputes.

In the hypothetical consent judgment, the SEC would ask the court to invoke its contempt power by enjoining MG Global from violating securities laws. The court would consequently review the consent judgment to determine if it is within the bounds of fairness, reasonableness, adequacy, and whether it serves the public interest. The court would therefore need to know the underlying facts. Viewing the consent judgment between the SEC and MG Global as simply the cost of doing business does not take into account the public interest nor does it carefully assess the truth behind the allegations. If a consent judgment rests solely on mere allegations, the truth about the defendant’s actions is unknown, and thus the consent agreement would be unreasonable. As a result, the public

117. See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 330 (charging Citigroup only with negligence, even though allegations amounting to knowing and fraudulent intent were apparent).
118. See id. at 330 (noting that language amounting to knowing and fraudulent intent is missing from the Citigroup complaint).
119. See id. at 333 (explaining that even though there was a parallel proceeding, the investors were not in a better situation as a result of that proceeding).
120. See SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) (explaining that consent judgments involving a federal agency have aspects of a judicial decree and thus require a closer review of the terms of the consent judgment).
121. See id.
122. See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 332 (explaining that the difference between a settlement amongst private parties and consent judgments involving a public agency is that private parties can settle a case without ever agreeing on the facts, whereas some knowledge of the facts are required in a settlement with a public agency); see also SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829(JSR), 10 Civ. 0215(JSR), 2010 WL 624581, at *1, *5 (S.D.N.Y. Feb. 22, 2010) (noting that the proposed consent judgment’s greatest characteristic is that it includes a more developed statement of facts); Johnson, supra note 5, at 628 n.5 (defining public interest to include a societal interest in the benefits of “adjudication, transparency, and corporate responsibility”).
123. See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 333 (“[T]he parties’ successful resolution of their competing interests cannot be automatically equated with the public interest.”).
124. See id. at 335 (finding the consent judgment unreasonable because it is based on mere allegations); see also id. at 333 (rejecting the SEC’s position that not expressly denying an allegation somehow made the truth about the allegation known to the court and public).
interest would not be served, and the consent judgment between the SEC and MG Global would be rejected.

III. A COMBINATION OF BOTH STANDARDS ALLOWS FOR GREATER ENFORCEMENT AND TRANSPARENCY

A clear standard that establishes the necessary elements of a consent judgment must be adopted in the near future as other courts begin to apply Judge Rakoff’s standard. Consent judgments play a significant role in the SEC’s enforcement program to stop and punish violators of securities laws. Judge Rakoff’s approach to consent judgments brings such decrees closer to the standard of “fair, reasonable, adequate, and in the public interest”; there are, however, drawbacks. If courts adopt Judge Rakoff’s more demanding approach, fewer consent judgment settlements will survive, creating a great imposition on the SEC and public. Thus, it is prudent that a combination of both the traditional standard and the Rakoff standard be adopted—a standard that will produce consent judgments that are truly reasonable, fair, adequate, and in the public interest.

In the absence of sufficient facts, the court lacks a framework for determining adequacy. A proposed consent judgment without a

---

125. See id. at 335 (stating that a successful resolution did not equate to serving the public’s best interest).


127. See Interview: SEC Enforcement Division Director Robert Khuzami, THOMSON REUTERS NEWS & INSIGHT (April 27, 2012), http://newsandinsight.thomsonreuters.com/Securities/News/2012/04_-_April/Interview_SEC_Enforcement_Division_Director_Robert_Khuzami/ (“[W]e are able to use the resources we save [through settlements] to fight other frauds and return money to other harmed investors.”).

128. See id. (explaining that without the “no admit/deny” provision fewer defendants will settle because of the civil and criminal consequences of an admission of wrongdoing).

129. See Brief for Business Roundtable as Amicus Curiae in Support of Appellants at 7, SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11-5527), 2012 WL 2166144 (stating that Judge Rakoff’s decision will result in more litigation for the federal judiciary to oversee).

130. See id. at 14 (noting that a new approach to proposed consent decrees will deprive agencies of a crucial enforcement tool, force the SEC to incur great costs from litigation, and impose onerous burdens on the judiciary).

131. Compare Bondi & Fischer, supra note 11 (contending that refusal to accept settlements with a “no admit/deny” policy and requiring additional facts will force the SEC to find alternatives to settlements), with Zimmerman, supra note 94, at 570 (contending that a closer judicial review will give the court an opportunity to exercise an independent basis for the terms of the consent judgment).

The factual basis does not serve the public interest because it asks the court to employ its power and assert its authority on the basis of unknown facts. The court’s role is to exercise some independent judgment; its role is not to act as a rubber stamp in granting consent judgments. In an economy where greater transparency is needed, the public deserves to know about the occurrence of violations and those responsible for them.

