THE YALE LAW JOURNAL FORUM
September 7, 2016

Securities Settlements in the Shadows

Urska Velikonja

The Dodd-Frank Act authorized the Securities and Exchange Commission ("SEC") to bring almost any enforcement action in an administrative proceeding.[1] Before Dodd-Frank, the SEC could secure civil fines against registered broker-dealers and investment advisers in administrative proceedings, but had to sue in court non-registered firms and individuals, including public companies and executives charged with accounting fraud, or traders charged with insider trading violations. After the Dodd-Frank amendment, save for a few remedies that can only be obtained in court, the SEC can choose the forum in which it prosecutes enforcement actions.

At the time of its enactment, the provision did not generate much interest. Few commentators recognized its full potential and initially the SEC was reluctant to use it. When the current SEC Chair Mary Jo White took office, the Enforcement Division changed tack and began filing more enforcement actions in administrative proceedings, both settled and contested.[2] Contested actions litigated in administrative proceedings instead of in court have raised concern. Securities defendants sued before Administrative Law Judges ("ALJs") have more limited procedural rights than those sued in court, and the process itself is considerably faster, allowing less time to compile exculpatory evidence and raising concerns of defendant disadvantage.

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–302, § 929P, 124 Stat. 1376, 1862–65 (2010).

2. *See* Gretchen Morgenson, *At the SEC, a Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html [http://perma.cc/GSN3-2KW5] (quoting SEC enforcement director Andrew Ceresney as saying that the SEC "will be bringing more administrative proceedings given the recent statutory changes").

In October 2014, the *Wall Street Journal* splashed across its front page a purported exposé of SEC litigation in front of ALJs,[3] insinuating that ALJs were biased against defendants, and accusing the SEC of steering weaker cases to the administrative forum. The story has captured the attention of lawmakers,[4] judges,[5] advocates,[6] academics,[7] and the press,[8] and is currently the most significant issue in securities enforcement. The controversy is somewhat unfortunate given that resolution of contested actions by ALJs remains the exception,[9] and that reported data showing a disparity in outcomes is almost certainly wrong.[10]

At the same time that the SEC increased filings of contested actions in administrative proceedings, the SEC made a parallel change that has so far escaped attention. Since Dodd-Frank, the SEC has shifted its settlement filings from district court to administrative proceedings, just as it has shifted litigation in contested actions to ALJs. The SEC settles a considerable share of enforcement actions during the confidential investigation and before initiating

3. Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, WALL ST. J., A1 (Oct. 21, 2014), http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590 [http://perma.cc/4ATA-AFYM] (reporting that in fiscal years 2012 and 2013 the SEC prevailed in 90% and 100% of trials before ALJs, respectively, and in 75% and 63% of trials in court, respectively).

4. Press Release, Congressman Scott Garrett, Garrett Introduces Bill to Restore Due Process Rights for All Americans (Oct. 22, 2015), http://garrett.house.gov/media-center/press-releases/garrett-introduces-bill-to-restore-due-process-rights-for-all-americans [http://perma.cc/9C59-AWQJ].

5. Judge Jed S. Rakoff, PLI Securities Regulation Institute Keynote Address, Is the S.E.C. Becoming a Law Unto Itself? (Nov. 5, 2014), http://securitiesdiary.files.wordpress.com/2014/11/rakoff-pli-speech.pdf [http://perma.cc/2AMY-LZTV].

6. Center for Capital Markets Competitiveness, *Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices*, U.S. CHAMBER OF COMMERCE 3 (2015), http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf [http://perma.cc/MSV7-YNSX].

7. David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. (forthcoming 2016).

8. *See, e.g.*, Jenna Greene, *The SEC's on a Long Winning Streak*, NAT'L L. J. (Jan. 22, 2015), http://www.nationallawjournal.com/id=1202715464297/The-SECs-On-a-Long-Winning-Streak [http://perma.cc/RW2P-FV5L]; Jean Eaglesham, *Federal Judge Rules SEC In-House Judge's Appointment 'Likely Unconstitutional'*, WALL ST. J. (June 8, 2015, 4:50 PM), http://www.wsj.com/articles/federal-judge-rules-sec-in-house-judges-appointment-likely-unconstitutional-1433796161 [http://perma.cc/293N-CM75].

