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Security and Exchange Commission's (SEC) “Neither Admit nor Deny” Settlements Continue to Draw Controversy

Article By
Mary P. Hansen
Daniel E. Brewer
Drinker Biddle & Reath LLP
Securities Law Perspectives

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Recently, Judge Harold Baer of the U.S. District Court for the Southern District of New York reluctantly approved the **SEC’s “neither admit nor deny” insider trading settlement** with Ronald Dennis, a former analyst with **CR Intrinsic Investors**, a **hedge fund** affiliated with S.A.C. Capital Advisors. *See SEC v. Dennis*, No. 14 Civ. 1746 (S.D.N.Y. Apr. 22, 2014). To settle the SEC’s charges, Dennis agreed, without admitting or denying the allegations regarding his misconduct, to a permanent bar from the securities industry and to pay $95,351 in disgorgement, $12,632 in prejudgment interest, and a civil penalty of $95,351. Notably, Dennis was not charged criminally.

In its recently filed complaint against Dennis, the SEC alleged that Dennis participated in the now-infamous insider trading scheme involving Dell securities. More specifically, the SEC alleged that from 2008 through 2009, an unnamed Dell insider provided material nonpublic information regarding Dell to Sandeep Goyal, a financial analyst and former Dell employee. Goyal then passed on the information to Jesse Tortora, a then-analyst at a hedge fund managed by Diamondback Capital. Tortora shared the information with a number of individuals, including others at

Diamondback and Dennis. The SEC alleged that Dennis caused portfolio managers at CR Intrinsic and S.A.C. Capital to execute trades in Dell securities based on the Dell inside information he received from Tortora. The SEC alleged that Dennis's information allowed CR Intrinsic and S.A.C. Capital to earn approximately $3.2 million in profits and losses avoided.

Previously, in January 2012, the SEC and the U.S. Attorney for the Southern District of New York charged Tortora, Goyal, and six others for their roles in the insider trading scheme. *See* SEC press release andS.D.N.Y. press release. The government alleged that the defendants reaped unlawful profits of approximately $15.7 million. Neither the SEC nor the U.S. Attorney's Office charged Dennis, CR Intrinsic, or S.A.C. Capital at that time. The government also announced that Goyal, Tortora, and one other defendant had already pleaded guilty to their roles in the insider trading scheme. The remaining defendants were found guilty after a jury trial.

Goyal, Tortora, and the other defendant who pleaded guilty also settled with the SEC. In those settlements, the defendants "admitted" the same facts that they admitted to in connection with their guilty pleas. *See SEC v. Adondakis*, 12-cv-0409 (S.D.N.Y. Mar. 8, 2013). In addition, two investment advisers involved in the scheme, Diamondback Capital and Level Global, entered into "neither admit nor deny" settlements with the SEC. Diamondback Capital agreed to disgorge approximately $6 million in unlawful profits and to pay a civil penalty of $3 million. *See* SEC's Diamondback Capital press release. Level Global agreed to disgorge approximately $11 million in unlawful profits and to pay a civil penalty of approximately $10 million. *See* SEC's Level Global press release. Diamondback Capital and Level Global were not charged criminally.

After receiving the SEC's proposed consent judgment against Dennis, Judge Baer "questioned whether it would be necessary to hold a hearing on the subject of the Commission's determination to settle … without requiring … Dennis to admit or deny the allegations of the Commission's complaint." *See* SEC Letter dated Apr. 3, 2014, *SEC v. Dennis*, No. 14 Civ. 1746. In particular, Judge Baer appeared troubled by the fact that other defendants involved in the same insider trading scheme, specifically Goyal and Tortora, pleaded guilty and entered into "admit" settlements with the SEC.

