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## Admissions of Guilt in Civil Enforcement

Verity Winship

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**Article**

**Admissions of Guilt in Civil Enforcement**

**Verity Winship<sup>†</sup> & Jennifer K. Robbennolt<sup>††</sup>**

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Judge Rakoff: “Do you admit the allegations?”

Lawyer for defendant, Citigroup Global Markets: “We do not admit the allegations, your Honor. But if it’s any consolation, we do not deny them.”<sup>1</sup>

## INTRODUCTION

Opening fake accounts, secretly moving customer money, begging friends and family to open “ghost” accounts—these were all ways that Wells Fargo employees reportedly met aggressive sales quotas.<sup>2</sup> “We were constantly told we would end up working for McDonald’s,” a former Wells Fargo employee told the *Los Angeles Times* when the story broke.<sup>3</sup> “If we did not make the sales quotas . . . we had to stay for what felt like after-school detention.”<sup>4</sup> Multiple civil authorities pursued the bank—the Office of the Comptroller of the Currency (OCC), the Consumer Financial Protection Bureau (CFPB), and the Los Angeles City Attorney’s Office.<sup>5</sup> These state and federal author-

1. Transcript of Oral Argument at 13, *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) (No. 11 Civ. 7387 (JSR)), *vacated*, 752 F.3d 285 (2d Cir. 2014).

2. E. Scott Reckard, *Wells Fargo’s Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013), <http://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html>; Press Release, Consumer Financial Protection Bureau, “Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts” (Sept. 8, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts>.

3. Reckard, *supra* note 2.

4. *Id.*

5. See Consumer Financial Protection Bureau, *supra* note 2 (stating that Wells Fargo will pay penalties to the OCC and the City and County of Los Angeles).

ities ultimately resolved the matter in the way that most civil enforcement matters are resolved: by settlement.

A key aspect of the settlement was whether the bank had to admit that it did something wrong. The Wells Fargo CEO testified before Congress: he was “deeply sorry,” although he also “want[ed] to make very clear that . . . [w]e never directed nor wanted our [team members] . . . to provide products and services to customers they did not want.”<sup>6</sup> A full page advertisement declared that Wells Fargo was “[m]oving forward to make things right.”<sup>7</sup> Despite these very public statements, the agreement with the CFPB and others was entered “without admitting or denying the findings of facts and conclusions of law.”<sup>8</sup> It was entered, Wells Fargo stipulated, “in the interest of compliance and resolution of the matter.”<sup>9</sup> The agreement with the Los Angeles City Attorney’s Office provided that the agreement “shall not constitute any evidence of admission of fault or concession of liability by Wells Fargo, either express or implied.”<sup>10</sup> Perhaps with an eye to collateral consequences (especially disqualification for certain business), the deal specified that the agreement did not amount to an admission of fact or liability “showing moral turpitude.”<sup>11</sup> Headlines following this

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6. *An Examination of Wells Fargo’s Unauthorized Accounts and the Regulatory Response: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 114th Cong. 72 (2016) [hereinafter *Wells Fargo Hearing*] (statement of John Stumpf, Chairman & Chief Executive Officer, Wells Fargo & Company), <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg23001/pdf/CHRG-114shrg23001.pdf>; Jeff Cox, *Wells Fargo CEO Stumpf Apologizes, Vows that Bank Will Do Better*, CNBC (Sept. 20, 2016), <http://www.cnbc.com/2016/09/20/wells-fargo-ceo-stumpf-takes-stand-before-senate-expected-to-apologize.html>.

7. Adrienne Pasquarelli, *Wells Fargo Ramps up Marketing in Push To Regain Trust*, ADAGE (Oct. 14, 2016), <http://adage.com/article/cmo-strategy/wells-fargo-ramp-marketing/306303>.

8. Wells Fargo Bank, N.A., No. 2016-CFPB-0015 (Consumer Fin. Prot. Bureau Sept. 4, 2016) (consent order), [http://files.consumerfinance.gov/f/documents/092016\\_cfpb\\_WFBconsentorder.pdf](http://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf); Wells Fargo Bank, N.A., AA-EC-2016-67 (Office of the Comptroller of the Currency Sept. 6, 2016) (consent order for a civil monetary penalty), <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-106a.pdf> (“The Comptroller finds, and the Bank neither admits nor denies . . .”).

9. Wells Fargo Bank, N.A., No. 2016-CFPB-0015 (Consumer Fin. Prot. Bureau Sept. 4, 2016) (stipulation and consent), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092016\\_cfpb\\_WFBstipulation.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092016_cfpb_WFBstipulation.pdf).

10. [Proposed] Stipulated Final Judgment at 3, *State v. Wells Fargo & Co.*, No. BC580778 (Cal. Super. Ct. Sept. 1, 2016). The Los Angeles City Attorney’s website indicates that this is the judgment that was entered. See *Protecting Consumers—Wells Fargo*, L.A. CITY ATT’Y, <https://www.lacityattorney.org/allegations-against-wells-fargo> (last visited Feb. 2, 2018).

11. [Proposed] Stipulated Final Judgment, *supra* note 10, at 13.

settlement declared that “Wells Fargo Offers Regrets, but Doesn’t Admit Misconduct.”<sup>12</sup>

Do the regulators’ actions against Wells Fargo “hold it accountable,” as the Comptroller of the Currency claimed in a congressional hearing?<sup>13</sup> And, more particularly, what is the role of admissions of wrongdoing in civil settlements in holding settling enforcement targets accountable? The Wells Fargo settlement is one example of the type of civil enforcement that raises the question at the heart of this article: *Whether and when should administrative agencies require enforcement targets to admit wrongdoing when settling an enforcement matter with the agency?*<sup>14</sup>

Regulators, judges, and commentators describe agencies’ approaches to admissions with words like truth,<sup>15</sup> wrongdoing,<sup>16</sup> guilt,<sup>17</sup> culpability,<sup>18</sup> responsibility,<sup>19</sup> liability,<sup>20</sup> confes-

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12. Michael Corkery, *Wells Fargo Offers Regrets, but Doesn’t Admit Misconduct*, N.Y. TIMES (Sept. 9, 2016), <https://www.nytimes.com/2016/09/10/business/dealbook/wells-fargo-apologizes-but-doesnt-admit-misconduct.html>.

13. *Wells Fargo Hearing*, *supra* note 6, at 2 (statement of Thomas J. Curry, Comptroller, Office of the Comptroller of the Currency).

14. This Article uses the term “target” to describe any target of a civil enforcement action by an agency, regardless of whether it is technically a defendant or a respondent or whether the proceeding takes place in court or in an administrative agency’s adjudicatory system. Also for convenience, the term “settlement” describes the agreement between the target and the agency that resolves the enforcement matter. These agreements may be in the form of “consent decrees,” “consent judgments,” or “consent orders.”

15. SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *vacated*, 752 F.3d 285 (2d Cir. 2014) (raising concerns over lack of admissions because the “public is deprived of ever knowing the truth”).

16. Corkery, *supra* note 12; Matt Taibbi, *SEC: Taking on Big Firms Is “Tempting,” but We Prefer Picking on Little Guys*, ROLLING STONE (May 30, 2012), <http://www.rollingstone.com/politics/news/sec-taking-on-big-firms-is-tempting-but-we-prefer-whaling-on-little-guys-20120530> (decrying SEC settlements in which companies failed to “admit wrongdoing”).

17. Carmen Germaine, *SEC’s Thinking Still a Mystery After Merrill Lynch Megadeal*, LAW360 (June 23, 2016), <https://www.law360.com/articles/810453/sec-s-thinking-still-a-mystery-after-merrill-lynch-megadeal> (pointing out that it is “unclear exactly how the agency decides to seek an admission of guilt”).

18. Gretchen Morgenson, *S.E.C. Wants the Sinners To Own Up*, N.Y. TIMES (Mar. 14, 2015), <https://www.nytimes.com/2015/03/15/business/sec-wants-the-sinners-to-own-up.html> (pointing to “admissions of culpability” in only eighteen cases in two years).

19. Mary Jo White, Chair, Sec. & Exch. Comm’n, Deploying the Full Enforcement Arsenal, Remarks at the Council of Institutional Investors Fall Conference (Sept. 26, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202> (“[T]here are certain other cases . . . where there is a special need for public accountability and acceptance of responsibility.”).

sion,<sup>21</sup> and apology.<sup>22</sup> One newspaper headline went so far as to describe agencies that require admissions as wanting “sinners to own up.”<sup>23</sup> Regulators talk about admissions by enforcement targets as a matter of “public accountability and acceptance of responsibility.”<sup>24</sup> This Article looks behind this rhetoric to give important—and previously missing—content to these claims about the function of admissions and their relationship to announced regulatory goals. Building on studies of the legal functions and effects of apologies,<sup>25</sup> we draw on empirical research examining the psychology of blame, responsibility, and accountability to analyze the function and potential value of admissions by targets of civil enforcement.

In doing so, we provide a nuanced account of what it means to make and require admissions. First, although the policy choice is often portrayed as binary—either an agency requires admissions or it does not—the reality is more varied. An agency can establish a policy in which only some matters are settled with an admission of wrongdoing. In that context, the regulators’ task is to identify when to require admissions. In each case, regulators-as-negotiators must decide whether, how, and to what extent admissions will serve the aims of the agency. In

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20. Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 506–08 (2013).

21. Lynndon Groff, Note, *Is Too Big to Fail Too Big to Confess: Scrutinizing the SEC’s “No-Admit” Consent Judgment Proposals*, 54 B.C. L. REV. 1727, 1727 (2013) (explaining that “the [SEC’s] standard settlement terms” do not require companies “to confess to wrongdoing”); see also Andrew Tangel & Jim Puzanghera, *SEC’s Mary Jo White Wants Companies to Fess Up*, L.A. TIMES (Jan. 1, 2014), <http://articles.latimes.com/2014/jan/01/business/la-fi-sec-white-20140102>.

22. John Rothchild, *How to Say You’re Sorry*, TIME, June 20, 1994, at 51 (criticizing companies’ refusals to apologize for financial misconduct); see also Marc S. Raspanti et al., *The SEC’s New Admissions Policy Means Sometimes Having to Say You’re Sorry*, 39 CHAMPION 16, 16 (2015).

23. Morgenson, *supra* note 18.

24. White, *supra* note 19; see also Mary Jo White, Chair, Sec. & Exch. Comm’n, Chairman’s Address at SEC Speaks 2014 (Feb. 21, 2014) [hereinafter White, SEC Speaks], [https://www.sec.gov/news/speech/2014-spch022114mjw#\\_ftnref14](https://www.sec.gov/news/speech/2014-spch022114mjw#_ftnref14) (“[A]dmissions are important because they achieve a greater measure of public accountability, which, in turn, can bolster the public’s confidence in the strength and credibility of law enforcement, and the safety of our markets.”).

25. See, e.g., Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) [hereinafter Robbennolt, *Legal Settlement*]; Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006) [hereinafter Robbennolt, *Settlement Levers*].

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doing so, regulators must consider the strength of the case against the target of enforcement and the nature of the allegations.

Second, regulators must consider the content of the admissions sought or required. Commentators, regulators, judges, and journalists often refer to admissions of guilt or wrongdoing. But what does that mean? Admitting facts? Taking responsibility? Admitting to having intentionally engaged in particular behavior or wrongdoing? Admitting having violated the law? Regulators might require admissions in each of these senses. Or they might pick and choose. With this in mind, we delineate several different categories of admission based on insights from the empirical literature and on concrete examples drawn from the experience of administrative agencies.

The experience of one agency—the Securities and Exchange Commission (SEC)—serves as a central case study. The SEC provides a rich example of the debate over whether to require settling targets to admit wrongdoing because the agency's policy about requiring admissions has changed over time in response (in part) to a public debate over the function of admitting wrongdoing.<sup>26</sup>

That said, however, our observations are aimed not just at the SEC, but are directed more broadly at civil enforcement across agencies. In addition to the SEC, we draw on examples from other financial regulators, the Environmental Protection Agency (EPA), the Federal Trade Commission (FTC), the Department of Justice's (DOJ) Civil Division, the Federal Communications Commission (FCC), and other agencies. Some agencies have formal policies that state whether and under what circumstances they will require admissions. But others simply go about the business of enforcement without a formal policy defining their approach to admissions. The resulting settlements, then, provide case-by-case examples of the agency's admissions practices. Regardless of whether agencies have formal policies on admissions, they generally rely heavily on settlement as a key tool of administrative enforcement. Whether or not an agency requires admissions interacts with the willingness of targets to settle. And, admissions—or, more commonly, declarations that nothing is admitted—form part of the resulting settlement agreements. Whereas much of the existing literature about admissions in agency enforcement focuses on

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26. See *infra* Part III.

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admissions in SEC settlements, especially the potential collateral consequences of such admissions, this Article uses the explicit debate over the SEC's practices to draw attention to the high (and mostly unexamined) stakes for enforcement throughout the administrative system.

The Article proceeds as follows. Part I describes the context within which we consider admissions of wrongdoing: civil enforcement by administrative agencies. As this Part explains, settlement is the main mode of resolving enforcement actions for many agencies. Admissions are focal in this context because resolution through settlement lacks the determination of facts or liability that an adjudicative proceeding would provide. This Part concludes by outlining some of the consequences of an agency's choice about whether to require admissions. Part II examines what it means to "admit wrongdoing" in the context of civil enforcement. It analyzes the interaction between admissions and denials of wrongdoing. It then asks what precisely is being admitted: Facts? Legal violation? State of mind? These models are then given concrete expression in Part III, which turns to the case study of the SEC's admission practices. Part IV addresses the function and value of admissions and considers the implications of these functions for agencies negotiating admissions and the content of those admissions in enforcement actions.

## I. THE CONTEXT OF CIVIL ENFORCEMENT

### A. AGENCY ENFORCEMENT

Whether to require enforcement targets to make admissions is a policy decision for many agencies that have civil enforcement authority.<sup>27</sup> To understand the context in which this decision arises and the scope of our analysis, this Section first examines what is meant by *civil* enforcement, and then turns to the question of *which agencies* are included in our analysis.

We are concerned here with admissions in the context of civil, rather than criminal, enforcement. As used here, the term civil enforcement encompasses both judicial actions and actions within an administrative agency, often before an administrative law judge. Civil here is defined pragmatically: civil agen-

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27. Although agencies may adopt a uniform policy or decide whether to demand admissions on a case-by-case basis, this Article sometimes uses the phrase "admissions policy" or "admissions model" as shorthand for an agency's decisions about requiring admissions in settlements with enforcement targets.



cies and civil enforcement are primarily distinguished by the remedies that may be sought.<sup>28</sup> For instance, the SEC and the DOJ's Criminal Division enforce the same insider trading statute, but the civil enforcement authority—the SEC—has no power to send anyone to jail. The agencies themselves provide good illustrations of how these lines are drawn in practice. The FTC, for example, describes the difference between civil and criminal actions in terms of remedies and whether there is evidence of the target's intention.<sup>29</sup> “The FTC's civil enforcement actions shut down fraud and get restitution for consumers or disgorgement.”<sup>30</sup> The agency “partners with the U.S. Department of Justice, U.S. Attorneys, and other federal and state criminal law enforcers” when it develops “evidence that proves these defendants knew about the fraud” that could give rise to a criminal fraud prosecution.<sup>31</sup>

Although our focus is on civil proceedings and regulators, criminal enforcement provides an important foil. In particular, criminal proceedings are the core example of a context in which defendants routinely must admit their wrongdoing and responsibility, even when a case is resolved through an agreement rather than adjudication.<sup>32</sup>

Agencies vary in structure, legal framework, and other aspects of their work, but many agencies have an enforcement function that relies heavily on settlement and that accordingly implicates the decision whether to require admissions of wrongdoing as a term of settlement. Financial regulators provide one set of examples. Not only do these agencies have goals and practices in common, but their settlement practices were

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28. See John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193–94 (1991) (pointing to “the disappearance of any clearly definable line between civil and criminal law,” and arguing that “implementation of the crime/tort distinction is today feasible only at the sentencing stage”); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796 (1992).

29. *Criminal Liaison Unit*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/criminal-liaison-unit> (last visited Feb. 2, 2018).

30. *Id.*

31. *Id.*

32. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1379 (2003) (identifying several reasons why prosecutors and judges may oppose guilty pleas that do not include admission of wrongdoing (nolo pleas)); Buell, *supra* note 20, at 506–08 (2013) (explaining that defendants are allowed to enter nolo pleas only in “the most unusual circumstances”); see also sources cited *infra* note 85.

collectively in the spotlight after the 2007 financial crisis. A hearing in front of the House Financial Services Committee in 2012 focused on financial agencies' settlement practices in general, and their admissions policies in particular.<sup>33</sup> The testimony at that hearing made it clear that the SEC was not the only agency confronting this policy choice. Witnesses not only included the Director of the SEC's Enforcement Division, but also representatives of the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the OCC.<sup>34</sup> All pointed to—and were challenged on—their agency's policy of allowing settlement without admissions. The General Counsel for the Federal Reserve, for instance, observed that “[t]he vast majority of the Federal Reserve’s formal enforcement actions are resolved upon consent” and that “[t]he Federal Reserve typically sets out summary recitations of the relevant facts in whereas clauses.”<sup>35</sup> He noted, however, that “like our fellow banking regulators, it has not been our practice to require formal admissions of misconduct.”<sup>36</sup>

The U.S. Commodity Futures Trading Commission (CFTC), which regulates derivatives and other financial products, provides another example in the context of financial regulation. Like the SEC, the CFTC's policy of entering into settlements without requiring admissions of responsibility has triggered discussion and criticism. In 2013, for instance, a CFTC Commissioner called for a policy change: “Admitting to these findings of fact needs to be something part and parcel to

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33. *Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the H. Comm. on Fin. Serv., 112th Cong. (2012)* [hereinafter *Hearing on Settlement Practices*], <https://financialservices.house.gov/uploadedfiles/112-128.pdf>.

34. *Id.* at 1.

35. *Id.* at 7 (statement of Scott G. Alvarez, General Counsel, Board of Governors of the Federal Reserve System).

36. *Id.*; see also *id.* at 10 (statement of Richard J. Osterman, Jr., Deputy General Counsel, Federal Deposit Insurance Corporation) (“The vast majority of our cases are resolved through stipulated settlements which achieve our statutory responsibilities and protect the public interest without admissions of liability.”); *id.* at 12 (statement of Daniel P. Stipano, Deputy Chief Counsel, Office of the Comptroller of the Currency) (noting that “[i]n the vast majority of cases, OCC enforcement actions are resolved by consent” and that the associated enforcement order “includes the Comptroller’s findings supporting an action and a statement that the institution or individual neither admits nor denies wrongdoing”).

these types of settlements. All too often, a firm will neither admit nor deny any wrong doing [sic]. That needs to stop. . . .”<sup>37</sup>

But the underlying question about when civil agencies should require admissions reaches well beyond financial regulators. Administrative agencies rely heavily on settlement, rather than adjudication, in their enforcement functions, and part of what is or could be negotiated in settlement discussions is the extent to which the target will acknowledge responsibility.<sup>38</sup>

The FTC and the EPA are examples of agencies that explicitly allow settlement without requiring parties who settle with the agency to admit their responsibility.<sup>39</sup> The EPA rules of practice provide that consent agreements must state that the respondent “admits the facts stipulated in the consent agreement *or* neither admits nor denies specific factual allegations contained in the complaint.”<sup>40</sup> Following this policy, some EPA consent decrees include language indicating that the court’s order was entered “without the adjudication or admission of any issues of fact or law.”<sup>41</sup> The FTC’s rules permit consent agreements to “state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.”<sup>42</sup>

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37. Bart Chilton, Comm’r, U.S. Commodities Futures Trading Comm’n, Concurrence of Commissioner Bart Chilton in the Matter of JPMorgan Chase, N.A. (JPMorgan) (Oct. 16, 2013), <http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement101613>; cf. Francine McKenna, *PCAOB Extracts First Admission of Guilt from Public Company Audit Firm*, MARKETWATCH (Oct. 2, 2015), <http://www.marketwatch.com/story/pcaob-extracts-first-admission-of-guilt-from-public-company-audit-firm-2015-10-02> (pointing to the Public Company Accounting Oversight Board’s (PCAOB) new policy of requiring admissions of guilt).