9. In FY 2010, the year before the Dodd-Frank Act became effective, the SEC filed contested enforcement actions against 501 defendants. Of those, 40 defendants (8%) were sued in administrative proceedings and 461 (92%) in court. In FY 2015, the SEC filed contested actions against 550 defendants. Of those, 105 (18%) were filed in administrative proceedings and 465 (82%) in court. While the difference is statistically significant, contested securities enforcement in administrative proceedings remains rare. See Tables 2 and 3 in Appendix.

10. *See* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 976 nn.414-16 (2016).

legal proceedings. Most settlements resolve the matter as to both liability and sanctions, but in order for the settlement to become effective, the enforcement staff must submit it for approval either to a judge in federal district court or to the Commission in an administrative proceeding. The thus-far-ignored shift to administrative settlement is both larger and more significant than the shift in litigation that drew the *Wall Street Journal*'s attention. Before Dodd-Frank, 40% of settlements were filed in administrative proceedings; in fiscal year 2015, over 80% were.[11]

The shift to filing settled actions in administrative proceedings instead of in court is significant for several reasons. First, SEC investigations are confidential until the enforcement action is filed. When a settled enforcement action is filed in court, a federal judge reviews the settlement to ensure its consistency with the public interest. On occasion, judges have requested additional briefing and even oral argument to ensure that the proposed settlement is in the public interest.[12] As a result of judicial oversight of settlements, the SEC vowed to change enforcement practices that judges rejected.[13] By contrast, settled actions filed in administrative proceedings receive no formal external scrutiny. Settlement negotiations remain confidential until after the Commission approves the settlement in a closed hearing.

Despite a handful of high-profile settlement rejections, judicial oversight was never terribly effective at policing settlement practices. Most judges perceived their review duties as limited and rubber-stamped most settlements. But sometimes, judges pushed back. As a result, both the SEC and defendants perceived in-court settlements as costly and unpredictable with ambiguous benefit to them. So it should come as no surprise that settlements are no longer filed in court. But one might question whether the wholesale shift to in-house settlements is desirable, given the near-complete absence of transparency and oversight, at least until after the settlement has been finalized.

Operating in the shadows, SEC settlement practices can drift quickly and stealthily as a result of internal and external factors, including budgetary constraints, capture, and short-term political interests. In fact, SEC settlement practices have drifted. Contrary to Chair White's initiative to prioritize securities fraud cases, recent SEC prosecutions are less likely to prosecute scienter-based violations.[14] Contrary to the expressed commitment to prosecute

11. *See* Appendix, Tables 2 and 3.

12. *See* discussion *infra* Part I.

13. *See infra* note 26 and accompanying text.

14. Data on file with author.

more individuals, recent SEC prosecutions target fewer.[15] And despite promises to insist on factual admissions, few settlements include them.[16]

In Part I, this Essay briefly explains the law regulating settlements of securities enforcement actions. In Part II, it reports original data showing the significance of the change after Dodd-Frank, and in Part III, it explains the implications of the shift to settling securities cases in administrative proceedings in lieu of court, and proposes some modifications to reduce the risk of enforcement drift.

I. THE LAW ON SECURITIES SETTLEMENTS

Section 929P of the Dodd-Frank Act authorized the SEC in "any cease-and-desist proceeding" to impose a civil penalty on "any person" that is found to have violated federal securities laws.[17] This was a departure from the previous rule that required the SEC to seek civil fines against non-regulated entities and individuals in federal district court. The provision authorizes the SEC to choose whether to file an enforcement action in court or in an administrative proceeding, except for actions in which the SEC seeks equitable remedies that only courts can impose, including injunctions,[18] such as a temporary restraining order or an asset freeze,[19] and receivership. When the agency can choose the forum, it will usually litigate where it is more cost-effective to do so.[20]

15. *See* Stephen J. Choi & Adam C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment* 32-34 (Feb. 23, 2016), http://papers.ssrn.com/sol3/papers.cfm [http://perma.cc/5J67-HK9G].