The SEC argues that requiring more facts requires extensive and expensive discovery. However, it is difficult for a court to impose relief on the basis of mere allegations. This is problematic because the consent judgment between the SEC and MG Global asks the court to “employ its power and assert its authority when it does not know the facts.” Charging MG Global with negligence and then allowing it to settle without admitting or denying the allegations ends up hurting defrauded investors instead of helping them. Those defrauded investors who try to recoup their losses through private litigation are at a disadvantage because they cannot bring securities claims based on negligence, nor can they derive any collateral estoppel assistance from MG Global’s non-admission/denial of the SEC’s allegation.

The SEC has a duty to see that the truth emerges. If the court fails to find the truth, it should not grant judicial enforcement for the

---

133. See id. (noting concern that the court may simply become a “handmaiden” to a privately negotiated settlement).

134. See id. at 331 (stating that the court’s independent judgment is necessary in a settlement involving a public agency asking the court to impose injunctive remedies).

135. See Prial, supra note 44 (noting that transparency and accountability are key to the SEC’s mission, and the public interest is not served if violators of securities laws can avoid the allegations by paying a fine and not admitting guilt).

136. See Randall Bodner et al., SEC Penalties on Trial, 23 SEC. ENFORCEMENT 18, 25 (2009) (arguing that the point of a settlement is to prevent the costs associated with preparing for trial).

137. See Citigroup Global Mkts., Inc., 827 F. Supp. 2d at 333 (holding that allegations in a complaint are not evidence of anything and do not provide a factual basis for the court to evaluate the consent judgment).

138. Id. at 335.

139. See id. at 334–35 (stating that the defrauded investors are not actually protected by the terms of the proposed consent decree because the proposed judgment does not commit the SEC to returning any of the money recovered from Citigroup to the defrauded investors).

140. See id. at 334 (finding the combination of the negligence charges with the terms of the proposed judgment to be a “double blow” to investors leaving them “short-changed”).

141. See id. at 335.
mere sake of convenience and deference. 142 The role of a judge in determining whether a decree protects the public interest should include an evaluation of the facts establishing the allegation. 143 Thus, a better-developed statement of facts is necessary for future consent judgments. 144

Judge Rakoff’s greatest criticism of recently proposed consent judgments is the inclusion of the “no admit/deny” provision. 145 Truth of the allegations, however, cannot be discovered by simply removing the “no admit/deny” provision. 146 Further, requiring an admission of guilt will not create greater enforcement; 147 instead, it will result in fewer settlements. 148 The “no admit/deny” provision is central to the SEC’s enforcement strategy. 149 Without it, banks become subject to more litigation from investors. 150 As a result, companies will refuse to enter settlements where they would be forced to acknowledge liability. 151

142. See id. (finding that if a consent judgment is not supported by facts, then granting such decree would be using the court as an “engine of oppression”).

143. See id. at 332 (holding that the court and the public need some knowledge of the facts in order to evaluate the justification for the remedies sought in a consent judgment); see also SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829(JSR), 10 Civ. 0215(JSR), 2010 WL 624581, at *1, *5 (S.D.N.Y. Feb. 22, 2010) (concluding that the reason the consent decree met the standard was because it was premised on better developed facts, which were scrutinized by the court).

144. See Bank of Am. Corp., 2010 WL 624581, at *5 (stating that the “greatest virtue” of the proposed consent judgment is the better developed statement of facts).

145. See SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 310 (S.D.N.Y. 2011) (noting the more troubling aspect of the proposed consent judgment is the fact that the allegations are resolved without the defendant admitting or denying the allegations brought against them); see also Citigroup Global Mktgs., Inc., 827 F. Supp. 2d at 330 (rejecting the proposed consent judgment because the court did not have any “proven or admitted facts” upon which to base its own independent judgment).

146. Cf. Bank of Am. Corp., 2010 WL 624581, at *5 (stating that the new consent judgment has a better developed statement of underlying facts while making no mention of the “no admit/deny” provision’s effect on establishing those facts).

147. See SEC Mem. of Law, supra note 18, at 11–12 (arguing that, by refusing to allow defendants to deny allegations, the SEC prevents confusion over the accuracy of the allegations made in the complaint).

148. See Interview: SEC Enforcement Division Director Robert Khuzami, supra note 127.

149. See Jean Eaglesham & Suzanne Kapner, SEC Cops Want to Fight U.S. Judge Street, WALL ST. J. (Dec. 16, 2011), http://online.wsj.com/article/SB1000142405297020484450457709833058976236.html (explaining that if the appeals court upholds Judge Rakoff’s ruling in Citigroup, it will become highly persuasive authority for other courts around the country, negating an important SEC strategy).