38. See *infra* Part I.B.

39. Larissa Lee, Note, *Admission of Guilt: Sinking Teeth into the SEC’s Sweetheart Deals*, 3 J. MARSHALL GLOBAL MKTS. L.J. 27, 34 (2014) (noting that no-admit-no-deny policies characterize many agencies, including the FTC, the EPA, the Federal Reserve, the OCC, and the FDIC).

40. Environmental Protection Agency Consolidated Rules of Practice, 64 Fed. Reg. 40,138, 40,183 (July 23, 1999) (to be codified at 40 C.F.R. § 22.18(b)(1)) (emphasis added).

41. See, e.g., Consent Decree, *United States v. Enbridge Energy Ltd. P’ship*, No. 1:16-cv-914 (W.D. Mich. May 23, 2017), [https://www.epa.gov/sites/production/files/2017-06/documents/enbridgeentered-cd\\_0.pdf](https://www.epa.gov/sites/production/files/2017-06/documents/enbridgeentered-cd_0.pdf); Consent Decree at 2, *United States v. City of Gary*, No. 2:16-cv-00512 (N.D. Ind. Dec. 12, 2016), <http://www.epa.gov/sites/production/files/2016-12/documents/cityofgary-cd.pdf>.

42. 16 C.F.R. § 2.32 (2017).

Other agencies explicitly permit settlement, but are silent about admissions.<sup>43</sup>

The FCC provides an unusual example in that it explicitly—and controversially—adopted a policy of seeking admissions in 2014 when Travis LeBlanc became enforcement chief. In an early speech, LeBlanc called past consent decrees “a bit of a ‘boondoggle’ for the industry” because the targets “didn’t have to admit to anything.”<sup>44</sup> The FCC’s policy change was contested, prompting predictions of a “showdown” with the “new sheriff.”<sup>45</sup>

Finally, although our primary focus is on U.S. administrative agencies, the questions we raise about admissions, our analysis of the range of admissions that might be made, and the role of admissions in negotiating civil settlements, reach beyond U.S. domestic agencies. A vivid illustration comes from Canada; in contrast to the SEC, securities authorities in Ontario have moved from a policy of always requiring admissions to one that permits settlement without admission.<sup>46</sup>

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43. Under the Program Fraud Civil Remedies Act, the Department of Education, the Department of the Treasury, and the Department of Labor have promulgated procedures for settlement that do not mention or give any direction as to admissions. See 29 C.F.R. § 22.46 (2017); 31 C.F.R. § 16.46 (2017); 34 C.F.R. § 33.46 (2017).

44. *FCC Enforcement Chief Outlines New Focus: Consumers, Prevention, Efficiency*, BLOOMBERG BNA (July 23, 2014), <https://www.bna.com/fcc-enforcement-chief-n17179892750> (reporting LeBlanc’s 2014 remarks at a Federal Communications Bar Association lunch).

45. Margaret Harding McGill, *FCC Enforcement Shifts Nearing Breaking Point with Industry*, LAW360 (July 7, 2015), <https://www.law360.com/articles/675011/fcc-enforcement-shifts-nearing-breaking-point-with-industry> (“Under the guidance of Chief Travis LeBlanc, the Enforcement Bureau’s more adversarial approach to industry means bigger fines, admissions of liability and what some see as an attempt at policy-making through enforcement. And while the options for challenging the bureau are largely unappealing, attorneys say a showdown with the new sheriff feels almost inevitable.”).

46. Staff Notice, Ont. Sec. Comm’n., Request for Comments on Proposed Enforcement Initiatives (Oct. 21, 2011), [http://www.osc.gov.on.ca/documents/en/Securities-Category1/sn\\_20111021\\_15-704\\_rfc-enforcement-initiatives.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category1/sn_20111021_15-704_rfc-enforcement-initiatives.pdf). Most of the examples in this Article are drawn from federal agencies, but state agencies may face the same type of issue. One example comes from state anti-trust authorities based in their respective attorney general’s offices. See Consent Decree at 2, *New York v. Herman Miller, Inc.*, No. 08-cv-02977 (S.D.N.Y. Mar. 25, 2008), [https://ag.ny.gov/sites/default/files/pdfs/bureaus/antitrust/Signed\\_FJ.pdf](https://ag.ny.gov/sites/default/files/pdfs/bureaus/antitrust/Signed_FJ.pdf) (“Without any admission or denial of liability or wrongdoing and to avoid the additional burden and expense of continued litigation, [defendant] has consented [to settlement].”).

## B. THE ROLE OF SETTLEMENT

Questions of whether to require admissions arise in the context of negotiated settlements between the agency and the target of the enforcement action. When a case settles, there is no final adjudication of liability or of the facts by administrative adjudication or by a court. At least in the SEC context, the matter is often settled at the same time it is filed, so there are no adjudicatory proceedings at all.<sup>47</sup> The extent and type of admission to be made is part of the settlement negotiation. Three aspects of agency settlements are particularly relevant to the discussion about admissions.

First, settlement between agencies and the targets of enforcement has long been an accepted tool of agencies in part because such agreements stretch scarce resources.<sup>48</sup> Although settlement rates vary by agency and time period, many agencies report settling the majority of their enforcement matters.<sup>49</sup>

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47. STEPHEN CHOI ET AL., N.Y. UNIV. POLLACK CTR. FOR LAW & BUS. & CORNERSTONE RESEARCH, SEC ENFORCEMENT ACTIVITY AGAINST PUBLIC COMPANIES AND THEIR SUBSIDIARIES: FISCAL YEAR 2016 UPDATE 7 (2016), <https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-Against-Public-Company-Defendants-2016> (reporting that ninety-seven percent of SEC settlements with public companies in fiscal year 2016 were settled at the same time they were initiated and that the median was eighty-seven percent for fiscal years 2010–2015).

48. See Comm. on Fed. Regulation of Sec., *Report of the Task Force on SEC Settlements*, 47 BUS. LAW. 1083, 1092–93 (1992); ADMIN. CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 24 (1979) (stating, approvingly, that agencies “resolve the great majority of civil money penalty cases without reaching the stage of formal administrative adjudication or a court collection proceeding”); U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 48 (1947) (quoting DEAN ACHESON ET AL., FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 35 (1941)) (noting that agency “settlement of cases and issues by informal methods is nothing new,” and “even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process”).

49. See, e.g., *Hearing on Settlement Practices*, *supra* note 33, at 10 (statement of Richard J. Osterman, Jr., Deputy General Counsel, Federal Deposit Insurance Company) (“The vast majority of our cases [were] resolved through stipulated settlements.”); *id.* at 7 (statement of Scott G. Alvarez, General Counsel, Board of Governors of the Federal Reserve System) (“The vast majority of the Federal Reserve’s formal enforcement actions are resolved upon consent.”). See generally Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 888 (describing consent decrees as “common in every variety of lawsuit over public policy”).

Some of the same rationales given for favoring settlement in the U.S. legal system more generally are also invoked as reasons for agency enforcement settlements: efficiency and litigant “buy in,” as well as conservation of judicial or other public resources.<sup>50</sup> Other rationales are particular to the agency context. For example, former SEC Chair Mary Jo White described the benefits of relying on settlements: they allowed the SEC to “get relief within the range of what we could reasonably expect to achieve after winning at trial” and “to eliminate all litigation risk, resolve the case, return money to victims more quickly, and preserve our enforcement resources to redeploy to do other investigations.”<sup>51</sup>

Second, the terms of agency settlements are generally public. Like the settlement of litigation between private parties, settlements between an agency and an enforcement target involve aspects of contract.<sup>52</sup> But unlike settlements between private parties, the terms of the settlement are generally publicly known. In some administrative contexts, the “publicness” of these terms is formal. Consent orders are published in the Federal Register for public comment before being finalized.<sup>53</sup> Agencies are also sometimes required to issue a related press release.<sup>54</sup>

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50. See, e.g., Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 25; Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 327–32 (1988) (noting that settlement conserves judicial and litigant time and resources, and that it allows for compromise, often without liability).

51. White, *supra* note 19.

52. See, e.g., SEC v. Levine, 881 F.2d 1165, 1178–79 (2d Cir. 1989) (“A consent judgment, though it is a judicial decree, is principally an agreement between the parties. Such judgments should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation.” (quoting *United States v. ITT Cont’l Banking Co.*, 420 U.S. 223, 236–37 (1975))).

53. See, e.g., 15 U.S.C. § 16(b) (2012) (requiring that consent judgments with the United States under the antitrust laws be published in the Federal Register for notice and comment); 42 U.S.C. § 9622 (2012) (providing a public comment period when a consent decree is entered into in the context of Comprehensive Environmental Response, Compensation and Liability (CERCLA)); 10 C.F.R. § 205.199J (2017) (“When a Consent Order has been signed, both by the person to whom it is issued and the DOE, the DOE will publish notice of such Consent Order in the Federal Register and in a press release to be issued simultaneously therewith.”); 16 C.F.R. § 2.34 (2017) (providing that the FTC will publish consent decrees).

54. 15 U.S.C. § 16(c) (requiring the agency to publish summaries of anti-trust consent decrees in a newspaper); 10 C.F.R. § 205.199J (requiring the DOE to issue a simultaneous press release).

Even when these consent decrees are not formally published, the agency often announces in a press release or other public release that a matter has been settled.<sup>55</sup> Settlement terms may be publicly available on the agency webpage, with links to the underlying documents, or summarized in a press release or other short report.<sup>56</sup> Even before they became widely available on the Internet, press releases and litigation releases announced agency settlements with some detail. Although anecdotal, it is easy to identify newspaper articles about high profile or locally important cases that describe the terms of settlement, including whether the target made any admissions.

For example, an article on an SEC settlement with the Port Authority of New York and New Jersey reported that the SEC “secur[ed] a rare admission of wrongdoing.”<sup>57</sup> The SEC’s settlements with a variety of targets—building suppliers who allegedly prevented employee whistleblowing,<sup>58</sup> disgraced mayors,<sup>59</sup> and turnaround specialists<sup>60</sup>—were all reported in

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55. See, e.g., *The City of West Haven, Connecticut Clean Water Act Settlement*, EPA (Dec. 15, 2016), <https://www.epa.gov/enforcement/city-west-haven-connecticut-clean-water-act-settlement>; AJN Investments, LLC, SEC Litigation Release No. 23714, (Dec. 28, 2016), <https://www.sec.gov/litigation/litreleases/2016/lr23714.htm>.

56. See, e.g., *Cases and Proceedings*, FTC, <https://www.ftc.gov/enforcement/cases-proceedings> (last updated Dec. 6, 2017); *Civil Cases and Settlements*, EPA, <https://cfpub.epa.gov/enforcement/cases> (last updated Dec. 5, 2017); *Litigation Releases*, SEC, <https://www.sec.gov/litigation/litreleases.shtml> (last updated Dec. 7, 2017).

57. Paul Berger, *SEC Announces \$400,000 Settlement of Probe*, ASBURY PARK PRESS, Jan. 11, 2017, at A14; see also Elizabeth Lazarowitz, *Whale of a Hit Morgan To Pay \$920M for Fiasco*, N.Y. DAILY NEWS, Sept. 20, 2013, at 28; Bobby Yip, *Merrill Lynch to Pay \$415 Million for Misusing Customer Cash*, ST. LOUIS POST-DISPATCH (June 24, 2016), [http://www.stltoday.com/business/local/merrill-lynch-to-pay-million-for-misusing-customer-cash/article\\_ce2d6ca1-b0f2-547a-b338-369d628c1816.html](http://www.stltoday.com/business/local/merrill-lynch-to-pay-million-for-misusing-customer-cash/article_ce2d6ca1-b0f2-547a-b338-369d628c1816.html) (noting that Merrill Lynch “admit[ted] to wrongdoing to settle charges that it misused customer cash”).

58. Russell Grantham, *BlueLinx Settles Whistleblower Case SEC Accused Atlanta Building Supply Firm of Trying to Stifle Exiting Workers From Alleging Wrongdoing*, ATLANTA J.-CONST., Aug. 12, 2016, at A9 (reporting that the enforcement target agreed to pay a \$265,000 penalty to the SEC “but didn’t admit or deny the allegation”).

59. See Kaitlin L. Lange, *Ex-Fort Mitchell Mayor has Law License Suspended*, CIN. ENQUIRER, Dec. 20, 2016, at A5 (reporting that a disgraced mayor agreed to a settlement “which was neither an admission or denial of the SEC’s charges”); Ashlee Rezin, *Harvey Mayor Fined \$10K for ‘Fraudulent Bond Offerings’*, CHI. SUN TIMES (May 19, 2016), <https://chicago.suntimes.com/news/harvey-mayor-fined-10k-for-fraudulent-bond-offereings> (reporting that the mayor “did not admit to any wrongdoing”).

60. Thomas Heath, *Chevy Chase Turnaround Specialist Agrees to Pay \$3.1 Million to Settle SEC Charges*, WASH. POST (June 2, 2016), <https://www>

articles that included the detail that the target did not admit wrongdoing. Accordingly, unlike in other contexts where settlement terms are confidential, information about agency settlements is available to the public in various forms.

Third, because these agency settlements have public implications, they may be subject to judicial review. When an agency settles a court action, for instance, the settlement must be approved by a judge, who reviews it to determine whether it is “fair, reasonable, and adequate” and in many cases whether it is in the public interest.<sup>61</sup> This judicial settlement review is particularly relevant to the development of the SEC’s approach to admissions. One of the triggers for changes in SEC policy about admissions was the refusal of a trial court judge, Judge Jed Rakoff of the Southern District of New York, to approve a settlement between the SEC and Citigroup.<sup>62</sup>

### C. CONSEQUENCES OF ADMISSIONS POLICY

Whether an agency requires settling targets to make admissions can affect the willingness of the targets of enforcement to settle their cases. The practical consequences of admissions for targets, therefore, have implications for the ability of agencies to settle cases.

One of the primary concerns for targets of administrative enforcement is the effect that admissions will have on other legal actions that reach the same underlying conduct.<sup>63</sup> Private

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.washingtonpost.com/business/capitalbusiness/chevy-chase-turnaround-specialist-agrees-to-pay-31-million-to-settle-sec-charges/2016/06/02/b7904976-28fb-11e6-ae4a-3cdd5fe74204\_story.html (reporting that “Blackstreet [Capital Management] admit[s] to no wrongdoing as part of the \$3.1 million settlement”).

61. See, e.g., *SEC v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 161–63 (2d Cir. 2012) (“The district court rejected the settlement, concluding that it was ‘neither reasonable, nor fair, nor adequate, nor in the public interest.’”); SAMUEL J. WINER, CHRISTOPHER M. CUTLER & KENNETH B. WINER, *SECURITIES ENFORCEMENT: COUNSELING AND DEFENSE* § 17.07, (2017) (noting that the relevant federal district court must approve any settlements of a civil court case with the SEC).

62. *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *vacated*, 752 F.3d 285 (2d Cir. 2014). For further discussion of Judge Rakoff’s decision, see *infra* Part III.B.

63. See, e.g., Joseph F. Guida & Jean M. Flores, *From Here to a Penalty: Anatomy of EPA Civil Administrative Enforcement*, 43 TEX. ENVTL. L.J. 129, 152 (2013) (noting that targets of EPA civil administrative enforcement may be reluctant to admit “allegations and conclusions of law because of potential legal implications outside of the immediate proceeding”); Paul Radvany, *The SEC Adds a New Weapon: How Does the New Admission Requirement Change*



litigation is an important category of parallel action. The mechanism by which admissions affect other legal actions might be one of preclusion: an admission may be used to prevent relitigation of that factual issue in a separate suit.<sup>64</sup> Or, the settlement with the regulator might be used as evidence in the parallel private litigation.<sup>65</sup>

Targets may also be concerned about the effect of an admission that is made before one agency when they are being investigated by multiple agencies for the same conduct. This type of multiagency action has ample precedent. For example, when a London-based trader made a bet that caused a loss of six billion dollars—the so-called London Whale matter—J.P. Morgan not only admitted wrongdoing and settled with the SEC, but it also settled simultaneously with the U.K. Financial Conduct Authority, the Federal Reserve, and the OCC,<sup>66</sup> and later with the CFTC.<sup>67</sup> Thus, in considering the possibility of admissions in a negotiation with one agency, targets may well have to consider the implications of those admissions across agency actions.

The potential consequences may also go beyond the effects in related litigation or enforcement. Insurance coverage may be threatened by some admissions, as these policies generally do not cover fraud or intentional misconduct.<sup>68</sup> As one law firm warned its clients, particular targets may face other consequences: “Admitting securities fraud can seriously jeopardize contracts with government entities, state licenses to engage in financial services, surety bonds, the ability to engage in fiduciary business, and many other things.”<sup>69</sup>

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*the Landscape?*, 15 CARDOZO J. CONFLICT RESOL. 665, 696–97 (2014); Jason E. Siegel, Note, *Admit It! Corporate Admissions of Wrongdoing in SEC Settlements: Evaluating Collateral Estoppel Effects*, 103 GEO. L.J. 433, 442–43 (2015).

64. See Siegel, *supra* note 63.

65. *Id.*

66. Press Release, U.S. Sec. & Exch. Comm’n, JPMorgan Chase Agrees To Pay \$200 Million and Admits Wrongdoing to Settle SEC Charges (Sept. 19, 2013) [hereinafter JPMorgan Press Release], <https://www.sec.gov/News/Press-release/2013-187>.

67. Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Files and Settles Charges Against JPMorgan Chase Bank, N.A., for Violating Prohibition on Manipulative Conduct in Connection with “London Whale” Swaps Trades (Oct. 16, 2013), <http://cftc.gov/PressRoom/PressReleases/pr6737-13>.

68. *The Future of Admitting When Settling SEC Enforcement Actions: Some Initial Considerations*, JONES DAY (June 2013), <http://www.jonesday.com/the-future-of-admitting-when-settling-sec-enforcement-actions>.

69. *Id.*

Collateral consequences for targets have consequences for regulators. Collateral consequences, especially the potential use of the admission in private litigation, can influence the willingness of targets to settle and, correspondingly, the degree to which settlement is a prevalent and useful tool of the administrative agency.<sup>70</sup> A lawyer for Citigroup warned (perhaps hyperbolically) that if admissions were required in SEC settlements, “[t]he federal regulatory enforcement regime would screech to a grinding halt.”<sup>71</sup> The General Counsel of the Federal Reserve made a similar, though more understated, point in congressional testimony: “Requiring admissions of guilt as a condition of entering into a consent action we believe would have a deleterious effect on our supervisory efforts by causing more institutions and individuals to contest the requested relief in formal administrative proceedings, which typically take years to reach resolution.”<sup>72</sup> For similar reasons, former SEC Chair White called allowing no-admit-no-deny settlements “ordinarily, a significant win-win.”<sup>73</sup>

The potential interaction between an admissions policy and the willingness of defendants to settle is also vividly illustrated by the contrast between the development of the SEC’s policy and one developed by securities authorities in Canada. While the SEC moved from a no-admit-no-deny regime to one in which the agency sometimes requires admissions,<sup>74</sup> Canadian authorities moved in the other direction. Securities authorities in Ontario shifted from a policy of always requiring admissions to one that permits “no-contest settlements,” in which targets make no admission.<sup>75</sup> Why? The Canadian authorities explicitly pointed to their prior policy of requiring admissions as making targets of enforcement overly reluctant to settle cases.<sup>76</sup>

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70. See Buell, *supra* note 20, at 518.