16. *See* Mary Jo White, SEC Chair, *Deploying the Full Enforcement Arsenal* (Sept. 26, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539841202 [http://perma.cc/H5HT-B92E] (announcing that the SEC would seek admissions in appropriate cases). Only six settlements in FY 2014 and seventeen in FY 2015 included factual admissions. Data on file with author.

17. 124 Stat. 1862 (2010).

18. 15 U.S.C. § 78u-3(a) (2012).

19. Asset freezes are court-ordered equitable remedies that prevent defendants from controlling allegedly illegally-obtained funds until the case is resolved. *See, e.g.*, Press Release, Securities & Exch. Comm'n, *SEC Announces Asset Freeze Against Alleged EB-5 Fraudster in Seattle Area* (Aug. 25, 2015), http://www.sec.gov/news/pressrelease/2015-173.html [http://perma.cc/532J-98GZ] (announcing that a judge in the U.S. District Court for the Western District of Washington issued an order freezing the assets of an individual accused of defrauding Chinese investors).

20. *See* Andrew Ceresney, Keynote Speech and New York City Bar 4th Annual White Collar Institute (May 12, 2015), http://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html [http://perma.cc/AU95-E2H6].

The SEC Enforcement Division does not have the resources to litigate all enforcement actions,[21] so it seeks to settle with defendants to avoid protracted and expensive litigation. From FY 2007 to FY 2015, between a third and one half of all defendants in primary enforcement actions settled with the SEC before the enforcement action was filed.[22]

The usual procedure for filing a settled enforcement action in an administrative proceeding is for the Enforcement Division to present the proposed settlement at a meeting of the five Commissioners, followed by a vote of the Commissioners approving the settlement.[23] For settlements filed in administrative proceedings, the Commission both orders the investigation into a securities matter and ultimately approves the proposed settlement. Neither the Enforcement Division nor the defendant has any incentive to appeal the settlement, so no third party ever formally reviews it.

By contrast, if the settlement is filed in federal district court, a judge must approve the settlement before it becomes effective. Even where the judge approves the settlement without question, the process usually takes anywhere from a few days to a few weeks. But it is not unusual for a judge to ask questions and demand additional briefing to ensure that the proposed settlement is in the public interest.[24]

In 2009, Judge Jed Rakoff of the Southern District of New York became famous for rejecting a settlement between the SEC and Bank of America. Judge Rakoff ruled that the proposed fine was too small in light of the violation, and that the enforcement action did not sanction any individuals.[25] Since then, the SEC, the DOJ, and other financial regulators have said that they would try to prosecute more individuals for financial and securities violations.[26]

---

21. *See* Mary Jo White, SEC Chair, Testimony before the Subcommittee on Financial Services and General Government (Apr. 1, 2014), http://www.sec.gov/News/Testimony/Detail/Testimony/1370541360599 [http://perma.cc/R4BB-H963].

22. See Appendix, Table 1. SEC enforcement actions can be divided into three groups: primary actions seeking to establish liability for violating securities laws; secondary actions seeking to impose additional sanctions; and follow-on actions that are based on primary actions and seek to bar the defendant from the securities industry or from appearing before the SEC. *See* Velikonja, *supra* note 10, at 928-31.

23. 17 C.F.R. § 201.240 (2006).

24. *See* David Zaring, *Requiring Defendants to Admit Guilt Will Be Costly for the S.E.C.*, N.Y. TIMES DEALBOOK (July 2, 2013 1:27 PM), http://dealbook.nytimes.com/2013/07/02/requiring-defendants-to-admit-guilt-will-be-costly-for-s-e-c [http://perma.cc/H7SP-UVDU] (listing several judges who have been concerned about SEC settlements).

25. *See* Zachary Kouwe, *Judge Rejects Settlement Over Merrill Bonuses*, N.Y. TIMES (Sept. 14, 2009), http://www.nytimes.com/2009/09/15/business/15bank.html [http://perma.cc/CM3N-MQYM].