The SEC responded to Judge Baer's concerns in a letter submission asserting that no hearing was necessary because the proposed settlement was "fair, adequate, reasonable, and in the public interest." The SEC cited 28 cases in which judges in the Southern District of New York had approved "neither admit nor deny" consent judgments since December 2011. It further noted that Judge Baer approved the "neither admit nor deny" settlements for two different entities arising under the same insider trading scheme. *See SEC v. Adondakis*, 12-cv-0409, Final Judgment as to Defendant Level Global Investors, L.P. (S.D.N.Y. May 31, 2013); *SEC v. Sigma Capital Management, LLC*, No. 13-cv-1740, Final Judgment as to Defendant Sigma Capital Management, LLC (S.D.N.Y. Mar. 29, 2013). In response to the SEC's argument, Judge Baer questioned how he could really know if the consent decree is unfair, inadequate, or unreasonable, noted that the previous "neither admit nor deny" settlements were different, and stated he would "review the papers again." *See SEC v. Dennis*, No. 14 Civ. 1746.

Ultimately, Judge Baer signed the consent judgment against Dennis, but in a handwritten note on the judgment stated "as noted earlier I am signing this judgment with the understanding that I have no knowledge as to whether it is unfair, unreasonable or inadequate and in reliance on your representations and the defendant." *See SEC v. Dennis*, No. 14 Civ. 1746.

Judge Baer's comments may reflect some confusion and frustration regarding the SEC's current settlement policy. Since January 2012, the Enforcement Division has required defendants who plead guilty in a parallel criminal proceeding to "admit" in their civil proceeding to the same facts that they admit to in connection with their guilty plea. *See* Public Statement by SEC Staff: Recent Policy Change. Clearly, Tortora and Goyal fell squarely within the parameters requiring that they enter into "admit" settlements with the SEC. In addition, it is not unusual that Diamondback and Level Global were not required to admit, because they were not charged criminally and settled with the SEC prior to Chair White's announcement of the expanded "admit" settlement policy.

In June 2013, Chair White and certain senior officers in the SEC's Division of Enforcement announced that the SEC had expanded its "admit" settlement policy and would begin to require defendants to admit wrongdoing "in certain cases where heightened accountability or acceptance of responsibility through the defendant's admission of misconduct may be appropriate" and in cases of "egregious misconduct," such as cases involving obstruction of the SEC's investigation or harm to large numbers of investors. *See* *Neither "Admit nor Deny" Settlements at the SEC,* SECurities Law Perspectives (Mar. 27, 2014).

The SEC alleged that Dennis was involved in a complex insider trading scheme and was responsible for generating more than $3.2 million in profits at hedge funds that have been the subject of intense scrutiny by the SEC and U.S. Attorney's Office. On its face, it seems reasonable to expect that this would be exactly the kind of case in which the SEC would require an "admit" settlement, especially in light of the number of related criminal indictments, guilty pleas, and guilty verdicts. Because the SEC does not explain why it did not require Dennis to make admissions, it is difficult to determine whether the case sheds any light on when the staff will insist upon an "admit" settlement in the future. It may well be that Dennis rendered substantial cooperation in connection with the staff's investigation. Or it may be that the SEC considered Dennis's conduct in the context of the other, possibly more culpable, individuals involved in the scheme. With the exception of possibly a larger civil penalty, it appears that the SEC obtained the same sanctions to which it would have been entitled even if Dennis had "admitted" his misconduct or been found liable after a trial, including a permanent industry bar. Certainly, Dennis's agreement to settle to a full range of sanctions conserved precious SEC resources.

On April 25, 2014, just after Judge Baer approved the Dennis consent judgment, SEC Enforcement Director Andrew Ceresney made some interesting comments at the PLI annual SEC Enforcement Conference regarding "admit" settlements. Ceresney remarked that the SEC will determine on its own whether to require admissions and will not "trade" admissions for other sanctions such as disgorgement or civil penalties. While it does not appear that Dennis "traded" admissions for lighter remedial sanctions, it does appear from the SEC's own arguments that the SEC considered its ability to preserve trial resources when it allowed Dennis to settle on a neither admit nor deny basis.

This latest settlement demonstrates that the SEC's settlement policy continues to evolve and that "neither admit nor deny" settlements are likely still the norm for the SEC. It also signals, however, that courts are becoming more hesitant to rubberstamp such settlements and that the SEC and settling defendants should no longer assume that settlements will be approved without their having to demonstrate that the settlement is fair, reasonable, and adequate. While injecting a certain amount of uncertainty into the process may not be entirely welcome by either the SEC or settling defendants, such judicial scrutiny may bring some transparency to SEC settlements.