71. Argument at 44, *SEC v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158 (2d Cir. 2012) (Nos. 11 CV 5227, 11 CV 5242, 11 CV 5375).

72. *Hearing on Settlement Practices*, *supra* note 33, at 7; see also *id.* at 10 (statement of Richard J. Osterman, Jr., Deputy General Counsel, FDIC) (“[R]equiring a respondent to specifically admit the alleged conduct in a settlement may have the unintended consequence of delaying prompt relief and corrective action.”).

73. White, *supra* note 19.

74. See *id.*

75. Staff Notice, *supra* note 46.

76. Philip Anisman, *No-Contest Settlements and the SEC’s Recent Experience: Implications for Ontario*, ONT. SEC. COMM’N (June 4, 2015), [http://www.osc.gov.on.ca/documents/en/securities-category1/rpt\\_20130605\\_15-706\\_no-contest-settlements.pdf](http://www.osc.gov.on.ca/documents/en/securities-category1/rpt_20130605_15-706_no-contest-settlements.pdf).

Observers of Canadian securities regulation have pointed out that such a requirement “greatly increases the time, human resources, and amount of money that regulators must devote to a particular file.”<sup>77</sup>

It is unclear to what extent concerns about the impact of admissions on the use and usefulness of settlement have materialized for targets. Courts have not fully resolved the reach of preclusion in this situation, or the extent to which evidence of admissions would be permitted in parallel litigation.<sup>78</sup> The intensity of collateral consequences also depends on the extent to which agency enforcers and private litigants target the same conduct.<sup>79</sup> If the overlap is great, then litigants should be particularly concerned with collateral consequences. If the overlap is not as significant, then the effect of an admission in agency proceedings should not matter as much.

Moreover, regulators may be able to shape admissions to reduce the concern about their use in private litigation. Indeed, this Article’s analysis of different admissions models<sup>80</sup> highlights the ability of regulators to do just that: select among different types of admissions (of fact, legal violation, or state of mind) to calibrate the possible collateral consequences for the target and balance the various policy goals of the agency.<sup>81</sup> In the context of securities enforcement, for instance, we see cases in which corporations admit that they violated a section of the securities laws that does not require a showing of scienter, leaving relatively unaffected later assertions of securities fraud, which do require a showing of scienter.<sup>82</sup>

Having a clear sense of the collateral consequences of admissions and the implications of those consequences for settlement is important for agencies attempting to negotiate admissions as part of a settlement. As we will see, combining this understanding with an appreciation of the potential value of

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77. Poonam Puri, *Securities Litigation and Enforcement: The Canadian Perspective*, 37 *BROOK. J. INT’L L.* 967, 981 (2012).

78. See Siegel, *supra* note 63, at 444–45.

79. See *id.*

80. See *infra* Part II.

81. See *infra* Part IV.

82. For example, in its London Whale settlement with the SEC, J.P. Morgan did not admit to anything involving scienter. Instead, it admitted negligence in internal controls, which could not be used in parallel private litigation. See Radvany, *supra* note 63, at 696–98; JPMorgan Chase & Co., No. 3-15507 (Sec. & Exch. Comm’n Sept. 19, 2013) (order instituting cease-and-desist proceedings), <https://www.sec.gov/litigation/admin/2013/34-70458.pdf>.

admissions for accomplishing the goals of both the agency and the target will even better equip regulators to set broad policies regarding admissions and to make decisions in particular cases.<sup>83</sup>

## II. ADMISSION MODELS

The debate over whether agencies should require enforcement targets to make admissions tends to be organized around two main options: requiring admissions or not requiring them. This approach reflects competing norms from two other contexts. The first norm underlies civil settlements between private parties, in which admissions of liability would seem oddly out of place.<sup>84</sup> The second norm comes from criminal prosecutions, in which admissions (or adjudications) of wrongdoing are almost always required.<sup>85</sup> Prosecutors and courts are concerned about the legitimacy of an action that is not based on a jury finding of culpability or a comparable set of admissions.<sup>86</sup> Accordingly, the debate about admissions is, at least in part, a debate about the nature of administrative enforcement and the domain from which agency civil settlements should borrow.

Although discussion of admissions in civil enforcement has been organized around these two models (“no admission” and “admission”), it is useful to break down the two categories to

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83. See *infra* Part IV.

84. See, e.g., Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1383 (1994) (“Settlements are often accompanied by exculpatory statements to the effect that no wrongdoing or liability is admitted.”).

85. Buell, *supra* note 20, at 506; Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917, 921–22 (2008). For an empirical examination of different types of corporate criminal settlement agreements, see Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 587 tbl.12 (2015) (“[O]ver 91% of DPAs and 79% of NPAs are found to require an agreement to the admissibility of a statement of facts and prior testimony or statements, compared to 38% of all plea agreements.”). For an empirical analysis of *Alford*, no contest, and guilty pleas for criminal defendants convicted of murder or manslaughter, see Allison D. Redlich & Asil Ali Özdoğru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467 (2009); see also Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1423–26 (2016) (noting that “in the corporate prosecution setting, such detailed admissions are a commonplace aspect of plea agreements,” but arguing that in criminal law more generally plea bargains typically include admissions to acts constituting the elements of the crime, but do *not* typically include detailed admissions of wrongdoing).

86. Buell, *supra* note 20, at 508.

identify nuances within each. What is the interaction between admissions and denials of wrongdoing? What precisely is being admitted? Facts? Violation of a particular statute or rule? Intent?

#### A. NO ADMISSION

Take, as a starting point, the type of settlement that does not require the target to admit anything. The core example is the settlement of civil claims between private parties, which generally resolves a matter without any type of admission.<sup>87</sup> This lack of admissions may even be a specific part of the bargain underlying these private civil settlements and is so common that it has been incorporated into standard form settlement documents. For example, form settlement agreements for private parties include a clause providing for “No Admission of Liability.”<sup>88</sup> Even in the class action context, where the settlement is quasi-public in that it is subject to judicial review, a clause included in form documents with the heading “No Admission of Wrongdoing” specifies not only that defendants do not admit anything but also that defendants “expressly deny all charges of wrongdoing or liability.”<sup>89</sup>

Perhaps because of this strong norm in the private context, agency settlements initially emerged without requiring admissions of wrongdoing. Consent decrees first appeared as a way to resolve administrative actions in the context of civil antitrust

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87. See Galanter & Cahill, *supra* note 84.

88. JEREMY A. MERCER & EVAN A. BLOCK, SETTLEMENT AGREEMENT AND RELEASE 3 (Practical Law Standard Document 2-503-1929, 2017) (“No Admission of Liability . . . [P]ayment of the Settlement Payment is not, and may not be construed as, an admission of liability by [PARTY B] and is not to be construed as an admission that [PARTY B] engaged in any wrongful, tortious, or unlawful activity. [PARTY B] specifically disclaims and denies (a) any liability to [PARTY A] and (b) engaging in any wrongful, tortious, or unlawful activity.”).

89. PRACTICAL LAW LITIG., CLASS ACTION SETTLEMENT AGREEMENT 6 (Practical Law Standard Document 6-608-2586, 2017) (“This Settlement Agreement shall not be construed or deemed to be evidence of an admission or concession on the part of any Defendant with respect to any claim, fault, liability, wrongdoing or damage whatsoever. The Defendant(s) expressly deny all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts, or omissions alleged, or that could have been alleged, in the Class Action, and the Defendant(s) continue to believe the claims asserted against them in the Class Action are without merit. Notwithstanding these denials, the Defendant(s) have concluded that continuing to litigate the Class Action would be protracted and expensive and that, in light of its cost, risk, and uncertainty, it is desirable that the Class Action be fully and finally released as set forth in this Settlement Agreement.”).

enforcement.<sup>90</sup> In one such consent decree from the 1920s, the targets explicitly disclaimed liability.<sup>91</sup> They agreed to settle “upon condition that their consents to the entry of said decree shall not constitute or be considered an admission,” and that the decree “shall not constitute or be considered an adjudication that the defendants or any of them have in fact violated any law of the United States.”<sup>92</sup>

At first glance, this no admission model simply permits settlement without any requirement that the enforcement target make any admissions. But the choice for regulators is more complicated. First, although no admission is required, it is useful to consider what other information (for instance, factual allegations and penalty amounts) is available in the settlement and what messages that information conveys. Second, regulators are faced with a policy decision about denial. Will they allow express denial, permit silence about denial, or require targets to specify that they do not deny the allegations? Examples of each approach can be found in administrative settlements.

### 1. Factual Allegations

Even settlements that are entered into without any admission of any kind are accompanied by detailed factual allegations. Most SEC settlements, for example, provide that the target does not admit or deny the claims.<sup>93</sup> Each of these settlements, however, is accompanied by a court order or complaint that includes detailed factual allegations.<sup>94</sup> Indeed, one of the triggers of the debate over whether the SEC should require admissions—the proposed settlement in *SEC v. Citigroup Global Markets Inc.*—included a provision that the bank did not admit or deny the allegations.<sup>95</sup> The accompanying complaint consisted, however, of twenty-one pages of detailed factual allegations.<sup>96</sup>

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90. Schwarzchild, *supra* note 49, at 888 (“Consent decrees first became prominent in antitrust cases.”).

91. *Swift & Co. v. United States*, 276 U.S. 311, 320 (1928).

92. *Id.*

93. *See infra* Part III.D.

94. *See, e.g.*, Complaint at 4, *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11 Civ. 7387 (JSR)) *vacated*, 752 F.3d 285 (2d Cir. 2014), <https://www.sec.gov/litigation/complaints/2011/comp-pr2011-214.pdf>.

95. *See SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011).

96. *See* Complaint at 1–21, *supra* note 94.

Other agencies have similar practices. One example is a Federal Reserve enforcement action against a bank for bribing foreign government officials by giving jobs to individuals the officials recommended.<sup>97</sup> The settlement did not require formal admission of wrongdoing, but nonetheless recited the factual allegations in detail, including allegations about the central conduct that gave rise to the enforcement action.<sup>98</sup> The agreement provided, for example, that:

WHEREAS, from at least 2008 through 2013, [the target bank] operated a referral hiring program whereby candidates who were referred, directly or indirectly, by foreign government officials and existing or prospective commercial clients, and who in most instances were less qualified than non-referred candidates who were hired through the Firm's standard hiring programs, were offered internships, training, and other employment opportunities in order to obtain improper business advantages for the Firm.<sup>99</sup>

The former General Counsel of the Federal Reserve indicated that “set[ting] out summary recitations of the relevant facts in whereas clauses” was the agency’s common practice.<sup>100</sup>

Some agencies have written requirements that information about the allegations be included in the formal settlement documents. For example, while the rules governing the Department of Energy’s nuclear safety program provide that a consent

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97. Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Board Orders JPMorgan Chase & Co. to Pay \$61.9 Million Civil Money Penalty (Nov. 17, 2016), <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20161117a.htm> (describing the action against the bank for “hiring individuals referred by foreign officials and other clients in order to obtain improper business advantages for the firm”).

98. See JPMorgan Chase & Co., No. 16-22-B-HC, 16-22-CMP-HC, 2016 WL 7667933 (Fed. Reserve Nov. 17, 2016). The closest the consent order gets to referring to admissions of wrongdoing is this language: that the Board of Governors ordered the target bank

before the filing of the notices, or taking of any testimony, or adjudication of or finding on any issues of fact or law herein, and solely for the purpose of settling this matter without a formal proceeding being filed and without the necessity for protracted or extended hearings or testimony . . . shall cease and desist and take affirmative action [as described].

*Id.* at \*3. In 2012 testimony, then General Counsel for the Federal Reserve noted that its practice was not to require “formal admissions of misconduct.” See *Hearing on Settlement Practices*, *supra* note 33, at 7.

99. J.P. Morgan Chase & Co., 2016 WL 7667933, at \*1.

100. *Hearing on Settlement Practices*, *supra* note 33, at 7.

order “need not constitute an admission” of a legal violation,<sup>101</sup> they do require recitations of fact and remedy.<sup>102</sup>

Similarly, even where the enforcement target makes no admissions, information about the penalty agreed to, if any, is available as part of the settlement agreement. When the SEC’s policy of not requiring admissions came under fire, one of the agency’s defenses was that the fact of payment, particularly large payments, communicated wrongdoing.<sup>103</sup> A typical SEC press or litigation release includes the penalty amount in the release and sometimes even in the headline: “Citadel Securities Paying \$22 Million for Misleading Clients About Pricing Trades”<sup>104</sup> or “Ernst & Young to Pay \$11.8 Million for Audit Failures.”<sup>105</sup> In both of these examples, the headlines announced both the penalty amount and the alleged wrongdoing, even though the matters were resolved without any admissions.<sup>106</sup>

In sum, even in the absence of an admission, some information is available, often including detailed factual allegations and the amount of fines. There is clearly a *legal* difference between a target who makes an admission and one who does not. Many of the collateral consequences discussed above are triggered only in the context of a formal admission.<sup>107</sup> It is not clear, however, whether the nonlawyer public distinguishes be-

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101. 10 C.F.R. § 820.23 (2017).

102. *Id.* (requiring the consent order to “set forth the relevant facts which form the basis for the Order and what remedy, if any, is imposed”).

103. Transcript at 13, SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) (No. 11 Civ. 7387 (JSR)) *vacated*, 752 F.3d 285 (2d Cir. 2014).

104. Press Release, U.S. Sec. & Exch. Comm’n, Citadel Securities Paying \$22 Million for Misleading Clients About Pricing Trades (Jan. 13, 2017) [hereinafter Citadel Press Release], <https://www.sec.gov/news/pressrelease/2017-11.html>; *cf.* Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Board Orders JPMorgan Chase & Co. to Pay \$61.9 Million Civil Money Penalty (Nov. 17, 2016), <http://www.federalreserve.gov/newsevents/pressreleases/enforcement20161117a.htm> (providing another example of headlines containing the penalty amount).

105. Press Release, U.S. Sec. & Exch. Comm’n, Ernst & Young to Pay \$11.8 Million for Audit Failures (Oct. 18, 2016) [hereinafter Ernst & Young Press Release], <https://www.sec.gov/news/pressrelease/2016-219.html>.

106. Citadel Press Release, *supra* note 104 (“Without admitting or denying the findings, Citadel Securities agreed to be censured and pay \$5.2 million in disgorgement of ill-gotten gains plus interest of more than \$1.4 million and a penalty of \$16 million.”); Ernst & Young Press Release, *supra* note 105 (noting that targets “consented to the SEC’s order without admitting or denying the findings”).

107. *See supra* Part I.C.



tween a complaint or consent decree that details the wrongdoing, but does not include admissions, and an agreement that both details and admits the allegations.

## 2. Denial

It is not enough for regulators to decide whether to require settling targets to make admissions. An accompanying question is whether to allow the enforcement targets to *deny* wrongdoing for the same conduct.

One possibility is not only to allow targets to avoid making admissions, but also to allow them to deny the allegations. This combination of no admission and denial may be built into the formal settlement documents. Several examples can be found in the context of the FTC. In one case, for example, the FTC accused a data broker of disclosing the records of 200,000 consumers.<sup>108</sup> The consent judgment between the data broker and the FTC explicitly stated that “[d]efendant makes no admissions to, and *denies*, the allegations in the complaint.”<sup>109</sup>

Facebook reached a similar agreement with the FTC in 2012 in relation to allegations made about its privacy practices.<sup>110</sup> A paragraph in the consent order notes that the agreement “[does] not constitute an admission . . . that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint . . . are true.”<sup>111</sup> The paragraph also includes an explicit denial: Facebook “expressly denies the allegations set forth in the complaint.”<sup>112</sup> This provision triggered a dissent from one of the FTC commissioners, in part because it allowed Facebook to deny the allegations.<sup>113</sup>

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108. *Hearing on Settlement Practices*, *supra* note 33, at 82 n.24.

109. *U.S. v. ChoicePoint*, No. 1:06-CV-0198, 2006 U.S. Dist. LEXIS 98749, at \*2 (N.D. Ga. Feb. 15, 2006) (emphasis added).

110. Facebook, Inc., No. 092 3184, 2011 WL 6092532 (Fed. Trade Comm’n Nov. 29, 2011) (agreement containing consent order), <https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf>. For related documents see *Facebook, Inc.*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc> (last visited Feb. 2, 2018).

111. Facebook, Inc., 2011 WL 6092532, ¶ 5. The provision carved out “jurisdictional facts,” which were admitted. This is not about the underlying events, but is designed to prevent Facebook from challenging where (in what forum) this order was entered and dispute was resolved.

112. *Id.*

113. Facebook, Inc., No. 092 3184, Docket No. C-4365, 2012 WL 3301153 (Fed. Trade Comm’n Aug. 10, 2012) (dissenting statement of Commissioner J. Thomas Rosch), [https://www.ftc.gov/sites/default/files/documents/public\\_](https://www.ftc.gov/sites/default/files/documents/public_)

A particularly detailed denial can be found in a 2010 settlement between the DOJ's Civil Division and AstraZeneca for False Claims Act allegations. The agreement first uses what seems to be fairly standard language in this context: "Agreement is neither an admission of facts or liability by AstraZeneca nor a concession by the United States that its claims are not well founded."<sup>114</sup> But the provision then goes on to make a full-some denial:

AstraZeneca expressly denies the allegations of [listed enforcement agencies and actions] and denies that it has engaged in any wrongful conduct. Neither this Agreement, its execution, nor the performance of any obligation under it, including any payment, nor the fact of settlement, are intended to be, or shall be understood as, an admission of liability or wrongdoing, or other expression reflecting on the merits of the dispute by AstraZeneca.<sup>115</sup>

Other examples are less formal. Agencies are concerned about the possibility that the settlement documents will provide that the target does not admit anything, but that the target will then make a public statement denying wrongdoing or responsibility—providing a "revisionist history in press releases."<sup>116</sup> The CFTC's procedural rules specifically anticipate and

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statements/dissenting-statement-commissioner-j.thomas-rosch-matter-facebook-inc./120810facebookstatement.pdf; *see also* Consent Decree at 2, *United States v. Ford Motor Co.* (D.D.C. June 27, 1998), <https://www.epa.gov/sites/production/files/documents/fordmotor-cd.pdf> ("WHEREAS, Ford has denied and continues to deny the violations alleged in the Complaint.").

114. AstraZeneca, 4 (Dep't of Justice Apr. 27, 2010) (settlement agreement), [https://www.justice.gov/sites/default/files/usao-edpa/legacy/2011/05/05/astrazeneca\\_settlementagreement.pdf](https://www.justice.gov/sites/default/files/usao-edpa/legacy/2011/05/05/astrazeneca_settlementagreement.pdf); *see also* Youth and Family Centered Servs., 10 (Dep't of Justice Apr. 22, 2009) (settlement agreement and mutual releases), <https://www.justice.gov/archive/usao/pae/News/2009/apr/southwoodsettlementagreement.pdf>; Ashland Hosp. Corp., 4 (Dep't of Justice) (settlement agreement), <https://www.justice.gov/sites/default/files/usao-edky/legacy/2014/05/28/kingsdaughterssettlement.pdf> ("This Settlement Agreement is neither an admission of liability by KDMC nor a concession by the United States that its claims are not well founded."). Advice to entities settling False Claim Act actions suggests that this language or a close equivalent is common in FCA settlements. *See* Jonathan Cone et al., *Negotiating False Claims Act Settlements*, WEST BRIEFING PAPERS, Feb. 2014, at 6, <https://www.crowell.com/files/Negotiating-False-Claims-Act-Settlements.pdf>.