26. *See* Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, *Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association* (Sept. 13, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html

Two years later, in November 2011, Judge Rakoff rejected another settlement, this time between the SEC and Citigroup Global Markets, Inc. because the proposed settlement did not include "any proven or admitted facts upon which to exercise even a modest degree of independent judgment."[27] (Per SEC common practice, the defendant consented to the judgment "without admitting or denying the underlying allegations."[28]) Although the Second Circuit reversed Judge Rakoff's order demanding factual admissions,[29] the SEC nevertheless declared that it would seek factual admissions in appropriate cases.[30]

II. CHANGED SETTLEMENT PRACTICES

Until Dodd-Frank, the SEC filed more of its settlements in district court than in administrative proceedings.[31] In 2013, the practice shifted sharply, and, in FY 2015, the SEC filed five times as many settlements in administrative proceedings as it did in court (as shown in the Figure below).

[http://perma.cc/XN4S-78SY] ("No matter what, individual executives and employees must answer for their conduct."). These efforts have yet to bear fruit. *See* Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J. F. 33, 44-45 (2016) (observing that despite a considerable increase in the number of bank prosecutions, "actual bankers are not usually charged").

27. SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 330 (S.D.N.Y. Nov. 28, 2011).

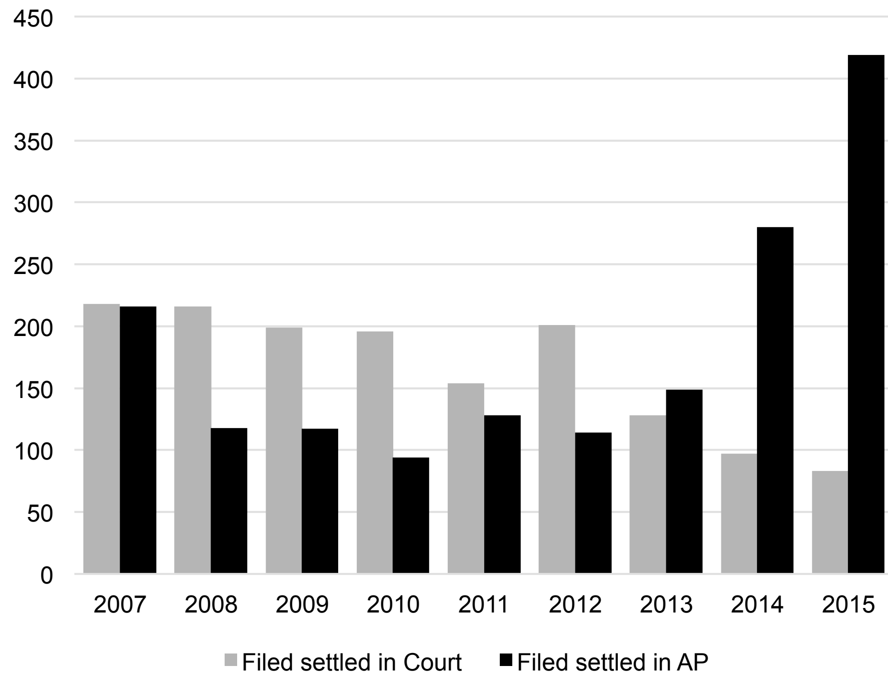
28. *Id.* at 332.

29. SEC v. Citigroup Global Mkts., 752 F.3d 285 (2d Cir. 2014).

30. *See* White, *supra* note 16 (announcing that the SEC would seek admissions in appropriate cases).

31. The count reported in the Figure includes only defendants in primary enforcement actions, and does not include follow-on, secondary, and delinquent filing cases. For a more detailed explanation of the methodology, see Velikonja, *supra* note 10, at 928-31, 932-47, 949-57 (listing various methodological problems with SEC enforcement statistics and suggesting corrective measures).