150. See Citigroup Global Mktgs., Inc., 827 F. Supp. 2d at 334 (implying that the inclusion of the “no admit/deny” policy serves as a protection for companies who violate securities laws because it limits the number of suits investors can bring against these violators).

151. See Prial, supra note 44 (indicating that, in the absence of a “no admit/deny” provision, companies will continue to fight the SEC).
Consent judgments are an effective and efficient means for resolving disputes. Due to the advantages associated with settlements, it would be a major disservice to the SEC and the public if consent judgments no longer served the purpose they were intended to serve. With settlements, the SEC is able to spread its limited resources to go after the largest number of cases possible.

A number of factors determine whether judicial enforcement is appropriate. To allow for greater transparency, there needs to be some factual basis in proposed judgments that gives the public insight into what violations actually occurred. The SEC should be required to “explain the evidence which is available, and . . . offer a rational connection between the facts found and the choice made.” If there is no admission, there needs to be a stronger framework, i.e., something more than mere allegations. Courts can require the SEC to provide a written factual predicate for why it believes the court should find the proposed settlement judgment fair, reasonable, adequate, and in the public interest. The benefits of providing the court with a written factual predicate provide increased transparency to investors and the markets and enhanced guidance to companies and individuals about the conduct underlying the violation. Removing the “no admit/deny” policy is not the best means to greater enforcement. Instead, there needs to be a balance between the advantages of consent judgment settlements and the need for greater transparency in financial markets.

---

152. See SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) (stating that the SEC tries to avoid the risks and costs of litigation by entering into consent judgments).

153. See SEC v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983) (recognizing that settlements conserve SEC resources and inform potential investors of securities violators); Eaglesham & Kapner, supra note 149 (stating that Robert Khuzami, the SEC’s Enforcement Director, believes that rejecting settlements will make it harder to police Wall Street).

154. See Randolph, 736 F.2d at 529–30.

155. See Johnson, supra note 5, at 674 (noting that it is in the public’s interest to be able to distinguish bad actors from those who have made minor violations of securities laws).


157. See SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 330 (S.D.N.Y. 2011) (stating that no admission and no factual basis leaves the court depriving the public of ever knowing the truth and does not meet the standard of “fair, reasonable, adequate, and in the public interest”).

158. See Wilczek, supra note 11 (noting that supporters of Judge Rakoff’s decision find it justifiable to have the SEC provide a rationale for the enforcement penalties it is seeking in order to shed light on whether settlements are adequate).

159. Id.
CONCLUSION

The decision in *Citigroup* significantly altered many courts’ decisions regarding SEC consent judgments. With courts in other districts already citing to Judge Rakoff’s famous opinion, the SEC is concerned this could hamper its enforcement program.160

The benefits and challenges that come with applying a stricter standard, as suggested by Judge Rakoff, are topics of conversation all over the securities world. Investors will benefit from removal of the “no admit/deny” provision because it will be easier for them to recoup their losses if banks are forced to acknowledge liability. Furthermore, large companies will no longer be able to hide behind the “no admit/deny” policy and eliminate liability by simply paying a fine. Removing this “easy way out” for violators of securities law will promote transparency and accountability.

This more demanding standard, however, poses challenges as well. The SEC settles most of its cases by consent decrees, and creating a more stringent standard can result in more costs and greater risks. Consent judgments save resources, time, and money. As a result, the SEC is better able to effectively and reasonably allocate its resources and bring more charges than it would bring if it had to litigate most of its cases. Judge Rakoff’s decision, if approved on appeal, can significantly change the way securities laws are enforced. Requiring an admission subjects defendants to collateral estoppel with regard to the asserted claims. This will compel defendants to defend the allegations made against them rather than settle. With more trials come more costs, which is something the SEC tries to avoid. Due to the advantages and disadvantages that both standards afford, the SEC, the defendants, and the public would be better served with a hybrid standard possessing elements of both.

Requiring defendants to admit to the SEC’s allegations while at the same time requiring the SEC to provide a more factual basis for those allegations defeats the purpose of a settlement. In settlements where the defendant does not admit or deny the allegations, a court should require more facts to establish a greater framework. This will give courts a better idea of whether the terms of the decree fit the violations alleged. For cases where the court is left with little factual basis, it is fair to require an admission of guilt because the court will have some knowledge of the truth of the allegations. Further, the

---

160. See Eaglesham & Kapner, supra note 149 (explaining that negotiations for several consent judgments stalled because the SEC is unsure about what it must ask for in the settlements).
court can better justify the penalties imposed and properly determine whether those penalties fit the violations. To ensure that consent judgments meet the standard of reasonable, fair, adequate, and in the public interest, courts should apply a standard that combines both the traditional standard and the Rakoff standard. Until then, the ambiguity in the law will leave the SEC unsure of the proper means of enforcement, and the public will not receive the transparency it deserves.