115. AstraZeneca, *supra* note 114, at 4.

116. Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Setting Forth Aspirations for 2011, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011), <http://www.sec.gov/news/speech/2011/spch020411laa.htm>; *see also* *Hearing on Settlement Practices*, *supra* note 33, at 24 ("[E]veryone focuses on the 'no admit,' but there is also a 'no deny' aspect, which means in our settlements, individual entities can't then after the settlement get on the courthouse steps and say, 'We deny liability.'"); Grantham, *supra* note 58 (quoting the general counsel of a company that settled with the SEC for sup-

bar this more informal denial, providing that the settling target must agree not to “take any action or make any public statement denying, directly or indirectly, any allegation in the complaint or findings or conclusions in the order, or creating, or tending to create, the impression that the complaint or the order is without a factual basis.”<sup>117</sup>

The criminal analog is the *Alford* plea, in which a defendant pleads guilty but at the same time asserts his or her innocence.<sup>118</sup> In the Supreme Court case for which such pleas are named, the defendant asserted that “I pleaded guilty on second degree murder because they said there is too much evidence, but I ain’t shot no man . . . I’m not guilty but I plead guilty.”<sup>119</sup> Although constitutionally permissible, *Alford* pleas are strongly disfavored, in keeping with the norm of requiring a factual basis to underlie pleas in criminal enforcement.<sup>120</sup>

### 3. No Denial

The other possibility is that a target agrees to a settlement while neither admitting nor denying anything. The Wells Fargo enforcement actions provide an example: Wells Fargo settled with the CFPB “without admitting or denying the findings of facts and conclusions of law.”<sup>121</sup> At least since the 1970s, most of the SEC’s settlements have been made explicitly on this basis. Typical language in the consent decree provides that the defendant consents to the settlement “without admitting or denying any of the allegations.”<sup>122</sup> This language is often re-

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pressing whistleblower suits as saying that “[w]e never intended to prevent whistleblower lawsuits,” and that “the company settled with the SEC to avoid litigation costs”).

117. 17 C.F.R. § 10, app. A (2017).

118. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *see also* Buell, *supra* note 20, at 507.

119. *Alford*, 400 U.S. at 28 n.2.

120. Buell, *supra* note 20, at 507–08.

121. Wells Fargo Bank, N.A., No. 2016-CFPB-0015, 2 (Consumer Fin. Prot. Bureau Sept. 4, 2016) (consent order), [http://files.consumerfinance.gov/f/documents/092016\\_cfpb\\_WFBconsentorder.pdf](http://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf); *see also* Wells Fargo Bank, N.A., AA-EC-2016-67, 1 (Office of the Comptroller of the Currency Sept. 6, 2016), <http://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-106a.pdf> (“[T]he Comptroller finds, and the Bank neither admits nor denies . . .”).

122. *See, e.g.*, *WorldCom, Inc.*, No. 02-CV-4963 (JSR) (Sec. & Exch. Comm’n July 2003) (consent and undertaking), <http://www.sec.gov/litigation/litreleases/wcomconsent070303.htm>; *see also, e.g.*, *Goldman Sachs Grp., Inc.*, No. 17-03, 2016 WL 7429257, at 1, 19 (Commodity Futures Trading Comm’n Dec. 21, 2016) (order instituting proceedings), <http://www.cftc.gov/idc/groups/public/>

peated in the press release or litigation release in which the SEC announces its enforcement actions.<sup>123</sup>

Interestingly, the SEC refuses to allow silence. Its rules provide that the “refusal to admit the allegations” will be treated as “equivalent to a denial” unless the settling target explicitly states that “he neither admits nor denies the allegations.”<sup>124</sup> A rationale for prohibiting silence was expressed by the FTC commissioner who dissented in an enforcement action against Facebook. He worried that language stating that a consent agreement was “for settlement purposes only” might be “tantamount to a denial.”<sup>125</sup>

Here too a rough criminal analog exists: the *nolo contendere* plea in which a defendant pleads guilty without admitting guilt.<sup>126</sup> Although permitted by the rules of criminal procedure,<sup>127</sup> prosecutors and courts heavily discourage its use.<sup>128</sup>

## B. ADMISSION

The core example of settlements that require admissions comes from outside of civil enforcement. Admissions are a central part of the criminal law settlement model. Plea agreements, nonprosecution agreements, and deferred prosecution agreements have in common that they resolve criminal matters through agreement. One feature of these agreements is that they require the target to admit responsibility.<sup>129</sup> Even for corporations, the U.S. Attorneys’ Manual provides that “[a] corporation should be made to realize that pleading guilty to crimi-

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@lrenforcementactions/documents/legalpleading/enfgoldmansachsorder122116.pdf.

123. See, e.g., Press Release, Sec. & Exch. Comm’n, Morgan Stanley Paying \$13 Million Penalty for Overbilling Clients and Violating Custody Rule (Jan. 13, 2017) [hereinafter Morgan Stanley Press Release], <https://www.sec.gov/news/pressrelease/2017-12.html>; Litigation Release No. 14722, Sec. & Exch. Comm’n, Sec. & Exch. Comm’n v. Am. Bus. Sec., Inc., Civil Action No. 94-4866 ER(JRx) (C.D. Cal.) (Nov. 16, 1995), <https://www.sec.gov/litigation/litreleases/lr14722.txt> (“These defendants consented, without admitting or denying the allegations in the Complaint, to the entry of the Final Judgments.”).

124. 17 C.F.R. § 202.5(e) (2017).

125. Facebook, Inc., No. 092 3184, Docket No. C-4365, 2012 WL 3301153 (Fed. Trade Comm’n Aug. 10, 2012) (dissenting statement of Commissioner J. Thomas Rosch), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/dissenting-statement-commissioner-j.thomas-rosch-matter-facebook-inc./120810facebookstatement.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-j.thomas-rosch-matter-facebook-inc./120810facebookstatement.pdf).

126. Buell, *supra* note 20, at 506–07.

127. FED. R. CRIM. P. 11(a)(1).

128. Buell, *supra* note 20, at 507–08.

129. See *supra* note 85 and accompanying text.

nal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business.”<sup>130</sup>

When advocating a policy of requiring admissions, the headlines and critiques about civil enforcement practices often point to admitting “responsibility” or “guilt” or “wrongdoing.”<sup>131</sup> Former SEC Chair White suggested that “[t]here is nothing quite like a company or corporate executive who violated the securities laws openly and publicly admitting their guilt.”<sup>132</sup> But what exactly must targets admit? When translated into a policy or applied to a single case, agencies must be specific about the nature of the admissions they wish to negotiate. Even in the context of criminal plea agreements, for instance, which is the core example of required admissions, a settling defendant both “admits to the facts supporting the charges” and, separately, “admits guilt.”<sup>133</sup> Variations and combinations exist, and the lines between categories are not absolute, but three rough categories can be identified: admissions of fact, of violations of the law, and of state of mind.

### 1. Facts

Distinctions between admissions of facts and legal violations are sometimes expressly made in the agency’s rules of procedure. The FTC’s rules about settlement, for instance, provide that settlement agreements shall contain “either an admission of the proposed findings of fact and conclusions of law submitted simultaneously by the Commission’s staff” or a waiver of the required findings of fact.<sup>134</sup> Separately, these rules provide that the agreement “does not constitute an admission by any party that the law has been violated.”<sup>135</sup>

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130. 9-28.1500-Plea Agreements with Corporations, OFFICE U.S. ATT’YS, <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> (last visited Feb. 2, 2018).

131. See, e.g., Corkery, *supra* note 12; Germaine, *supra* note 17; Taibbi, *supra* note 16; White, *supra* note 19.

132. Mary Jo White, Chair, Sec. & Exch. Comm’n, The Challenge of Coverage, Accountability and Deterrence in Global Enforcement, Address to the IOSCO 39th Annual Conference (Oct. 1, 2014), <https://www.sec.gov/News/Speech/Detail/Speech/1370543090864>.

133. CRIM. DIV. OF THE U.S. DEP’T OF JUSTICE & ENF’T DIV. OF THE U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 74 (Nov. 14, 2012) (outlining how criminal and civil FCPA cases are resolved).

134. 16 C.F.R. § 2.32 (2017).

135. *Id.*

The distinction between facts and other types of admissions has also been made in particular settlement agreements. For instance, the SEC brought an enforcement action against Standard & Poor's (S&P) Ratings Services that was settled in administrative proceedings in January 2015.<sup>136</sup> The settlement provided that S&P consented to the SEC's order "without admitting or denying the findings herein," but at the same time S&P explicitly admitted the facts detailed in an appendix.<sup>137</sup> Another example comes from the FCC. A June 2017 order and consent decree required an admission of particular facts, without any "other admission of liability or violation of any law, regulation or policy," noting explicitly that "the Bureau makes no finding of any such liability or violation."<sup>138</sup>

In other instances, targets seem to admit some specific facts because they have already made similar admissions in separate proceedings. In a 2015 administrative settlement between the SEC and Standard Bank, for instance, the consent order specified that the bank entered into the agreement "without admitting or denying the findings herein," except for facts admitted in a matter before the U.K. Serious Fraud Office.<sup>139</sup>

Factual admissions may be required in part to prevent later denials. The U.S. Attorneys' Manual makes this connection explicitly. For corporate pleas, for instance, it provides that "pleas should be structured so that the corporation may not later 'proclaim lack of culpability or even complete innocence.' . . .

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136. Standard & Poor's Ratings Servs., No. 3-16348, 2015 WL 252448 (Sec. & Exch. Comm'n Jan. 21, 2015) (instituting administrative and cease-and-desist proceedings), <https://www.sec.gov/litigation/admin/2015/33-9705.pdf>.

137. *Id.*

138. Pocatello Channel 15, LLC, 32 FCC Rcd. 4705 (Fed. Comm. Comm'n June 2, 2017) (consent decree), [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-17-540A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-17-540A1.pdf) ("19. Admission of Liability. Pocatello admits to the facts discussed in paragraphs 3-10 regarding its failure to meet the requirements of the Communications Laws. By entering into this Consent Decree, Pocatello makes no other admission of liability or violation of any law, regulation or policy, and the Bureau makes no finding of any such liability or violation . . ."). The following consent decrees use identical language in their Admission of Liability paragraphs: KM Television of Iowa LLC, 32 FCC Rcd. 1535 (Mar. 2, 2017), [http://apps.fcc.gov/edocs\\_public/attachmatch/DA-17-214A1.pdf](http://apps.fcc.gov/edocs_public/attachmatch/DA-17-214A1.pdf); Mission Broadcasting, Inc., 31 FCC Rcd. 13766 (Dec. 15, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-177A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-177A1.pdf); Life of Victory TV, Inc., 31 FCC Rcd. 11628 (Oct. 21, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-16-1176A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1176A1.pdf).

139. Standard Bank PLC, No. 3-16973, 2015 WL 7713706, at 1 (Sec. & Exch. Comm'n Nov. 30, 2015) (order instituting cease-and-desist proceedings), <https://www.sec.gov/litigation/admin/2015/33-9981.pdf>.

Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.”<sup>140</sup>

## 2. Legal Violations

Admissions of legal violations might take several forms. A target might admit to violations of specific laws, a general body of law, the complaint’s allegations, or violations of (unspecified) law in general.

Several FCC settlements after 2014 include admissions of specific statutes or rules. In one such example, Time Warner Cable (TWC) entered into a consent decree with the Agency in which it admitted that its conduct “violated the Commission’s rules.”<sup>141</sup> Other FCC settlement agreements from this period include similar language pointing to specific rule violations.<sup>142</sup>

In some settlements that include admissions, respondents have admitted to legal violations broadly, rather than to violations of specific provisions. For example, agreements have included this language: respondents or defendants “acknowledge that their conduct violated the federal securities laws”<sup>143</sup> or

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140. *9-28.1500-Plea Agreements with Corporations*, *supra* note 130.

141. Time Warner Cable Inc., 29 FCC Rcd. 9992, at 3 (Aug. 25, 2014) (order), [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-14-1126A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1126A1.pdf) (“6. Admission of Liability. TWC admits, solely for the purpose of this Consent Decree and for Commission civil enforcement purposes, and in express reliance on the provisions of paragraph 8 herein [that details limits on the agency’s further action], that the circumstances described in paragraph 3 [failure to file reports] herein constitute violations of the Commission’s Network Outage Reporting Rules.”).

142. *See, e.g.*, St. George Cable, Inc., 31 FCC Rcd. 3663, at 4 (Apr. 29, 2016) (consent decree), [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-16-415A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-16-415A1.pdf) (“Admission of Liability. St. George admits for the purpose of this Consent Decree and for Commission civil enforcement purposes, and in express reliance on the provisions of paragraph 8 herein, that the operation of its cable system violated the Cable Signal Leakage Rules, EAS Rules, and Registration Rules, as detailed in paragraph 4 herein.”); Johnson Towers Corp., 30 FCC Rcd. 12275, at 3 (Nov. 2, 2015) (consent decree), [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-15-742A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-15-742A1.pdf) (“9. Admission of Liability. JTC admits for the purpose of this Consent Decree and for Commission civil enforcement purposes, and in express reliance on the provisions of paragraph 8 herein, that its actions referenced in paragraph 4 herein and the NAL violated the Antenna Structure Rules.”).

143. *See, e.g.*, Bank Leumi le-Israel B.M., No. 3-17631, 2016 WL 6081797, at 1 (Sec. & Exch. Comm’n Oct. 18, 2016) (order instituting administrative and cease-and-desist proceedings), <https://www.sec.gov/litigation/admin/2016/34-79113.pdf>; Credit Suisse AG, No. 3-17617, 2016 WL 5800369, at 1 (Sec. & Exch. Comm’n Oct. 5, 2016) (order instituting cease-and-desist proceedings), <https://www.sec.gov/litigation/admin/2016/33-10229.pdf>; Citigroup Global

“acknowledge that the conduct set forth in [the admitted facts] violated the federal securities laws.”<sup>144</sup> These particular examples—actions against Bank Leumi, Credit Suisse, and Citigroup Global Markets—involve both an admission of particular facts and an admission of violation of the securities laws.<sup>145</sup> Although the consent orders include language describing the particular provisions that were violated, even in some cases noting that the actions were “willful,” these are not captured within the scope of the admissions.<sup>146</sup>

### 3. State of Mind

One particular type of admission has to do with the state of mind of the enforcement target. As in other contexts, state of mind refers to the subjective intention of the target. Such admissions could be viewed as factual admissions (was the target’s conduct intentional?) or legal admissions (did the target act with the scienter required for the violation?). State of mind is worth considering as a separate category, however, in part because intentionality is important to the line between criminal and civil actions, and in part because the empirical literature suggests that people may react differently to admissions depending on whether the underlying behavior was intentional.<sup>147</sup>

Many existing settlements seem to be drafted with an eye to what they say about the target’s state of mind. For instance, in a 2013 SEC enforcement action against ConvergeEx brokerages, the defendants admitted to the facts and admitted that they “engaged in a fraudulent scheme by *taking steps to intentionally or recklessly conceal from customers the practice of taking*” the undisclosed trading profits.<sup>148</sup> The ConvergeEx defendants also admitted that their “conduct violated the federal

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Markets, Inc., No. 3-17338, 2016 WL 4363820, at 1 (Sec. & Exch. Comm’n July 12, 2016) (order instituting administrative and cease-and-desist proceedings), <https://www.sec.gov/litigation/admin/2016/34-78291.pdf>.

144. JPMorgan Chase Bank, N.A., 113 S.E.C. Docket 26, 2 (Dec. 18, 2015) (order instituting administrative and cease-and-desist proceedings), <https://www.sec.gov/litigation/admin/2015/33-9992.pdf>.

145. See sources cited *supra* note 143.

146. Citigroup Global Markets, Inc., No. 3-17338, 2016 WL 436820, at 6 (“As a result of the conduct described above, CGMI willfully violated the recordkeeping and reporting requirement . . .”).

147. See *infra* notes 316–21.

148. G-Trade Servs. LLC, 107 S.E.C. Docket 5418, 1, 6 (Dec. 18, 2013) (order instituting administrative and cease-and-desist proceedings) (emphasis added), <https://www.sec.gov/litigation/admin/2013/34-71128.pdf>.



securities laws,”<sup>149</sup> but did not admit they actually “intentionally or recklessly [concealed],” and arguably did not admit to acting with scienter.<sup>150</sup>

At least in the securities context, practical concerns about collateral consequences may drive agency settlements that avoid admissions of intentionality or recklessness. In particular, a target’s admission to a violation that requires only negligence is not useful in later Rule 10b-5 securities fraud claims by private plaintiffs because such claims require a showing of scienter.<sup>151</sup>

**Table 1: Admissions Options for Regulators**

<u>No Admissions</u>	<u>Admissions</u>
Factual Allegations	Facts
Denial Not Prohibited <ul style="list-style-type: none"> <li>• Pre-1970 SEC policy</li> <li>• <i>Alford</i> plea in criminal law</li> </ul>	Legal Violations <ul style="list-style-type: none"> <li>• Specific provisions</li> <li>• General violations</li> </ul>
Denial Prohibited <ul style="list-style-type: none"> <li>• Pre-2013 SEC policy (“Neither admit nor deny”)</li> <li>• <i>Nolo contendere</i> pleas in criminal law</li> </ul>	State of Mind

Table 1 summarizes the choices for regulators. These approaches to admissions are not mutually exclusive. Rather, regulators may combine them within one policy that sometimes requires admissions<sup>152</sup> or within a single settlement that requires several types of admissions (e.g., facts and legal violation).<sup>153</sup> Accordingly, these approaches to requiring admissions

149. *Id.* at 1.

150. *Id.* at 2, 6. They also did not admit to violating Rule 10b-5, which was listed in the factual allegations but not encompassed by the admissions. *Id.* at 1, 11.

151. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

152. *See infra* Part III.C (describing the SEC’s hybrid policy); *see also* Staff Notice, Ont. Sec. Comm’n., Update to OSC Staff Notice 15-704 on Proposed Enforcement Initiatives (June 13, 2013), [http://www.osc.gov.on.ca/documents/en/Securities-Category1/sn\\_20130605\\_15-706\\_update-sn15-704.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category1/sn_20130605_15-706_update-sn15-704.pdf) (outlining the admissions policy of the Ontario Securities Commission and identifying the circumstances in which no-contest settlements would be available).

153. *See, e.g.*, Guida & Flores, *supra* note 63, at 152 (noting that the EPA will sometimes “[h]ave respondent admit jurisdiction, fact allegations and con-

are relevant to agency decisions regardless of whether the agency takes a uniform, blanket approach to admissions, decides whether to require admissions case-by-case at the level of the particular settlement, or adopts hybrid policies that sometimes require admissions of wrongdoing.

### III. ADMISSIONS OF WRONGDOING IN SEC ENFORCEMENT

The SEC provides a rich example of the debate over whether to require settling targets to admit wrongdoing. The Agency's policy has changed over time, in part in response to a very public debate over the function of admitting wrongdoing. This Part traces the development of the SEC's policy on admissions, examining the calls for revisiting this policy and the SEC's response.

#### A. THE SEC'S "NO-ADMIT-NO-DENY" POLICY

For a long time, the SEC did not require settling defendants to admit wrongdoing. Instead the SEC followed a no admission approach and was silent on whether defendants could also *deny* wrongdoing.<sup>154</sup> The Agency, however, was concerned that targets followed their settlement with the SEC with public announcements that pointed to pragmatic reasons for settlement, such as the costs of litigation and the benefits of closure, while denying wrongdoing for the charged behavior.<sup>155</sup>

In the early 1970s, these concerns led the SEC to change its admissions policy.<sup>156</sup> The SEC still did not require admissions of wrongdoing, but did begin to prohibit enforcement targets from denying wrongdoing.<sup>157</sup> The new policy meant that the SEC would not "permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings."<sup>158</sup>

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clusions of law" and will "[s]ometimes [propose] 'neither admits nor denies'"); 1st Alliance Lending, LLC, No. 2014-CFPB-0003, 2014 WL 3685991, at 2 (Consumer Fin. Prot. Bureau Feb. 24, 2014) (consent order), [http://files.consumerfinance.gov/f/201402\\_cfpb\\_consent-order\\_first-alliance.pdf](http://files.consumerfinance.gov/f/201402_cfpb_consent-order_first-alliance.pdf) ("[A]dmitting the findings of fact and conclusions of law set forth below" in settlement documents with the CFPB).