FIGURE 1.
SETTLEMENTS BY VENUE (BY NUMBER OF DEFENDANTS)



Between FY 2007 and FY 2012, the SEC filed around 200 settlements per year in court—a little more than 60% of all settlements. In 2013, the practice shifted markedly, and by FY 2015—the last year for which complete data is available—the SEC filed only 17% of settlements in court. The change is significant not only in relative terms but in absolute terms as well: overall, the aggregate number of settlements filed in court is down by more than 60%. In FY 2007, the SEC filed 218 settlements in court and 216 in administrative proceedings. In FY 2015, the SEC filed only 83 settlements in court, compared with 419 settlements filed in administrative proceedings.[32]

As a result of the shift, in FY 2014 and FY 2015, *all* settlements with large Wall Street banks—the sorts of settlements that Judge Rakoff rejected—were filed in administrative proceedings. Not a single one was filed in court. For example, in August 2015, Citigroup Alternative Investments LLC and Citigroup Global Markets, Inc.—the same Citigroup subsidiary that faced Judge Rakoff in 2011—settled an administrative action to pay almost $180 million for

32. For a detailed breakdown by year, see the Appendix.

defrauding hedge fund investors.[33] The settlement does not include any factual admissions nor does it sanction any individuals. A few months earlier, the SEC filed an administrative settlement with Deutsche Bank AG for financial misrepresentations during the financial crisis, which included $55 million in fines.[34] Like the Citigroup settlement, Deutsche Bank did not make any factual admissions, nor was any individual sanctioned.[35] Both of these settlements were among the five largest settled actions (by amount of monetary penalties) filed in FY 2015.

The SEC has readily acknowledged the shift. SEC Enforcement Director Andrew Ceresney explained in May 2015 that the SEC changed its practice, and now files most settlements in administrative proceedings.[36] Although the shift is an unprecedented change in SEC enforcement, it has been largely ignored.

The complacency about administrative settlements in securities cases stands in stark contrast to the attention that litigation before ALJs has received. Litigants have successfully argued in several federal courts that the SEC is constitutionally required to litigate securities cases in federal court and not before ALJs because administrative adjudication deprives defendants of the right to a jury trial,[37] and because ALJs are improperly appointed.[38] Commentators have, similarly, noted that defendants enjoy more limited procedural rights before ALJs, raising issues of equal protection and due process.[39]

The objections raised by litigants and commentators do not extend to settlements; settlements filed in administrative proceedings have not stirred any concern, and any reference to the increase in administrative settlements is made in passing, if at all. The following Part suggests that this complacency is ill-advised.

33. Citigroup Alternative Investments LLC & Citigroup Global Markets, Inc., Securities Act Rel. No. 9,893 (Aug. 17, 2015).

34. Deutsche Bank AG, Exchange Act Rel. 75,040 (May 26, 2015).

35. The trend of sparing individuals when the bank is charged is not limited to the SEC. The DOJ, too, has aggressively prosecuted banks in 2015, but charged few actual bankers. *See* Garrett, *supra* note 26, at 44-45.

36. *See* Ceresney, *supra* note 20.

37. Hill v. SEC, No. 15-cv-1801, 2015 WL 4307088 (N.D. Ga. June 8, 2015).

38. Gray Fin. Grp., Inc. v. SEC, No. 15-cv-492 (N.D. Ga. Aug. 4, 2015) (order), ECF No. 56.

39. *See, e.g.*, Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1, 18-20 (Winter 2015-16) (concluding that ALJs pose serious due process concerns).

III. BRINGING SETTLEMENTS OUT OF THE SHADOWS

During an investigation, the Enforcement staff often seeks to secure a settlement. The Division usually pushes hard to extract the best possible settlement, and the defendant pushes back, often with dozens of high-priced attorneys. As a result, once they have reached an agreement, both parties want the settlement approved, and quickly. Neither side has any interest in submitting the settlement for third-party review. Settlement incentives ignore the fact that securities settlements do not merely resolve a dispute between two private parties. Securities settlements often affect third parties, such as injured investors.[40] They are also a core part of securities regulation. The SEC uses settlements to communicate to market participants and the public what behavior is right and wrong. These are the sorts of matters that ought not to be resolved in the shadows.

The Dodd-Frank amendment made it much easier for the SEC Enforcement Division to avoid judicial scrutiny of its settlements. In fact, the Second Circuit, in reversing Judge Rakoff's order refusing to approve the settlement between the SEC and Citigroup Global Markets, observed that that was the purpose of the amendment, noting that "to the extent that the SEC does not wish to engage with the courts, it is free to eschew the involvement of the courts and employ its own arsenal of remedies instead."[41]

The Second Circuit's observation is an accurate description of securities laws on the books, but it is not obvious that the change is desirable. The legal basis for approving settlements in administrative proceedings and in court is similar, at least on its face. The Commission is broadly authorized to prosecute any securities violation to further the twin goals of investor protection and the public interest, and the court must consider whether the settlement is "fair, reasonable, adequate and in the public interest" when it reviews a securities settlement.[42]

As described in Part I, despite similar guiding principles, courts and the Commission approach settlements differently. The Commission approves the proposed settlement in a closed hearing. While the Commission does not rubber-stamp all settlements, the sheer volume of work implies a limited investigation into each matter. Moreover, the Commission is acutely aware of its resource limitations and the constant pressure to do more with less. Like many decisions made under a budget constraint, securities enforcement decisions are made on the margin: insisting on factual admissions or more serious sanctions would deter settlement and force the Commission to litigate.

40. *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331 (2015).

41. SEC v. Citigroup Global Mkts., 752 F.3d 285, 297 (2d Cir. 2014).

42. *See id*. at 294.

Every dollar spent litigating an enforcement action that could be settled is a dollar not spent on prosecuting another securities violation. As a result, the Enforcement Division and the Commission itself may be tempted to make trade-offs to secure a quick settlement.

Courts face no such constraints. When courts review securities settlements, they are not particularly concerned about the SEC's limited budget or the incessant pressure to report record enforcement statistics.[43] As a result, judges' understanding of the "public interest" can be quite different from the SEC's understanding.[44]

SEC investigations of securities violations are confidential and are only made public when the Enforcement Division files an enforcement action. In administrative proceedings, the SEC opens and closes a settled action on the same day; there is never an opportunity for third-party review before the settlement is finalized, even informally. As a result, settlement practices in administrative proceedings can quickly depart from what is truly in the public interest, to what serves the interests of regulated entities and the short-term interests of SEC top brass.

In such an environment, drift can happen. Enforcement practices change in the face of changed capital markets, changed securities violations, and changed pressures on the SEC. For example, since 2013, when the SEC shifted to administrative enforcement in earnest, fewer settled enforcement actions target individuals as well as firms,[45] fewer settled actions charge violations of scienter-based provisions of securities laws than before,[46] and factual admissions remain the rare exception,[47] despite the announced policy to the contrary. Scienter-based claims have declined across all subject-matter categories, suggesting that no single enforcement initiative is driving the change.[48] The

43. *See* Velikonja, *supra* note 10, at 971-76; Rakoff, *supra* note 5, at 6-7.

44. *See, e.g.*, SEC v. Citigroup Global Mkts., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) (requiring additional factual findings to review that the proposed settlement is in the public interest). The decision was later reversed on appeal. *See* 752 F.3d 285 (2d Cir. 2014).

45. *See* Choi & Pritchard, *supra* note 15, at 32-34.

46. Scienter-based provisions are more serious and more difficult to prove, and have more significant collateral consequences. Fewer such settlements can be the result of fewer violations or of less serious enforcement. Data on file with author.