154. See *supra* Part II.A.

155. See Aguilar, *supra* note 116.

156. Consent Decrees in Judicial or Administrative Proceedings, 1972 WL 125351 (Nov. 28, 1972) (codified as amended at 17 C.F.R. § 202.5(e) (2017)).

157. *Id.*

158. *Id.*

Under the new policy, the Agency required settling targets to specify that they did not deny the allegations; silence was not enough.<sup>159</sup> The administrative release that announced this no-admit-no-deny policy pointed to the concern that “it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur.”<sup>160</sup>

The Agency’s no-admit-no-deny policy has been reflected in provisions within settlement agreements. Language in settlement agreements specifies that the target consents to the settlement “without admitting or denying any of the allegations.”<sup>161</sup> The litigation or press releases in which the SEC announces its enforcement activities also sometimes point to this feature of the settlement.<sup>162</sup>

#### B. OBJECTIONS TO THE POLICY

The SEC’s no-admit-no-deny policy has long had its critics. As one newspaper article from the 1990s put it: “[W]hen it comes to financial misconduct—stealing, cheating, fraud—companies have a terrific out. They can settle the charges without admitting they’ve done anything wrong. In return for large wads of cash, the Securities and Exchange Commission (SEC) allows most corporate offenders to dodge acknowledgment of their offenses.”<sup>163</sup> Nonetheless, the SEC’s policy persisted until

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159. *Id.*

160. *Id.*

161. *See, e.g., SEC v. Worldcom, Inc.*, No. 02-CV-4963 (JSR), 2002 WL 31748604, at \*5 (S.D.N.Y. Aug. 27, 2002).

162. *See, e.g.,* Litigation Release No. 22134, Sec. & Exch. Comm’n, Citigroup to Pay \$285 Million to Settle SEC Charges for Misleading Investors About CDO (Oct. 19, 2011) (noting that Citigroup settled “[w]ithout admitting or denying the SEC’s findings”); Morgan Stanley Press Release, *supra* note 123 (noting that the target consented “[w]ithout admitting or denying the findings that it violated various provisions” of the securities laws).

163. Rothchild, *supra* note 22, at 51; *see also Mutual Funds: Trading Practices and Abuses that Harm Investors, Hearing Before the Subcomm. on Fin. Mgmt., the Budget, & Int’l Sec. of the S. Comm. on Governmental Affairs*, 108th Cong. (2003) (statement of William Francis Galvin, Secretary of the Commonwealth of Massachusetts) (“Too often the guilty neither admit or deny any wrongdoing and routinely promise not to cheat again until they can come up with a more clever method to do what they just said they would not do again.”).

after the financial crisis of 2007, when it came under increasing scrutiny.<sup>164</sup>

Judge Jed Rakoff, a federal trial judge in the Southern District of New York, led the charge with vocal objections to the policy.<sup>165</sup> The debate was reported in national newspapers and prompted commentary that analyzed the policy dynamics.<sup>166</sup>

Two cases that grew out of the financial crisis prompted the very public showdown over the SEC's admissions requirement. At issue were cases that the SEC filed in federal trial court in New York, alleging securities law violations by Bank of America and Citigroup during the 2007 financial crisis.<sup>167</sup> The facts came straight out of the crisis: Citigroup, for instance, had allegedly created and marketed a fund, while simultaneously shorting many of the fund's assets, betting that those assets would decline in value.<sup>168</sup> According to the court, Citigroup profited by about \$160 million, while investors lost \$700 million.<sup>169</sup>

The SEC and Citigroup agreed to settle the case "on a neither admit nor deny basis"<sup>170</sup> and presented the proposed set-

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164. See Edward Wyatt, *S.E.C. Changes Policy on Firms' Admission of Guilt*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/07/business/sec-to-change-policy-on-companies-admission-of-guilt.html>.

165. This critique of the SEC's policy was a recurring theme for Judge Rakoff. See, e.g., *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011) (describing the "palpable . . . disservice to the public inherent" in the SEC's use of no-admit-no-deny settlements).

166. See, e.g., Buell, *supra* note 20 (articulating the deterrent effects and public benefits of requiring admissions of wrongdoing in public enforcement actions); Radvany, *supra* note 63 (discussing how the shift in SEC policy about admissions would affect settlement practices); David S. Hilzenrath, *Judge Rebukes SEC on Citigroup Deal*, WASH. POST, Nov. 29, 2011, at A16 (noting that Rakoff "slammed the SEC for following its standard practice of allowing defendants to settle charges without admitting or denying wrongdoing"); Edward Wyatt, *Judge Rejects SEC's Deal—Settlement in Citigroup Case Isn't "Fair,"* HOUS. CHRON., Nov. 29, 2011, at B6; Sarah N. Lynch, *SEC Chief Defends "Neither Admit nor Deny" but Will Review*, REUTERS (May 7, 2013), <http://www.reuters.com/article/us-sec-settlement/sec-chief-defends-neither-admit-nor-deny-but-will-review-idUSBRE94612F20130507>.

167. See *SEC v. Citigroup Glob. Mkts., Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) (rejecting proposed settlement), *vacated*, 752 F.3d 285 (2d Cir. 2014); *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009) (rejecting proposed settlement).

168. Complaint, *supra* note 94, at \*2.

169. *Citigroup Glob. Mkts.*, 827 F. Supp. 2d at 329.

170. See Memorandum by Plaintiff Securities and Exchange Commission in Support of Proposed Settlement at \*4, *Citigroup Glob. Mkts., Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. Oct. 19, 2011) (No. 11 Civ. 7387 (JSR)), 2011 WL 7561370.

tlement to Judge Rakoff, for his review. Not so fast, said Judge Rakoff. His opinion denying the settlement provided an extended critique of the failure to require admissions, calling the policy “hallowed by history, but not by reason.”<sup>171</sup> The return to harmed investors from such a settlement would be diminished, because investors would not be able to take advantage of the admissions in parallel private securities litigation.<sup>172</sup> The judge argued, moreover, that the policy “deprives the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact.”<sup>173</sup>

The court of appeals rejected the district court’s reasoning, essentially for being insufficiently deferential to the administrative agency.<sup>174</sup> It characterized the district court as expressing a policy view: “The district court believed it was a bad policy, which disserved the public interest, for the S.E.C. to allow Citigroup to settle on terms that did not establish its liability.”<sup>175</sup> The problem with the trial court’s decision, according to the appeals court, was that “dictat[ing] policy to executive administrative agencies” was not “the proper function of federal courts.”<sup>176</sup>

### C. SEC’S POLICY CHANGE

Although Judge Rakoff’s rejection of the proposed settlement in *Citigroup* was ultimately reversed by the court of appeals,<sup>177</sup> it left its mark on SEC policy and the terms of the debate. The SEC did not remain silent in response to these public critiques.<sup>178</sup> In addition to being the subject of attention and critique outside the Agency, the Agency’s policy was increasingly criticized from the inside as well.<sup>179</sup> In the wake of Judge Rakoff’s *Citigroup* opinion, for instance, one SEC commissioner

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171. See *Citigroup Glob. Mkts.*, 827 F. Supp. 2d at 332.

172. *Id.* at 332–33 (“[C]ounsel for Citigroup . . . noted, correctly, that he was free—notwithstanding the S.E.C.’s gag order precluding Citigroup from contesting the S.E.C.’s allegations in the media—to fully contest the facts in any parallel litigation; and he strongly hinted that Citigroup would do just that.”).

173. *Id.* at 332.

174. SEC v. *Citigroup Glob. Mkts., Inc.*, 673 F.3d 158, 163 (2d Cir. 2012).

175. *Id.*

176. *Id.*

177. *Id.*

178. Robert Khuzami, Dir., Div. of Enf’t, Sec. & Exch. Comm’n, Court’s Refusal To Approve Settlement in Citigroup Case, Public Statement by SEC Staff (Nov. 28, 2011), <http://www.sec.gov/news/speech/2011/spch112811rk.htm>.

179. See, e.g., Aguilar, *supra* note 116.

called for the Agency to require admissions.<sup>180</sup> Ultimately, the Agency announced—first in 2012 and then again in 2013—that it would expand the circumstances in which enforcement targets would have to make admissions to settle.

The first changes came in 2012, when the SEC eliminated the “without admitting or denying” language from settlements with enforcement targets who had also settled a criminal case, or had been convicted in a criminal action based on the same facts.<sup>181</sup> It makes some sense that the initial steps to modify admissions policy appeared in these cases. As noted above, the criminal model requires admissions in settlements.<sup>182</sup> Some of the key SEC positions during this period were filled by former criminal prosecutors. For instance, the head of the SEC’s Division of Enforcement, appointed in 2009, had been a federal prosecutor for more than a decade before going to work for the SEC.<sup>183</sup> He was the one to announce this first change to SEC admissions policy, which expanded in an area explicitly related to criminal proceedings.<sup>184</sup>

Change to the admissions policy continued during the tenure of SEC Chair Mary Jo White, who was in the position from April 2013 until January 2017.<sup>185</sup> Again, in some ways, this continued attention was unsurprising. Like the head of enforcement, White’s background was in criminal law: she was a former U.S. Attorney and federal prosecutor.<sup>186</sup> In public speeches, White explicitly stated that her experience with criminal law and prosecutions shaped her view of admissions.<sup>187</sup>

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180. *See, e.g., id.*

181. Robert Khuzami, Dir., Div. of Enf’t, Sec. & Exch. Comm’n, Recent Policy Change, Public Statement by SEC Staff (Jan. 7, 2012), <https://www.sec.gov/news/public-statement/2012-spch010712rskhtm>.

182. *See supra* note 85.

183. *Khuzami Will Lead SEC Enforcement*, WALL ST. J. (Feb. 20, 2009), <https://www.wsj.com/articles/SB123508426606527305>.

184. Khuzami, *supra* note 181.

185. *Biography: Mary Jo White*, U.S. SEC. & EXCHANGE COMM’N, <https://www.sec.gov/biography/white-mary-jo> (last visited Feb. 2, 2018).

186. *Id.*

187. White, *supra* note 19 (“[M]uch of my thinking on this issue was shaped by the time I spent in the criminal arena, where courts cannot accept a guilty plea without the defendant first admitting to the unlawful conduct. Anyone who has witnessed a guilty plea understands the power of such admissions—it creates an unambiguous record of the conduct and demonstrates unequivocally the defendant’s responsibility for his or her acts.”); Mary Jo White, Chair, Sec. & Exch. Comm’n, A New Model for SEC Enforcement: Producing Bold and Unrelenting Results, Speech at the NYU School of Law Program on Corporate Compliance and Enforcement and the NYU School of Law Pollack

In a speech in 2013, White announced that the Agency would require admissions in an expanded category of cases.<sup>188</sup> White noted that an SEC priority was to “demand accountability.”<sup>189</sup> A key way to achieve that aim was to require admissions of wrongdoing in cases where there was “a special need for public accountability and acceptance of responsibility.”<sup>190</sup> White identified four categories in which “admissions might be appropriate”:

Cases where a large number of investors have been harmed or the conduct was otherwise egregious.

Cases where the conduct posed a significant risk to the market or investors.

Cases where admissions would aid investors deciding whether to deal with a particular party in the future.

Cases where reciting unambiguous facts would send an important message to the market about a particular case.<sup>191</sup>

Although she spoke of “admissions,” “public accountability,” and “responsibility,” White was silent about what precisely should be admitted—whether fact, legal violation, or state of mind.<sup>192</sup> As we will see in the next Section, the SEC’s choices among these types of admissions as they implemented the new policy became a subject of much critique.

#### D. SEC ADMISSIONS PRACTICES

Following its announced change in policy, the SEC has required admissions of wrongdoing in some enforcement settlements. In an empirical study of admissions in SEC settlements during the years spanning the policy change, we identified settlements containing some sort of admission—of facts, legal vio-

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Center for Law and Business (Nov. 18, 2016) [hereinafter White, A New Model], <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html>. (“My views on this are, of course, informed by my experience as a federal prosecutor where criminal defendants—individuals or entities—must voluntarily admit their guilt if they agree to plead guilty.”).

188. White, *supra* note 19; see also James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES (June 21, 2013), <http://www.nytimes.com/2013/06/22/business/secs-new-chief-promises-tougher-line-on-cases.html>.

189. See White, *supra* note 19.

190. *Id.*; see also White, SEC Speaks, *supra* note 24 (pointing to admissions of wrongdoing to provide “a greater measure of public accountability, which, in turn, can bolster the public’s confidence in the strength and credibility of law enforcement, and the safety of our markets”).

191. White, *supra* note 19.

192. *Id.*

lation, scienter, or some combination.<sup>193</sup> Even after the announced policy changes, very few SEC settlements contained this language.<sup>194</sup>

One early example was J.P. Morgan's admission of specified facts and violation of the federal securities laws in the SEC's London Whale enforcement action concerning a trader who lost nearly six billion dollars.<sup>195</sup> More recently, the SEC highlighted two such settlements in their announcement of 2016 enforcement results.<sup>196</sup> The press release announced the Agency's settlement with Merrill Lynch for "violating customer protection rules by misusing customer cash and putting customer securities at risk" and noted both the penalty amount (\$415 million) and that "[t]he firm also admitted wrongdoing."<sup>197</sup> The agency also touted "[a] \$267 million enforcement action against J.P. Morgan wealth management subsidiaries, for failing to disclose conflicts of interest to clients," noting again that "[t]he firms also admitted wrongdoing."<sup>198</sup> Under the heading "Demanding Admissions in Important Cases Enhancing Public Accountability," the SEC's press release also identified six examples of cases in which it had "[d]emanded and obtained acknowledgements of wrongdoing under the admissions

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193. Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 ARIZ. L. REV. (forthcoming 2018) (identifying and analyzing SEC settlements containing admissions); see also David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 IOWA L. REV. 113 (2017). Earlier articles identified particular cases in which the SEC has required (or failed to require) admissions. See, e.g., Peter R. Flynn, Note, *Admission of Wrongdoing: Increasing Public Accountability in SEC Settlements*, 8 BROOK. J. CORP. FIN. & COM. L. 538 (2014) (describing several such cases); Siegel, *supra* note 63 (identifying and describing eight matters in which the SEC required admissions from 2012 to 2014).

194. Winship & Robbennolt, *supra* note 193.

195. JPMorgan Chase & Co., *supra* note 82, at 2; JPMorgan Press Release, *supra* note 66; Radvany, *supra* note 63, at 695.

196. Press Release 2016-212, Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016) [hereinafter 2016 Press Release], <https://www.sec.gov/news/pressrelease/2016-212.html>.

197. *Id.* The underlying agreement includes an admission of fact (admitting to four of six sections containing factual allegations) and an admission of legal violation (the targets "acknowledge that their conduct violated the federal securities laws"). Merrill Lynch, Pierce, Fenner & Smith Inc., No. 3-17312, 2016 WL 4363431 (Sec. & Exch. Comm'n June 23, 2016) (order instituting administrative and cease-and-desist proceedings), <https://www.sec.gov/litigation/admin/2016/34-78141.pdf>.

198. 2016 Press Release, *supra* note 196; JPMorgan Chase Bank, N.A., No. 3-17008, 2015 WL 9256635 (Sec. & Exch. Comm'n Dec. 18, 2015) (order instituting administrative and cease-and-desist proceedings) (detailing the agreement underlying the press release).



policy.”<sup>199</sup> The subject matter was varied—from false and misleading audits, to an Ethiopian electric utility’s sales of securities to the Ethiopian diaspora, to a computer coding error that caused flawed reporting.<sup>200</sup>

Though limited in scope, some context for these settlements is provided in a study, by the NYU Pollack Center for Law & Business and Cornerstone Research, that examined SEC settlements with public companies and their subsidiaries for fiscal years 2010 through 2016.<sup>201</sup> The study analyzed the top ten settlements for that period, measured by penalty amount.<sup>202</sup> Seven of the top ten required admissions.<sup>203</sup> Former SEC Chair White indicated that the SEC had required admissions from seventy-seven enforcement targets as of November 2016.<sup>204</sup>

Critics of the SEC’s implementation of the Agency’s new admissions policy have pointed to three flaws they perceive in the SEC’s admissions practices since 2013.<sup>205</sup> First, they point to low numbers or percentage of cases in which the Agency required any type of admission.<sup>206</sup> In 2015, Senator Elizabeth Warren sent a critical letter to then-Chair White listing the “[f]ailure to [r]equire [a]dmissions of [w]rongdoing in SEC [e]nforcement [c]ases” as one of the “extreme[] disappoint[ments]” of White’s term.<sup>207</sup> According to Senator Warren, only nineteen of five hundred and twenty settlements with the

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199. 2016 Press Release, *supra* note 196.

200. *Id.*

201. CHOI ET AL., *supra* note 47.

202. *Id.* at 8.

203. *Id.* To our knowledge, there are few broader empirical analyses that paint a systematic picture of what agencies have required in terms of admissions. More in-depth empirical analysis of agency settlements would be a welcome development. For an example, see Winship & Robbennolt, *supra* note 193, at 7.

204. White, A New Model, *supra* note 187 (reporting admissions from thirty individuals and forty-seven entities since the admissions policy was instituted).

205. Using our data on admissions in SEC settlements, we analyze these critiques in Winship & Robbennolt, *supra* note 193, at 7.

206. *Id.*

207. Letter from Elizabeth Warren, Senator, U.S. Senate, to Mary Jo White, Chair, Sec. Exch. Comm’n, 1, 4 (June 2, 2015), [http://www.warren.senate.gov/files/documents/2015-6-2\\_Warren\\_letter\\_to\\_SEC.pdf](http://www.warren.senate.gov/files/documents/2015-6-2_Warren_letter_to_SEC.pdf); MJ Lee, *Elizabeth Warren to Wall Street Cop: “Step Up,”* CNN (June 2, 2015), <http://www.cnn.com/2015/06/02/politics/elizabeth-warren-mary-jo-white-sec> (reporting Warren’s criticism of “the agency’s failure to extract admissions of guilt from financial institutions in legal settlements”).

SEC between June 2013 and September 2014 included an admission.<sup>208</sup>

Second, commentators criticize the Agency for the types of cases in which admissions have been required.<sup>209</sup> One of the themes of the report, *Rigged Justice: How Weak Enforcement Lets Corporate Offenders off Easy*, is the absence of admissions in the settlement of major cases.<sup>210</sup> Some critics suggest that admissions have been required mostly in “low-profile” cases and “garden-variety frauds.”<sup>211</sup> However, commentators have also noted that the pattern of enforcement is difficult to discern, in part because of the low numbers.<sup>212</sup>

Third, critics point to the types of admissions that have been required, making the rubric developed here particularly relevant.<sup>213</sup> One concern has been that the admissions often do not go far enough, because they require only the admission of facts.<sup>214</sup> Senator Warren wrote to Chair White that “the record of the SEC under your leadership is even worse than those numbers [of settlements that included admissions] suggest” because most “required only a broad admission of facts specified by the SEC rather than requiring that these firms admit to violations of specific securities laws.”<sup>215</sup> Senator Warren pointed to critics who called these factual admissions “the weakest admission of guilt as [sic] possible.”<sup>216</sup>

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208. Letter from Elizabeth Warren, *supra* note 207, at 5.

209. Winship & Robbennolt, *supra* note 193, at 7.

210. OFFICE OF SENATOR ELIZABETH WARREN, RIGGED JUSTICE: HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY (Jan. 2016); Warren Releases *Rigged Justice Report Detailing Lax Corporate Crime Enforcement*, CORP. CRIME REP. (Jan. 29, 2016), <https://www.corporatecrimereporter.com/news/200/warren-release-rigged-justice-report-detailing-lax-corporate-crime-enforcement> (noting that Senator Warren’s report “highlights 20 of the most egregious civil and criminal cases during the past year in which federal settlements failed to require meaningful accountability to deter future wrongdoing and to protect taxpayers and families”).