47. In FY 2015, about 2% of all settled actions included factual admissions (9 of 501). Data on file with author.

48. For example, in March 2014, the SEC launched an initiative to offer favorable settlement terms to municipal bond underwriters who self-report violations. In related settlements defendants agreed to violations of Section 17(a)(2) of the Securities Act, a negligence-based provision. *See* U.S. Sec. & Exc. Comm'n, SEC Completes Muni-Underwriter Enforcement Sweep, http://www.sec.gov/news/pressrelease/2016-18.html [http://perma.cc/VBR6-FUPU]. Settlements were included in the category Municipal Securities & Public Pensions. *See* U.S. SEC. & EXCH. COMM'N, SELECT SEC AND MARKET DATA FISCAL 2015, at 17-18.

ability to settle quietly has made it easier for SEC Enforcement to depart from publicly announced initiatives.[49]

It is not my contention that only courts can police SEC settlements or that courts should be in the business of setting enforcement priorities. Agencies are generally better informed as to both. But agencies are also subject to significant budgetary and political pressures than can cause enforcement practices to drift from what is optimal to whatever is expedient. Judicial oversight of SEC settlements operated as an external constraint on drift, and this constraint is now gone. Whatever one thinks of Judge Rakoff's interventions, he voiced the concerns of many that financial enforcement agencies were not doing a good enough job.[50]

To mitigate the risk that securities enforcement will become captured, or fall victim to short-term pressures, the SEC could return to pre-Dodd-Frank filing practices. This could be done without an amendment. The SEC has the discretionary right to choose where to sue defendants: it could simply resume the old practice of filing settlements in court. Given that budgetary pressures are a significant driver of administrative settlements, the SEC's enforcement budget could and should be increased to reduce the pressure to settle too quickly.

But there are additional institutional mechanisms, possibly superior to judicial oversight, that would bring enforcement out of the shadows. If we were to design the system from scratch, perhaps the Commission could hold public hearings before approving significant settlements.[51] For example, the Department of Labor decided to hold a public hearing on whether Credit Suisse should be permitted to serve as Qualified Professional Asset Manager after Credit Suisse pleaded guilty to tax fraud.[52]

Alternatively, the SEC could continue to resolve all enforcement actions administratively, but subject its enforcement agenda and settlement standards

---

49. It is more likely that there are fewer settlements alleging scienter-based violations because of the change in automatic disqualifications that took effect in September 2013. *See* Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CALIF. L. REV. 1081, 1091, 1098 (2015).

50. In a speech delivered in 2009, President Obama warned that "[w]e will not go back to the days of reckless behavior and unchecked excess at the heart of this crisis." The White House, Remarks by the President on Financial Rescue and Reform at Federal Hall (Sept. 14, 2009), http://www.whitehouse.gov/the-press-office/remarks-president-financial-rescue-and-reform-federal-hall [http://perma.cc/CQ8P-YQ79].

51. *Cf.* United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067, 1071 (W.D.N.Y. 1982) (ordering a public hearing on the proposed EPA settlement to address the public's concerns).

52. U.S. Dep't of Labor, US Department of Labor Announces Public Hearing on Credit Suisse (Nov. 14, 2014), http://www.dol.gov/opa/media/press/ebsa/ebsa20142115.htm [http://perma.cc/5MFS-TXQC].

to public review.[53] Currently, no agency does that. But the real and ongoing concern about the failures and shortfalls in financial enforcement suggests that some external review of enforcement beyond public shaming would be valuable. For example, the SEC leadership already reports annually to the House Financial Services and the Senate Banking committees, and the appropriations committees. Committee members could request more detailed reports on enforcement. In addition, the SEC has been quite responsive to public critique. As a result, an announcement of enforcement priorities accompanied by an end-of-year report on how the SEC enforcement program furthered these priorities could be an effective oversight mechanism.

Finally, the SEC could publish more detailed reports on enforcement and track variables of interest—such as whether the settlement included admissions, whether the defendant was sanctioned for serious scienter-based violations of securities laws, and whether the SEC prosecuted individuals—and let the public be the judge. All of these examples are steps that the SEC could implement without changes in the laws by simply publishing information it collects.

CONCLUSION

This Essay reveals the problem created by the Dodd-Frank amendment that authorized the SEC to file virtually all settled actions in administrative proceedings in lieu of in court. The Essay proposes reintroducing some external constraint on securities settlements, whether through courts, administrative processes, or greater transparency.