211. Germaine, *supra* note 17 (“Although the [SEC] has scored a few notable admissions in the past three years, critics say many cases have been low-profile and involved garden-variety frauds and securities law violations.”); Taibbi, *supra* note 16.

212. See Germaine, *supra* note 17 (noting criticism that the SEC hasn’t “followed through” on its approach of requiring more admissions).

213. Winship & Robbennolt, *supra* note 193, at 7.

214. *Id.*

215. Letter from Elizabeth Warren, *supra* note 207, at 5–6.

216. *Id.* at 6 (quoting Stephen Gandel, *Did the SEC Let JP Morgan off the Hook?*, FORTUNE (Sept. 20, 2013), <http://fortune.com/2013/09/20/did-the-sec-let-jpmorgan-off-the-hook>).

## IV. THE ROLE OF ADMISSIONS IN SETTLEMENT

What difference does an agency's admissions policy make to the agency? The answer lies in part in the ways in which obtaining admissions might either further or interfere with the enforcement and other goals of the agency, and in part in how the approach to admissions affects settlement negotiations with targets. We have seen concerns about the collateral consequences of admissions for targets and agency concerns about litigation costs and how best to deploy scarce resources.<sup>217</sup> There are also a variety of reasons why agencies might want to bargain for admissions. The ability to obtain admissions from enforcement targets has consequences for the agency's own enforcement goals, as well as its public image. Moreover, if the agency decides that admissions are called for, the agency will be better able to effectively bargain for admissions if it understands the range of consequences that admissions—and particular types of admissions—have for targets.<sup>218</sup> To this end, in this Part, we review the reasons that agencies might value admissions from the targets of enforcement. We explore the implications for settlement negotiation of the different admissions models—denial; no-admit-no-deny; and specific types of admissions. Throughout, we draw on empirical studies to identify factors for agencies to consider when negotiating with enforcement targets.

Agencies have diverse structures and goals, so one size will certainly not fit all when it comes to administrative enforcement. We, therefore, do not answer the ultimate question of how agencies should weigh these concerns against other consequences in any particular area or particular settlement. Instead, we take seriously these articulated goals, and ask what choices about admissions might further them, drawing on existing empirical research on blame, acknowledgement, claiming, the attribution of responsibility, and apologies. We conclude this Part by highlighting several implications of this research, including some (possibly counterintuitive) aspects of targets' relationship to admissions and to denial.

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217. See *supra* Parts I.B, I.C.

218. Effective negotiators think about the interests of the other side and interests that the two sides may share. See generally G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 76–88 (1999) (describing how identifying the other party's interests can improve negotiations).

## A. VALUE OF ADMISSIONS TO AGENCY AND PUBLIC

## 1. Public Accountability

At their core, admissions are one mechanism by which to provide public accountability. The need for accountability has been a prominent concern in the debate over whether to require admissions. In rejecting the settlement in the *Citigroup* case, for example, Judge Rakoff highlighted “an overriding public interest in knowing the truth.”<sup>219</sup> One of the articulated reasons for the SEC’s subsequent change in policy was that, at least in certain types of cases, admissions “may be required for a resolution to achieve public accountability.”<sup>220</sup> Calls for accountability reflect, at least in part, a broad desire for the targets of enforcement to take responsibility or to be held responsible for their actions.<sup>221</sup>

Interestingly, studies reflect desire for apologies and acknowledgment of responsibility not only from individuals, but

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219. SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328, 332, 335 (S.D.N.Y. 2011), *vacated*, 752 F.3d 285 (2d Cir. 2014) (noting that without admissions the “public is deprived of ever knowing the truth in a matter of obvious public importance”).

220. Mary Jo White, Chair, Sec. & Exch. Comm’n, The Importance of Trials to the Law and Public Accountability, 5th Annual Judge Thomas A. Flannery Lecture (Nov. 14, 2013), <https://sec.gov/news/speech/20113-spch111413mjw>; *see also* Press Release, George Canellos, Co-Dir., Div. of Enf’t, Sec. & Exch. Comm’n, Statement on SEC Enforcement Action Against JPMorgan (Sept. 19, 2013), <https://www.sec.gov/news/public-statement/canellos-statement-9-19-13> (“At its core, today’s case is about transparency and accountability, and [the target’s] admissions are a key component in that message.”); *Where the SEC Action Will Be*, WALL ST. J., June 24, 2013, at R4, <https://www.wsj.com/articles/SB10001424127887323893504578555990184592624> (quoting Mary Jo White as noting that “[p]ublic accountability in particular kinds of cases can be quite important”).

221. The SEC claims that its efforts to obtain admissions have added a measure of accountability to their efforts. Andrew Ceresney, Co-Dir., Div. of Enf’t, Sec. & Exch. Comm’n, Financial Reporting and Accounting Fraud, Speech at the American Law Institute Continuing Legal Education (Sept. 19, 2013), <http://www.sec.gov/news/speech/spch091913ac> (“[T]here is a certain amount of accountability that comes from a defendant admitting to unambiguous, uncontested facts.”); White, *supra* note 132 (“[A]dmissions do indeed bring about greater public accountability. There is nothing quite like a company or corporate executive who violated the securities laws openly and publicly admitting their guilt.”); Morgenson, *supra* note 18 (“In cases where we have obtained admissions, it adds accountability, and that has been very important.”) (quoting Andrew Ceresney, the SEC’s head of enforcement).

also from organizations such as corporations.<sup>222</sup> The fact that organizational apologies and acceptance of responsibility seem to matter does not mean that the considerations are identical for individuals and entities or that agencies must approach settlement with individuals and entities as one and the same.<sup>223</sup> Nor is there general agreement about related concepts, such as what it means to blame a corporation.<sup>224</sup> It does, however, suggest that the mere fact that a civil enforcement target is institutional does not resolve whether to seek admissions.

## 2. Deterrence

In addition to accountability, agencies are concerned about the effect of enforcement on the behavior of those within their jurisdiction. Indeed, one of the primary goals of agency enforcement is to accomplish deterrence.<sup>225</sup> Deterrence is also important to public audiences for agency action.<sup>226</sup> Studies have shown that injured parties and the public are motivated to prevent future harm—people want to know that offenders have learned from their mistakes and have taken steps to prevent the recurrence of similar behavior and similar harm in the future.<sup>227</sup> Admissions have a part to play in affecting deterrence

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222. See, e.g., Kristin M. Pace et al., *The Acceptance of Responsibility and Expressions of Regret in Organizational Apologies After a Transgression*, 15 CORP. COMM. 410, 420 (2010); *infra* note 273 and accompanying text.

223. Tom R. Tyler & Avital Mentovich, *Punishing Collective Entities*, 19 J.L. & POL'Y 203, 228–29 (2010).

224. See, e.g., Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1120, 1120 n.52 (2016) (noting that “scholars vigorously disagree on the propriety of ‘blaming’ a corporation” and citing articles in the debate); Tyler & Mentovich, *supra* note 223, at 228; see also Steven J. Sherman & Elise J. Percy, *The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to be Held Responsible for the Misdeeds of Individual Members*, 19 J.L. & POL'Y 137 (2010) (exploring the ways that individuals and entities are perceived).

225. White, *supra* note 19 (“And when we resolve cases, we need to be certain our settlements have teeth, and send a strong message of deterrence . . . and cause would-be future offenders to think twice.”).

226. See Buell, *supra* note 20, at 514 (discussing how guilty pleas with sufficient facts are critical for the DOJ).

227. Thomas H. Gallagher et al., *Patients’ and Physicians’ Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001 (2003) (finding that patients wanted disclosure of errors, prevention of recurrence, and apology); Kathleen M. Mazor et al., *Health Plan Members’ Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409, 415 (2004); Kathleen M. Mazor et al., *More than Words: Patients’ Views on Apology and Disclosure When Things Go Wrong in Cancer Care*, 90 PATIENT EDUC. & COUNS. 341, 344 (2013); Tamara Relis, *“It’s Not About the Money!”: A Theory on Misconceptions*

through their collateral impact on parallel legal actions and through the reputational consequences they may have for enforcement targets.<sup>228</sup>

Acknowledgement of the offense can be important to deterrence because it signals that the offender will not act in the same way again in the future. Studies of apologies, for example, find that people are more likely to believe that wrongful behavior is aberrational and less stable when the offender has apologized for the wrongful behavior.<sup>229</sup> In particular, taking responsibility for the wrongful behavior conveys that the offender understands the ways in which the behavior violated shared norms and will take steps not to repeat it.<sup>230</sup> Without admis-

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*of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701 (2007) (finding that plaintiffs often have extra-legal aims); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1611 (1994).

228. Buell, *supra* note 20, at 512–13. These consequences for targets have not gone unnoticed. For example,

after the FCC changed its policy to require admissions, one law firm warned in January 2015 that “companies must now admit to liability in the consent decree. One of the major benefits of consent decrees in the past was that it expressly stated that the targeted company had not been found guilty. Not only is that statement gone, the company must actually admit it violated the rules.”

*FCC Enforcement Update—2014 Year in Review*, FISH & RICHARDSON (Jan. 13, 2015), <https://www.fr.com/news/fcc-enforcement-update-2014-year-in-review>.

229. See, e.g., James R. Davis & Gregg J. Gold, *An Examination of Emotional Empathy, Attributions of Stability, and the Link Between Perceived Remorse and Forgiveness*, 50 PERSONALITY & INDIVIDUAL DIFFERENCES 392 (2011); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC & APPLIED SOC. PSYCHOL. 291 (2000); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219, 221 (1989); Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors*, 6 ACAD. PSYCHOL. BULL. 49 (1984); Randolph B. Pipes & Marci Alessi, *Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of a Repeated Offense*, 85 PSYCHOL. REP. 246 (1999); Robbenolt, *Legal Settlement*, *supra* note 25; Robbenolt, *Settlement Levers*, *supra* note 25; Dawn T. Robinson et al., *Heinous Crime or Unfortunate Accident? The Effects of Remorse on Responses to Mock Criminal Confessions*, 73 SOC. FORCES 175 (1994); Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY 281, 291 (1991).

230. Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 134–36 (1997) (analyzing responses to different components of apologies).

sions, it is difficult to believe that behavior and practices will improve.<sup>231</sup>

One critique of no-admit-no-deny policies is that they do not address these concerns about changing and improving behavior going forward. As one commentator has noted, “The reason [no-admit-no-deny] fails as a deterrent is the same companies keep doing the same thing over and over even after they enter into these agreements . . . . They not only don’t admit and don’t deny, they don’t change.”<sup>232</sup> A similar criticism notes that no-admit-no-deny policies “preclude[] reputational harm and potential private liability considerations that might more effectively deter future misconduct.”<sup>233</sup>

Beyond the broader deterrence considerations of ensuring that the overall consequences of the enforcement action are suf-

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231. See, e.g., Daryl Koehn, *When Saying “I’m Sorry” Isn’t Good Enough: The Ethics of Corporate Apologies*, 23 BUS. ETHICS Q. 239, 246 (“[W]ithout explicit acknowledgement of a particular harm, CEOs will find it hard to restore trust, because they and the audience will not know whether the two parties are even on the same page regarding the breach of trust [and that in order to] lay out some action steps for restoring trust by repairing the breach . . . the CEO needs to indicate that he or she acknowledges that the firm erred *in some particular way*.”); see also Buell, *supra* note 20, at 513.

232. *SEC’s Andrew Ceresney Defends Neither Admit nor Deny Settlements*, CORP. CRIME REP. (June 6, 2013), <https://www.corporatecrimereporter.com/news/200/secceresneyneitheradmitnordeny06062013> (quoting Robert Weissman, President of Public Citizen). This concern was at the forefront of a furor over remarks by Novartis CEO Joe Jimenez about a prospective settlement between Novartis and the DOJ in 2015. See Gary Giampetruzzi & Terra Reynolds, *5 Takeaways from the Novartis FCA Settlement*, LAW360 (Nov. 1, 2015), <https://www.law360.com/articles/720152/5-takeaways-from-the-novartis-fca-settlement>. Jimenez was reported in the press as saying:

We’re not admitting liability, it’s something we just believe we want to put behind us and that’s why we’ve reached an agreement and settlement in principle . . . . We continue to maintain that specialty pharmacies must continue to play a role in ensuring patient adherence . . . . *How that’s going to play out as to whether we change our behavior or not remains to be seen.*

*Id.* (emphasis added) (quoting D. Roland & J. Letzing, *Novartis Profit Hurt by U.S. Settlement*, WALL ST. J. (Oct. 27, 2015), <http://www.wsj.com/articles/novartis-profit-hurt-by-u-s-settlement-1445928106>). Novartis later “clarifi[ed]” that the statements “did not accurately reflect our position and the seriousness of the Company’s commitment to working with the government to ensure our behaviors and interactions with specialty pharmacies meet the highest ethical standards” and that it would make specific admissions of fact. *Id.*

233. Edward Greene & Caroline Odorski, *SEC Enforcement in the Financial Sector: Addressing Post-Crisis Criticism*, 16 BUS. L. INT’L 5, 12 (2015). And, indeed, the SEC’s change in policy has been said to be because “in certain cases, more may be required for a resolution . . . to be, and viewed to be, a sufficient punishment to send a strong message of deterrence.” White, *supra* note 220.

ficient to incentivize compliance,<sup>234</sup> requiring admissions may also be an important initial step that allows the enforcement target to make changes to practices and procedures that can help to prevent reoffense. In other words, making admissions may help set the conditions for future improvement:

When an organization covers up a problem, be it an internal one like sexual harassment or an external one like a defective product, not only does it risk recurrences of that specific problem, but it may set in motion various dysfunctional dynamics. Casualties may include open conversations, truth telling, and corporate morale. The organization may steadily lose its best workers as employees with integrity may leave and employees who tolerate cover-ups remain. Conversely, even if daunting at first, responsibility-taking can ultimately boost corporate morale.<sup>235</sup>

Though it arose out of a criminal proceeding in Canada, a case involving Suncor Energy, Inc. (“Suncor”), a large Canadian energy company, is an instructive example of a target that disclosed relevant facts as part of a settlement agreement with an eye toward improving its environmental practices.

Rather than simply pay a fine, the company saw . . . an opportunity to “prevent future incidents by others and ourselves . . . [and] capture learnings so they get shared more broadly.” A manager framed it this way: “a lot of companies would be very embarrassed by what happened and would want to get it behind them as quick as possible. Pay the bill and move on. The simple fact that Suncor is ready to open the kimono here a little bit—I think it’s a good thing. And I think we’ll learn from it, and I think others will as well.”<sup>236</sup>

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234. “[I]nstilling in others an expectation that there will be tough enforcement of all applicable laws is an essential ingredient to ensuring that corporate actors weigh their incentives properly—and do not ignore massive risks in blind pursuit of profit.” OFFICE OF SENATOR ELIZABETH WARREN, *supra* note 210, at 4 (quoting Eric H. Holder, Jr., Att’y Gen., Dep’t of Justice, Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>).

235. Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV., 903, 943 (2005). For discussion of importance of accepting responsibility for learning and reform in the criminal context, see Bibas, *supra* note 32, at 1363–64; *see also* Buell, *supra* note 20, at 513 (“[A] firm’s public declaration of the nature and facts of its own wrongdoing might spur more introspection and reform among the firm’s managers, employees, and owners than would a bare legal judgment in which a firm simply concedes that its government litigation adversary has something of a case, and the firm says it chooses to settle the whole thing so it can ‘move on.’”).

236. Stephanie Bertels et al., *A Responsive Approach to Organizational Misconduct: Rehabilitation, Reintegration, and the Reduction of Reoffense*, 24 BUS. ETHICS Q. 343, 355 (2014). Suncor also participated in public dialogue with the public and its peers. Comments about this conversation included the following: “I was very impressed by the amount of honest disclosure from Sun-



In these ways, then, responsibility-taking through admissions may help to serve the agency's overall enforcement goals.

### 3. Agency Legitimacy

Finally, in addition to their value for public accountability and deterrence, admissions have important implications for public perceptions of the legitimacy of the administrative agencies themselves. Legitimacy is "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."<sup>237</sup> Trust<sup>238</sup> that the authority has "people's best interests at heart" and perceptions that the agency's goals are aligned with those of the community both influence perceptions of legitimacy.<sup>239</sup> Agencies, therefore, are more likely to be perceived as legitimate when their decisions

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cor"; "this provided a good opportunity to ask questions and gain frank responses"; "a good opportunity for learning and reflection which could lead to issues being avoided in the future." *Id.* at 357.

237. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995); see also Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL. PUB. POLY & L. 78, 90 (2014) ("Legitimacy is about people's perception and reception of power and authority."). On legitimacy, see generally Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006) (explaining the importance of legitimacy to the success of authorities and institutions). On the legitimacy of the SEC, see, for example, KAREN R. BRYCE, MAINTAINING AND REGAINING ORGANIZATIONAL LEGITIMACY: THE U.S. SECURITIES AND EXCHANGE COMMISSION (2012). Our focus here is on public perceptions of legitimacy. We recognize that different stakeholders may have differing perceptions of legitimacy. See, e.g., Anna Lamin & Srilata Zaheer, *Wall Street vs. Main Street: Firm Strategies for Defending Legitimacy and Their Impact on Different Stakeholders*, 23 ORG. SCI. 47 (2012).

238. See generally Craig W. Thomas, *Maintaining and Restoring Public Trust in Government Agencies and Their Employees*, 30 ADMIN. & SOC'Y 166 (1998) (discussing how public officials can produce, maintain, and restore public trust). Trust involves an expectation that the other will act with benevolence and competence. Roderick M. Kramer & Roy J. Lewicki, *Repairing and Enhancing Trust: Approaches to Reducing Organizational Trust Deficits*, 4 ACAD. MGMT. ANNALS 245, 257 (2010). Overall, trust in government is relatively low. PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 4 (Nov. 23, 2015), <http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf>; see also Uri Friedman, *Trust in Government is Collapsing Around the World*, ATLANTIC (July 1, 2016), <http://www.theatlantic.com/international/archive/2016/07/trust-institutions-trump-brexit/489554>.

239. Tyler & Jackson, *supra* note 237, at 78. A third aspect of legitimacy is "authorization of authority (felt obligation to obey)." *Id.*

are perceived as being neutral, based on the merits of each case, and responsive to a shared set of underlying values.<sup>240</sup>

Being perceived as legitimate is important to accomplishing an agency's overall goals. When an institution is viewed by the public as being legitimate, it may experience broader support for its mission, find it easier to do its work effectively, and obtain an increased level of compliance with its mandates.<sup>241</sup> In contrast, when the institution does not uphold shared values and is not perceived as legitimate, the public can become cynical and unsupportive, which can leave the institution susceptible to increased criticism.<sup>242</sup> Indeed, the failure to insist on accountability has been cited as an enforcement failing that "undermines the foundations" of federal enforcement.<sup>243</sup>

The absence of agreed upon facts to support the consequences in an enforcement action or misalignment between any admitted facts and the consequences imposed may also lead observers to conclude that an agency's actions are illegitimate. As Judge Rakoff concluded, "a proposed Consent Judgment that asks the Court to impose substantial injunctive relief, enforced by the Court's own contempt power, *on the basis of allegations unsupported by any proven or acknowledged facts whatsoever*; is neither reasonable, nor fair, nor adequate, nor in the public interest."<sup>244</sup> Others have noted that "[t]here is something trou-

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240. Suchman, *supra* note 237; Tyler, *supra* note 237, at 392 ("Widespread legitimacy will exist only when the perspectives of everyday members are enshrined in institutions and in the actions of authorities.").

241. ROBERT W. JACKMAN, POWER WITHOUT FORCE: THE POLITICAL CAPACITY OF NATION-STATES 22 (1993) ("[T]o be reasonably effective, institutions must have a moderate aura of legitimacy."); *see also* Tyler, *supra* note 237, at 379.

242. *See* Suchman, *supra* note 237, at 575 (quoting John W. Meyer & Brian Rowan, *Institutional Organizations: Formal Structure as Myth and Ceremony*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 41, 50 (Walter W. Powell & Paul J. DiMaggio eds., 1991) ("Organizations that . . . lack acceptable legitimated accounts of their activities . . . are more vulnerable to claims that they are negligent, irrational or unnecessary."); *see also supra* Part III.B and notes 207–16 and accompanying text (describing criticisms of the SEC).

243. OFFICE OF SENATOR ELIZABETH WARREN, *supra* note 210, at 1.

244. SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011) (emphasis added), *vacated*, 752 F.3d 285 (2d Cir. 2014). These concerns parallel those that arise in criminal plea bargaining: "*Alford* and *nolo contendere* pleas send mixed messages, breeding public doubt, uncertainty, and lack of respect for the criminal justice system. Far from encouraging honesty, they let guilty defendants cloak their pleas in innocence. In contrast, jury verdicts and unequivocal guilty pleas suppress residual doubts and promote public confidence." Bibas, *supra* note 32, at 1386–87.

bling about a public enforcement action that ends with a conclusion of ‘maybe he (they) did it, maybe he (they) didn’t, but he’s (they are) paying a price for it in any event.’”<sup>245</sup>

In contrast, obtaining admissions from defendants might animate perceptions of agency legitimacy. Cases in which an agency obtains an admission as part of an enforcement action can help to foster a sense among the public that the agency enforcement has teeth and that appropriate and unbiased regulatory action is occurring. In the case of the SEC, for example, admissions elicited from J.P. Morgan were said to have had the effect of “bolstering public confidence for an agency long criticized for being too soft on Wall Street.”<sup>246</sup> Such successes validate the legitimacy of the agency’s goals, strategies, and effectiveness<sup>247</sup> and such legitimacy is likely to feed back into the agency’s ability to accomplish deterrence.<sup>248</sup>

#### B. VALUE OF ADMISSIONS TO TARGETS

In addition to considering how admissions might directly further the goals of the agency, agencies negotiating admissions must take into account targets’ willingness to make admissions. This requires agencies to consider, in a nuanced way, the potential effects of admissions on targets. In this regard, the collateral consequences we described above are significant and focal. But, in contrast to conventional legal wisdom, admissions, particularly when coupled with apologies or steps toward reform, may have beneficial effects for enforcement targets, as well as for agencies. Indeed, crisis communications experts of-

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245. Buell, *supra* note 20, at 510.

246. Dina ElBoghdady & Danielle Douglas, *JPMorgan’s Admission: A Symbolic Victory for the SEC, of Limited Use in Private Lawsuits*, WASH. POST (Sept. 19, 2013), [https://www.washingtonpost.com/business/economy/jpmorgan-chase-to-pay-920-million-for-london-whale-trading-loss/2013/09/19/0c9d7d52-2130-11e3-b73c-aab60bf735d0\\_story.html](https://www.washingtonpost.com/business/economy/jpmorgan-chase-to-pay-920-million-for-london-whale-trading-loss/2013/09/19/0c9d7d52-2130-11e3-b73c-aab60bf735d0_story.html). The SEC itself has claimed that when defendants acknowledge wrongdoing it “boosts investors’ confidence in the SEC’s enforcement program and in our markets.” White, *supra* note 132; cf. Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 580–81 (2012) (making the point that an agency’s choice to punish targets by “deliver[ing] just deserts and communicat[ing] moral condemnation” attracts more public support and gives the agency more flexibility than regulation).

247. See Suchman, *supra* note 237, at 592 (describing the ways in which successes—both technical and attention grabbing—can establish legitimacy).

248. See Buell, *supra* note 20, at 514 (noting the link between legitimacy and deterrence: “If the enterprise of public prosecution appears unprincipled or even random, then surely deterrence is seriously weakened”).

ten advise companies against litigation and in favor of making admissions:

A legal strategy, although of use in limiting liability exposure, is ineffective at best, especially when one considers the dynamic social milieu in which organizations operate. Although damage to a bottom line is a bona fide concern, so too is damage to a company's reputation, which also has bottom-line implications. A more effective approach to a crisis is a public relations strategy, in which an organization voluntarily admits that a problem exists, aims to be candid as possible, releases all the bad news (at once, if possible), and articulates the measures that are being taken to correct the problem.<sup>249</sup>

Enforcement targets, therefore, ought to weigh both the potential collateral consequences and the potential reputational effects of making admissions. And agencies negotiating with enforcement targets would be well served by having a more complete understanding of how these considerations might play out for different targets.

### 1. Denial

Targets' instincts may be to deny everything.<sup>250</sup> Denial, however, "is typically processed as an addendum" to the original information, meaning that the denial is not likely to erase the initial impression made by the allegations.<sup>251</sup> Even more importantly, the public may be skeptical of the denial itself.

At a fundamental level, denial or attempts to avoid the issue are suggestive of concealment and intransigence and serve to erode public trust in the organization. Main Street is often skeptical of corporate pronouncements, particularly when organizations are seen to be stonewalling or denying blame. Denial in effect stigmatizes the firm

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249. KEITH MICHAEL HEARIT, *CRISIS MANAGEMENT BY APOLOGY: CORPORATE RESPONSE TO ALLEGATIONS OF WRONGDOING* 41 (2006).

250. Nicole Gillespie & Graham Dietz, *Trust Repair After an Organization-Level Failure*, 34 *ACAD. MGMT. REV.* 127, 140 (2009) ("[O]rganizations often face legal, commercial, and/or shareholder pressures to 'save face' and 'never admit culpability,' potentially closing off these conciliatory remedial responses in the minds of management.").

251. Daniel M. Wegner et al., *The Transparency of Denial: Briefing in the Debriefing Paradigm*, 49 *J. PERSONALITY & SOC. PSYCHOL.* 338, 340 (1985) [hereinafter Wegner et al., *Transparency of Denial*] ("Far from erasing an impression, then, a denial *accompanies* an impression."); see also Daniel T. Gilbert et al., *You Can't Not Believe Everything You Read*, 65 *J. PERSONALITY & SOC. PSYCHOL.* 221, 231 (1993); Daniel M. Wegner et al., *Incrimination Through Innuendo: Can Media Questions Become Public Answers?*, 40 *J. PERSONALITY & SOC. PSYCHOL.* 822, 831 (1981) [hereinafter Wegner et al., *Incrimination Through Innuendo*] (discussing the effects that innuendo in media headlines has on individual perceptions of guilt).

with the public, causing “remaining constituents [to] curtail their support,” thereby negatively affecting its legitimacy.<sup>252</sup>

Denial may, therefore, ultimately hurt the target’s legitimacy and credibility with the public,<sup>253</sup> resulting in longer-term harm to the target’s brand.

Research has compared the effects of denials to the effects of other remedial responses, such as silence and apology. When the offense at issue involves a lack of competence, denials are *not* the most effective way to restore trust.<sup>254</sup> This is because denial does not address any underlying concern about fundamental abilities and gives no assurance that steps will be taken to increase the level of competence displayed.<sup>255</sup>

For alleged transgressions that are perceived to be matters of integrity, the effects of denials are more complicated. Research has found that in the absence of evidence supporting the allegations, denial can be a more effective response than either silence or an apology.<sup>256</sup> Because integrity violations are likely to be interpreted as signs of an overall lack of integrity, an apology confirms a type of violation that is perceived as less likely to change.<sup>257</sup> But, if the denial is contradicted by evidence of the transgression, any benefits of denial are under-

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252. Lamin & Zaheer, *supra* note 237, at 53 (alteration in original) (internal citations omitted) (quoting Blake E. Ashforth & Barrie W. Gibbs, *The Double-Edge of Organizational Legitimation*, 1 *ORG. SCI.* 177, 183 (1990)).

253. Lamin & Zaheer, *supra* note 237, at 59; *see also* Gillespie & Dietz, *supra* note 250, at 137 (arguing that denial is not a credible response to an organizational failure).

254. Peter H. Kim et al., *Removing the Shadow of Suspicion: The Effects of Apology Versus Denial for Repairing Competence- Versus Integrity-Based Trust Violations*, 89 *J. APPLIED PSYCHOL.* 104, 109 (2004); *see also* Silvia Grappi & Simona Romani, *Company Post-Crisis Communication Strategies and the Psychological Mechanism Underlying Consumer Reactions*, 27 *J. PUB. REL. RES.* 22, 36 (2015) (finding that denial did not reduce anger, increase sympathy, or improve views of the company).

255. Kim et al., *supra* note 254, at 107. Interestingly, denials appear to result in less condoning of a transgression as compared to other ways of accounting for behavior such as explanation or apology. *See* Valerie S. Folkes & Yun-Oh Whang, *Account-Giving for a Corporate Transgression Influences Moral Judgment: When Those Who “Spin” Condone Harm-Doing*, 88 *J. APPLIED PSYCHOL.* 79, 82 (2003).

256. Donald L. Ferrin et al., *Silence Speaks Volumes: The Effectiveness of Reticence in Comparison to Apology and Denial for Responding to Integrity- and Competence-Based Trust Violations*, 92 *J. APPLIED PSYCHOL.* 893, 894 (2007).

257. *Id.* at 899–900, 903 (2007); Kim et al., *supra* note 254, at 109, 113. *But see* Roy J. Lewicki et al., *An Exploration of the Structure of Effective Apologies*, 9 *NEGOT. & CONFLICT MGMT. RES.* 177, 191 (2016) (finding acknowledgment of responsibility to be important in cases involving integrity violations).

mined and trust is particularly damaged.<sup>258</sup> That is, if an offender denies wrongdoing, but that denial is proven to be false, the damage to trust is significantly worse than it would otherwise have been. This is an important caveat. As we have seen, in cases of civil enforcement, the agency's allegations and the evidence for those allegations will have already been put forward, in detail, in the complaint and will be articulated again in the consent order itself. Once the allegations have been made, it would not be surprising if relevant constituencies believe that where there is smoke, there is fire—whether or not the evidence would hold up at trial.<sup>259</sup>

In cases in which the defendant settles the case with the agency by agreeing to pay large penalties, inferences of wrongdoing may be even stronger. For example, in response to a settlement by Merrill Lynch with the Attorney General of New York, then-Attorney General Eliot Spitzer said: “[y]ou don’t pay a \$100 million fine if you didn’t do anything wrong.”<sup>260</sup> And more recently, Judge Victor Marrero commented on a proposed settlement between the SEC and SAC Capital Advisors in a case involving insider trading: “[t]here is something counterintuitive and incongruous about settling for \$600 million if [SAC] truly did nothing wrong.”<sup>261</sup> Under such circumstances, denial can have negative consequences for targets.

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258. W. Timothy Coombs et al., *Debunking the Myth of Denial's Effectiveness in Crisis Communication: Context Matters*, 20 J. COMM. MGMT. 381, 383 (2016); see also Kim et al., *supra* note 254, at 108–09.

259. See Ferrin et al., *supra* note 256, at 896 (“Even though an allegation may be unsubstantiated, perceivers are, in a sense, hardwired to unquestioningly incorporate this information into their belief structure and then only unaccept it under certain conditions.”). This concern underlies the issues with pretrial publicity. See generally Brian H. Bornstein et al., *Pretrial Publicity and Civil Cases: A Two-Way Street?*, 26 L. & HUM. BEHAV. 3 (2002); see also Gilbert et al., *supra* note 251; Wegner et al., *Incrimination Through Innuendo*, *supra* note 251; Wegner et al., *Transparency of Denial*, *supra* note 251. What people infer from the fact that a target settled an enforcement action and whether and how the nature of the settlement influences those inferences are empirical questions that are worthy of further study.

260. Patrick McGeehan, *\$100 Million Fine for Merrill Lynch*, N.Y. TIMES (May 22, 2002), <http://www.nytimes.com/2002/05/22/business/100-million-fine-for-merrill-lynch.html>; see also HEARIT, *supra* note 249, at 210 (“Cannot the willingness to settle and pay a \$100 million fine be read as an admission of guilt?”); Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247, 260 (2005) (observing claims that “[t]he payment is the acknowledgment of fault”).

261. Peter Lattman, *Judge is Skeptical of S.E.C. Deal with Hedge Fund*, N.Y. TIMES (Mar. 28, 2013), <https://dealbook.nytimes.com/2013/03/28/judge-questions-s-e-c-settlement-with-steven-cohens-hedge-fund>.

## 2. Silence and No-Admit-No-Deny

Targets face similar risks when they either remain silent or agree to state that they neither admit nor deny the allegations. Remaining silent in the face of detailed allegations is not likely to be tenable or effective. Because observers tend “to believe rather than disbelieve,”<sup>262</sup> unanswered allegations are likely to be accepted. “[T]he failure of reticence to challenge such information is likely to leave the perceiver with the same belief that he or she formed in response to the original allegation—that the accused party is guilty.”<sup>263</sup> In addition, because silence both “fails to disconfirm guilt” and “fails to convey redemption,” research has found that it is a suboptimal response in most cases.<sup>264</sup> “Not offering any communication conveys a lack of concern and integrity, as well as incompetence.”<sup>265</sup>

We have seen that agencies may refuse to allow targets to remain silent, treating the refusal to admit the allegations as a denial unless the target explicitly indicates that it neither admits nor denies the agency’s charges.<sup>266</sup> Like silence, such no-admit-no-deny provisions do not admit the allegations and, therefore, do not communicate that the target will do better in the future. And, like silence, no-admit-no-deny provisions do not deny the allegations and, therefore, do not attempt to disconfirm wrongdoing. It is possible, however, that no-admit-no-deny provisions are worse for the target than silence, because the target must explicitly state that it does not deny the allegations.<sup>267</sup>

## 3. Admissions

In contrast to silence or denial, making admissions may have positive reputational effects for the target, particularly in the long term.<sup>268</sup> On one hand, admissions may confirm the

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262. Ferrin et al., *supra* note 256, at 896.

263. *Id.*

264. *Id.* (“[R]eticence combines the worst elements of apology and denial: As a response to an integrity violation, reticence is akin to apology in that it fails to disconfirm guilt, and as a response to a competence violation, reticence is akin to denial in that it fails to convey redemption.”).

265. Gillespie & Dietz, *supra* note 250, at 138.

266. *See supra* notes 122–23.

267. This empirical question is worth additional exploration.

268. *See generally* HEARIT, *supra* note 249 (examining the role of apologies in crisis management); W. Timothy Coombs, *Protecting Organization Reputations During a Crisis: The Development and Application of Situational Crisis Communication Theory*, 10 CORP. REPUTATION REV. 163 (2007) (describing a

transgression.<sup>269</sup> But recall that the allegations will already be detailed in the complaint or consent decree. Admissions, therefore, may be “unlikely to cause any further decline in trust [beyond the allegations themselves] because the admission only provides information that is consistent with the belief that the perceiver formed in response to the original allegation—that the accused party is guilty.”<sup>270</sup>

More importantly, if properly made, admissions may be able to provide the acknowledgement that victims and the public seek as a signal that the transgression will not be repeated.<sup>271</sup> Injured parties and the public may also desire information from the target,<sup>272</sup> and admissions can satisfy that need. But targets may benefit even more by going beyond mere disclosure and coupling their admissions with apologies,<sup>273</sup>

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framework for managing threats to reputation); Gillespie & Dietz, *supra* note 250, at 140 (exploring the role of admissions in trust repair).

269. Ferrin et al., *supra* note 256, at 894; Kim et al., *supra* note 254, at 106.

270. Ferrin et al., *supra* note 256, at 896.

271. *Id.* at 899, 903; Gillespie & Dietz, *supra* note 250, at 140; Kim et al., *supra* note 254, at 108–09, 112–13. Error disclosure is widely discussed in the context of medical malpractice. One concern that is raised is that disclosure and apology will alert patients to errors of which they might not have otherwise become aware. *See generally* Allen Kachalia et al., *Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program*, 153 ANNALS INTERNAL MED. 213, 213 (2010) (recognizing concern that disclosure might invite lawsuits); Michelle M. Mello et al., *Communication-and-Resolution Programs: The Challenges and Lessons Learned from Six Early Adopters*, 33 HEALTH AFF. 20, 24 (2014) (describing concern that disclosure would increase litigation risk). The civil enforcement context differs in important ways from the medical disclosure context. As noted above, in cases of civil enforcement, the allegations are detailed in the agency’s complaint and in the consent order. *See supra* notes 96–104.

272. *See, e.g.*, Gallagher et al., *supra* note 227, at 1004–05 (finding that injured patients want and expect to receive information about what happened, what will be done, and their medical condition).

273. *See, e.g.*, Coombs, *supra* note 268, at 172 (describing apologies as a “rebuilding” strategy); Gillespie & Dietz, *supra* note 250, at 140 (describing apologies as important to reputation and trust repair); Grappi & Romani, *supra* note 254, at 26 (exploring the effects of a confessional strategy); Edward C. Tomlinson et al., *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 J. MGMT. 165, 169 (2004) (exploring the role of apologies in repairing violations). An apology goes beyond simply admitting facts or even a violation, incorporating “acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done.” NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 3 (1991); *see also* NICK SMITH, *I WAS WRONG: THE MEANINGS OF APOLOGIES* 18–19 (2008).



making promises to improve in the future,<sup>274</sup> and embracing steps toward reform.<sup>275</sup> Indeed, crisis communication experts advise that companies investigate, disclose, and apologize.<sup>276</sup>

Apologies are thought to be particularly appropriate and advisable when the crisis at hand involves violation of law or regulation.<sup>277</sup> Establishing a collective account of the facts (what happened, how, and why), apologizing, and engaging in reparation and reform (as appropriate) to prevent future missteps are central to repairing trust in the organization.<sup>278</sup> In-

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274. Maurice E. Schweitzer et al., *Promise and Lies: Restoring Violated Trust*, 101 *ORG. BEHAV. & HUM. DECISION PROCESSES* 1, 15 (2006).

275. See, e.g., Vincent et al., *supra* note 227, at 1613; see also C. Harry Hui et al., *The Impact of Post-Apology Behavioral Consistency on Victim's Forgiveness Intention: A Study of Trust Violation Among Coworkers*, 41 *J. APPLIED SOC. PSYCHOL.* 1214, 1226–29 (2011) (exploring how behavior can undermine or reinforce an apology). In some cases, targets may try to couple these types of additional measures with a settlement in which they do *not* make admissions. As we noted earlier, Wells Fargo settled the allegations against it with a number of administrative agencies, neither admitting nor denying the allegations. Wells Fargo also, however, made apologetic statements in congressional hearings, to its employees, in full-page newspaper ads, and on its website. See, e.g., Pasquarelli, *supra* note 7; Lucinda Shen, *Wells Fargo CEO Tim Sloan Just Apologized to His Employees*, *FORTUNE* (Oct. 26, 2016), <http://fortune.com/2016/10/26/time-sloan-fargo-apology>; *Wells Fargo Hearing*, *supra* note 6; *The Latest We're Doing to Build a Better Wells Fargo*, WELLS FARGO, <https://www.wellsfargo.com/commitment> (last visited Feb. 2, 2018). The apology and the underlying lack of admissions, however, garnered criticism. See, e.g., Gary Frisch, *Why Wells Fargo's Apology Wasn't an Apology at All*, *EQUITIES.COM* (Sept. 21, 2016), <https://www.equities.com/news/why-wells-fargo-s-apology-wasn-t-an-apology-at-all>; Lucy Kellaway, *Wells Fargo's Wagonload of Insincere Regrets*, *FIN. TIMES* (Sept. 18, 2016), <https://www.ft.com/content/55ee4610-790e-11e6-97ae-647294649b28>.