Judicial oversight of securities settlements may not have done much to police securities settlements when they were still filed in court. There are better ways to reduce the procedural costs of settlements and increase their transparency to ensure that enforcement practices further the public interest and protect investors. The Essay proposes two possible approaches that could be implemented immediately without legal change and at low cost: either congressional oversight committees could exercise more probing review of enforcement policy and practices, or the SEC leadership could begin reporting on how it is meeting the goals that it sets itself, including targeting individuals, seeking factual admissions and prosecuting even the smallest violations. At the least, the SEC itself should be as explicit about meeting the goals it sets for itself as it is about announcing them.

53. *See* Margaret Lemos, *Accountability and Independence in Public Enforcement* 50 (Mar. 16, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748720 [http://perma.cc/D8AJ-P69A].

APPENDIX: ENFORCEMENT ACTION FILINGS

The data in the Appendix is drawn from *Select SEC and Market Data Reports* that the SEC prepares annually and publishes on its website.[54] The Reports include a list of all enforcement actions filed during the fiscal year, organized by subject matter and date.

Each enforcement action often targets multiple defendants, and the same defendant is often targeted in two or three enforcement actions for the same violation. To improve the validity and reliability of data from year to year, I reviewed all enforcement actions filed between FY 2007 and FY 2015 and tabulated the data by defendants, not by enforcement actions. In addition, the data below only include defendants charged with securities violations, and do not include relief (or nominal) defendants, who received ill-gotten gain without violating securities laws.[55] Also, only defendants targeted in primary enforcement actions are included, not defendants in follow-on and secondary actions.[56] Finally, contempt proceedings and delinquent filing actions are also excluded.[57]

The tables break out filings depending on whether the defendant settled during the investigation and the action was filed as a settled action, or the defendant contested the charges. Contested actions include actions that ultimately settled, were decided by default, were voluntarily dismissed, or were decided on the merits by an ALJ or the Commission, or by a court at the motion to dismiss stage, on summary judgment, or after a jury or bench trial.

---

54. *See* U.S. Sec. & Exch. Comm'n, Reports and Publications, http://www.sec.gov/reports [http://perma.cc/XS8E-QW6X].

55. *See* Velikonja, *supra* note 10, at 946-47.

56. Follow-on and secondary actions are second or third proceedings against the same defendants for the same violation, seeking to impose additional sanctions. For a detailed methodology, see Velikonja, *supra* note 10, at 925-32.

57. *See* Velikonja, *supra* note 10, at 940-45.

TABLE 1.

FILINGS IN ALL VENUES

Fiscal Year	All Defendants	Filed Settled	Contested
2007	970	434	536
2008	856	334	522
2009	994	316	678
2010	791	290	501
2011	856	282	574
2012	920	315	605
2013	775	277	498
2014	790	377	413
2015	1072	502	570

TABLE 2.

FILINGS IN COURT

Fiscal Year	All Defendants	Filed Settled	Contested
2007	699	218	481
2008	705	216	489
2009	852	199	653
2010	657	196	461
2011	682	154	528
2012	734	201	533
2013	544	128	416
2014	413	97	316
2015	548	83	465

TABLE 3.

FILINGS IN ADMINISTRATIVE PROCEEDING

Fiscal Year	All Defendants	Filed Settled	Contested
2007	271	216	55
2008	151	118	33
2009	142	117	25
2010	134	94	40
2011	174	128	46
2012	186	114	72
2013	231	149	82
2014	377	280	97
2015	524	419	105

Urska Velikonja is a Visiting Professor of Law at Georgetown University Law Center and an Associate Professor of Law at Emory University School of Law. *She thanks Sam Buell, Jim Cox, Elisabeth de Fontenay, Emma Elliott, Jill Fisch, George Georgiev, Joe Grundfest, Don Langevoort, Margaret Lemos, Jonathan Macey, Andrew Volmer, Chris Walker, Yesha Yadav, and David Zaring for helpful conversations.*

Preferred Citation: Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J. F. 124 (2016), http://www.yalelawjournal.org/forum/securities-settlements-in-the-shadows.