276. See HEARIT, *supra* note 249; Coombs, *supra* note 268, at 172; Gillespie & Dietz, *supra* note 250, at 140.

277. Coombs, *supra* note 268, at 172; see also W. Timothy Coombs, *Choosing the Right Words: The Development of Guidelines for the Selection of the "Appropriate" Crisis-Response Strategies*, 8 *MGMT. COMM. Q.* 447, 466 (1995); W. Timothy Coombs & Sherry J. Holladay, *Helping Crisis Managers Protect Reputational Assets: Initial Tests of the Situational Crisis Communication Theory*, 16 *MGMT. COMM. Q.* 165, 172 (2002); see Liang Ma & Mengqi (Monica) Zhan, *Effects of Attributed Responsibility and Response Strategies on Organizational Reputation: A Meta-Analysis of Situational Crisis Communication Theory Research*, 28 *J. PUB. REL. RES.* 102, 105 (2016).

278. Reinhard Bachmann et al., *Repairing Trust in Organizations and Institutions: Toward a Conceptual Framework*, 36 *ORG. STUD.* 1123, 1125 (2015) (arguing that “restoring organizational trust first requires a process of sense-making to establish a shared understanding or accepted account of what happened, how and why” and “also what needs to be reformed or changed to prevent a future violation”); Gillespie & Dietz, *supra* note 250, at 133–35 (recommending that the organization make “apologies and reparations (where appropriate),” engage in actions “designed to avoid and prevent future trust

deed, “taking responsibility for the consequences of its actions in the face of [legal, commercial, or shareholder pressure] strongly indicates an organization’s integrity and concern for those affected.”<sup>279</sup> Acknowledging violations and accepting responsibility can also create the conditions that can lead to improvement in the relevant processes,<sup>280</sup> and demonstrate a commitment to that improvement going forward.<sup>281</sup> Thus, apologies have been associated with increased trust,<sup>282</sup> improved reputation in the long term,<sup>283</sup> and less anger.<sup>284</sup>

### C. NEGOTIATING ADMISSIONS

When considering approaches to admissions, commentators and agencies tend to focus on the potential effects of policies such as no-admit-no-deny on litigation and litigation risks. As we have seen, to the extent that enforcement targets are reluctant to make admissions in the face of collateral consequences,

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*transgressions*” and that “actively demonstrate ability, benevolence, and integrity”); see also ROY J. LEWICKI & BARBARA BENEDICT BUNKER, DEVELOPING AND MAINTAINING TRUST IN WORK RELATIONSHIPS, in TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH 114, 124 (Roderick M. Kramer & Tom R. Tyler eds., 1996) (recommending a four-stage process for trust repair).

279. Gillespie & Dietz, *supra* note 250, at 140.

280. See, e.g., Fred Rosner et al., *Disclosure and Prevention of Medical Errors*, 160 ARCHIVES INTERNAL MED. 2089, 2091 (2000) (explaining the connection between admitting and preventing errors).

281. Michael D. Pfarrer et al., *After the Fall: Reintegrating the Corrupt Organization*, 33 ACAD. MGMT. REV. 730, 738 (2008); see also Gillespie & Dietz, *supra* note 250, at 140 (arguing that “the sincerity of acknowledging direct responsibility (internal attribution) outweigh[s] the negative implications from conceded guilt. In contrast, alternative responses—excuses, reticence, or citing external attributions—will be viewed as deceptive and will therefore be less effective . . . .”); Edward C. Tomlinson & Roger C. Mayer, *The Role of Causal Attribution Dimensions in Trust Repair*, 34 ACAD. MGMT. REV. 85, 98 (2009) (noting that acknowledging responsibility “restore[s] trust or cooperation after a violation under certain circumstances”).

282. Tomlinson et al., *supra* note 273, at 181. For an example, see Nicole Gillespie et al., *Organizational Reintegration and Trust Repair After an Integrity Violation: A Case Study*, 24 BUS. ETHICS Q. 371 (2014).

283. W. Timothy Coombs & Sherry J. Holladay, *Comparing Apology to Equivalent Crisis Response Strategies: Clarifying Apology’s Role and Value in Crisis Communication*, 34 PUB. REL. REV. 252, 255–56 (2008); Lisa Lyon & Glen T. Cameron, *A Relational Approach Examining the Interplay of Prior Reputation and Immediate Response to a Crisis*, 16 J. PUB. REL. RES. 213, 232 (2004); Pace et al., *supra* note 222.

284. Suman Lee & Surin Chung, *Corporate Apology and Crisis Communication: The Effect of Responsibility Admittance and Sympathetic Expression on Public’s Anger Relief*, 38 PUB. REL. REV. 932, 933 (2012).

pushing for admissions may make settlement more difficult.<sup>285</sup> Insisting on admissions may mean that it takes longer to reach settlement and that more cases will go to trial.<sup>286</sup> At the same time, however, obtaining admissions could also result in greater accountability, deterrence, and legitimacy through more settlements that include admissions as well as via court rulings. Agency negotiators have to consider the potential for all of these consequences of seeking admissions, weighing them against each other in the creation of admissions policies and in negotiating individual cases.<sup>287</sup>

Reluctance to make admissions also has consequences for enforcement targets. Litigation is not just costly and risky for the agency—it is also costly and risky for the targets of enforcement actions.<sup>288</sup> In addition, litigation means ongoing publicity and a public trial. Denial and silence may compound the reputational damage.<sup>289</sup> Making admissions when the agency insists on them can be a way for targets to avoid those costs. Though targets may not want to make admissions, a credible threat of litigation should be a factor in targets' analysis of the weighing of legal and public relations consequences. In the case of the SEC, the Agency has reported some success in obtaining admissions:

Many originally doubted our ability to implement this new approach. Some expressed concern that we would not be able to obtain admissions because defendants would be overly concerned about collateral consequences. Others wondered whether our new policy would bog down settlements and cause more parties to go to trial. But these

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285. See *supra* Part I.C (describing collateral consequences).

286. White, *supra* note 19 (“[B]ecause of our increased demands for admissions, we recognize that we may see more financial firms that say: ‘We’ll see you in court.’”); White, *supra* note 220 (“[O]ur new approach could well lead to more trials by parties refusing to admit their wrongdoing.”).

287. See, e.g., Morgenson, *supra* note 18 (quoting SEC enforcement head Andrew Ceresney’s statement that “[h]eightedened accountability or acceptance of responsibility through the defendant’s admission of misconduct may be appropriate, even if it does not allow us to achieve a prompt resolution”).

288. Targets going to trial will incur the costs of mounting a defense. See, e.g., EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 7 (Fed. Judicial Ctr. 2010) (analyzing litigation costs); Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010) (reporting median litigation costs); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 77–78 (1983) (discussing factors that determine how much a party is willing to invest in litigation). They also risk losing at trial.

289. See *supra* Parts IV.B.1, IV.B.2 (discussing admission models that allow parties to deny or remain silent as to liability).

dire predictions have not materialized and we have been able to obtain significant admissions in cases where we thought they were appropriate.<sup>290</sup>

In cases in which admissions cannot be obtained through settlement, public accountability might be achievable by taking the case to trial.<sup>291</sup> Once an agency begins to insist on obtaining admissions and elicits them in some cases, particularly in prominent cases, and successfully takes cases to trial when such admissions are not forthcoming, the agency will have increased credibility and leverage to build on those successes in future negotiations. The SEC has pointed to examples of interaction between insisting on admissions and trial. Its 2016 case against the City of Miami reportedly went to trial “primarily because the City would not accept admissions,” ultimately resulting in a one million dollar penalty.<sup>292</sup> Admissions may also alter the timing of settlement. SEC actions are often settled at the same time they are filed.<sup>293</sup> Under the new admissions policy, however, some targets reportedly “balked at admissions during pre-filing settlement discussions.”<sup>294</sup> After the Agency

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290. Andrew Ceresney, Dir., Div. of Enf’t, Sec. & Exch. Comm’n, Keynote Address at Compliance Week 2014 (May 20, 2014), <https://www.sec.gov/news/speech/2014-spch052014ajc>; see also Morgenson, *supra* note 18 (“When the S.E.C. has demanded admissions, it says it usually gets them. If a defendant balks, the S.E.C. can respond with litigation.”). Similar experience has been reported in criminal plea bargaining. See Bibas, *supra* note 32, at 1379 (“What happens when the law forbids *Alford* and nolo pleas, judges refuse to allow them, or prosecutors refuse to enter them? Some of these cases go to trial, but many defendants eventually admit guilt . . . . Judges and counsel in states that forbid these pleas agreed that a majority of defendants who deny guilt at plea hearings eventually admit guilt when the only other option is to go to trial.”). As we noted above, however, not all are satisfied with the frequency and types of cases in which admissions have been obtained. See *supra* notes 207–16 and accompanying text (describing criticisms of the SEC).

291. See, e.g., White, *supra* note 220 (“More trials should mean greater public accountability and more instances of a full factual record of wrongdoing that should foster better development of the law.”).

292. White, A New Model, *supra* note 187.

293. CHOI ET AL., *supra* note 47, at 7.

294. White, A New Model, *supra* note 187 (citing Litigation Release, Sec. & Exch. Comm’n, SEC Obtains Final Judgment Against Promoters of Pyramid Scheme Targeting Latino Communities (Sept. 19, 2016), <https://www.sec.gov/litigation/litreleases/2016/lr23647.htm>; Litigation Release, Sec. & Exch. Comm’n, SEC Obtains Final Judgment Against Massachusetts-Based Promoter of Pyramid Scheme Targeting Latino Communities (May 27, 2016), <http://www.sec.gov/litigation/litreleases/2016/lr23548.htm>; Litigation Release, Sec. & Exch. Comm’n, SEC Obtains Final Judgment Against Promoter of Pyramid Scheme Targeting Latino Communities (Sept. 17, 2015), <https://www.sec.gov/litigation/litreleases/2015/lr23351.htm>; Press Release, Sec. & Exch. Comm’n,

filed the action, however, these targets ultimately agreed to settlements that included admissions.<sup>295</sup> And the prospect of having to make admissions or go to trial may more effectively deter wrongdoing in the first place.<sup>296</sup>

### 1. Admissions of Facts Versus Admissions of Legal Violations

One decision that agencies must make is whether to simply elicit admissions about facts or to insist on admissions about legal violations. In the aftermath of wrongdoing, there is often a desire that transgressors take responsibility for their behavior and for having caused harm.<sup>297</sup> Indeed, the inclusion of responsibility-taking is what makes apologies unique among remedial responses<sup>298</sup> and renders them particularly effective.<sup>299</sup> Accepting responsibility contributes significantly to the positive

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Wedbush Securities and Two Officials Agree to Settle SEC Case (Nov. 20, 2014), <https://www.sec.gov/news/press-release/2014-263>).

295. White, *A New Model*, *supra* note 187.

296. *See supra* note 228 and accompanying text (describing the deterrent effect of knowing that an admission will be required).

297. *See, e.g.*, Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 *LAW & SOC'Y REV.* 645, 661 (2008) (reporting that victims' families wanted a trial so that the defendants could be held accountable for their decisions); Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 *JAMA* 1359, 1361 (1992) (noting that plaintiffs were motivated by a desire for transparency and accountability); Vincent et al., *supra* note 227, at 1612 (noting the same).

298. The acceptance of responsibility distinguishes apologies from other remedial responses such as denials, excuses, and justifications. *See* ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* 113 (1971) (describing apologies as a "splitting of the self into a blameworthy part and a part that stands back and sympathizes with the blame giving"); TAVUCHIS, *supra* note 273, at 3 (describing the admission of fault as a minimum requirement of apologies); Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 *ANN. REV. PSYCHOL.* 133, 162 (1992) (describing the social functions of apologies); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 *AM. SOC. REV.* 46, 59 (1968) (describing the same).

299. *See, e.g.*, Pace et al., *supra* note 222, at 420 (describing benefits to company reputations); Robbenolt, *Legal Settlement*, *supra* note 25, at 486–89, 495–97 (analyzing the effect of apologies on settlement negotiations); Robbenolt, *Settlement Levers*, *supra* note 25, at 359–65 (analyzing the same); Scher & Darley, *supra* note 230, at 134–36 (comparing the effectiveness of different types of apologies); Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 *J. SOC. PSYCHOL.* 465, 476 (2004) (analyzing how the objective components of a harm-doer's interaction with a victim affect the victim's subjective perception of that interaction).

impacts of apology,<sup>300</sup> though expressions of sympathy without a concomitant taking of responsibility can have positive, albeit smaller, effects as well.<sup>301</sup>

Obtaining admissions of wrongdoing, guilt, or particular legal violations, then, might be particularly useful in signaling accountability to the public. Responsibility-taking might also further agencies' interests in deterrence and minimizing misconduct in the future.<sup>302</sup> As such, these sorts of admissions may have important benefits in some cases.

To the extent that targets are reluctant to take responsibility for particular wrongdoing,<sup>303</sup> however, agencies may still benefit from eliciting factual admissions. In addition to responsibility-taking, injured parties tend to value explanations of what has transpired.<sup>304</sup> Claimants in tort cases, for example,

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300. See, e.g., Lewicki et al., *supra* note 257, at 190 (finding that acknowledgement of responsibility is an important component of an apology); sources cited *supra* note 299 and accompanying text.

301. Robbennolt, *Settlement Levers*, *supra* note 25, at 34 (finding that partial apologies can have a positive impact); see also Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1048 (1999); Arie Nadler & Ido Liviatan, *Intergroup Reconciliation: Effects of Adversary's Expressions of Empathy, Responsibility, and Recipients' Trust*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 459, 463 (2006) (finding that those who heard expressions of sympathy perceived more acceptance of responsibility); Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1187–88 (1997) (concluding that partial apologies can be better than no apology at all).

302. See *supra* notes 229–36 and accompanying text (discussing the impact of apologies on perceptions about future behavior).

303. This reluctance may stem from concerns about collateral consequences. See *supra* Part I.C. (discussing collateral consequences). It may also be a result of a variety of other barriers to admitting wrongdoing. See generally CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS (2007) (describing the difficulties that people face in acknowledging mistakes); Jennifer K. Robbennolt & Jean Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013) (examining how it can be difficult to acknowledge unethical behavior).

304. See SUSAN F. HIRSCH, IN THE MOMENT OF GREATEST CALAMITY: TERRORISM, GRIEF, AND A VICTIM'S QUEST FOR JUSTICE 1–2 (2006) (describing desire for information in the aftermath of the bombings of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania); Gallagher et al., *supra* note 227, at 1005–06 (describing patients' desire for information about medical errors); Hadfield, *supra* note 297, at 670–71 (describing 9/11 victims' desire for information); Hickson et al., *supra* note 297, at 1362 (describing a desire for information in the tort context); Lewicki et al., *supra* note 257, at 190 (identifying “explanation” as an important component of an effective apology); Vincent et al., *supra* note 227, at 1609 (describing a desire for information in the tort context); see also Rachel Abrams & Danielle Ivory, *G.M. Secrecy on Crashes Adds to Families' Pain*, N.Y. TIMES (Apr. 3, 2014), <https://www.nytimes>

sometimes file lawsuits to acquire information about how their injuries occurred,<sup>305</sup> and are less likely to file claims when they receive information and explanations.<sup>306</sup> Similarly, people often want apologies from offenders; such apologies are valued, in part, as providing an explanation about what happened<sup>307</sup> and seem more adequate when they provide, and are based on, a shared factual understanding or “corroborated factual record.”<sup>308</sup> The provision of information can “convey respect for the victim and affirm his or her status. The very fact that the perpetrator thinks that the victim is due an explanation signals respect for the victim and tends to diminish the victim’s anger.”<sup>309</sup> Thus the provision of information and explanations can be a valuable part of the admissions elicited by an agency, even in the absence of the taking of responsibility or admissions of specific legal violations.<sup>310</sup>

Consider, as an example, medical “communication-and-resolution programs” that work to provide information to pa-

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.com/2014/04/03/business/barriers-wall-off-the-facts-of-gm-car-crashes.html (describing victims’ desire for information).

305. See, e.g., Hickson et al., *supra* note 297; Vincent et al., *supra* note 227; see also Hadfield, *supra* note 297. Claimants in medical malpractice lawsuits, for example, often assert that they filed suit to get information about what happened to them. Once they obtain that information, many claimants drop their claims. Cf. Dwight Golann, *Dropped Medical Malpractice Claims: Their Surprising Frequency, Apparent Causes, And Potential Remedies*, 30 HEALTH AFF. 1343, 1345–47 (2011) (concluding that many plaintiffs drop their claims as they acquire additional information).

306. See E. Allan Lind et al., *The Winding Road from Employee to Complainant: Situational and Psychological Determinants of Wrongful-Termination Claims*, 45 ADMIN. SCI. Q. 557, 576 (2000) (finding that employees who receive explanations for adverse employment decisions are less likely to file claims against their employers); Frank A. Sloan & Chee Ruey Hsieh, *Injury, Liability, and the Decision To File a Medical Malpractice Claim*, 29 L. & SOC’Y REV. 413, 427 (1995) (finding that patients who are promptly provided with information about their medical care, any problems, and their condition, are less likely to file lawsuits). See generally John C. Shaw et al., *To Justify or Excuse?: A Meta-Analytic Review of the Effects of Explanations*, 88 J. APPLIED PSYCHOL. 444 (2003) (reporting a meta-analysis finding that explanations influence justice perceptions).

307. See, e.g., Gallagher et al., *supra* note 227, at 1006 (describing a desire for information by medical malpractice claimants).

308. SMITH, *supra* note 273, at 28–33 (describing the importance of an agreed-upon set of facts for an effective apology).

309. Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 537 (2001).

310. See generally Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT’L L. 121, 155–56 (2017) (discussing the role of explanations in making amends for civilian casualties in armed conflict).

tients who experience negative outcomes or injuries during their medical care.<sup>311</sup> When a patient is injured, an investigation is conducted. If the investigation uncovers an error, information about the error is disclosed to the patient or the patient's family and attempts to settle the case are made.<sup>312</sup> If, instead, the investigation finds no error, no settlement or admission of error is made, but information about the investigation and its findings are still provided to the patient.<sup>313</sup>

## 2. Admissions of State of Mind

We saw above that information about the target's state of mind can be one element of the facts of a case, one that can have important implications for determining whether there has been a particular legal violation. While some claims will require only proof of negligence, other claims will require proof of scienter.<sup>314</sup> Targets, therefore, may resist making admissions that confirm intentionality or recklessness, out of concern for the potential collateral consequences they may face.<sup>315</sup>

Audiences for admissions, however, may value factual information about the state of mind of the offender. In writing about the importance of establishing a shared factual understanding of a transgression, philosopher Nick Smith notes that "the offender's mental states at the time of the offense will often amount to significant facts" that are important to clarify as part of a "thorough factual account."<sup>316</sup> This is so, at least in

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311. See generally Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH & LIFE SCI. L. 125 (2009) (describing error disclosure program at the University of Michigan); Kachalia et al., *supra* note 271 (same); Michelle M. Mello et al., *Communication-and-Resolution Programs: The Challenges and Lessons Learned From Six Early Adopters*, 33 HEALTH AFF. 20 (2014) (examining communication-and-resolution programs at six different organizations).

312. See sources cited *supra* note 311.

313. *Id.*

314. See *supra* notes 148–50 and accompanying text (describing state of mind requirements in securities litigation).

315. See *supra* Part I.C. (describing collateral consequences).

316. SMITH, *supra* note 273, at 29; *id.* at 50 ("[T]he mental state of the offender before and at the time of the offense holds significance not only because it bears on her moral responsibility, but also because it fills in important details about the factual record. The offender's mental states can provide some of the most important historical facts that a victim seeks to understand, and in this respect the analysis of the offender's mind can be an important component of corroborating the historical record . . ."); see also NICK SMITH, JUSTICE THROUGH APOLOGIES: REMORSE, REFORM, AND PUNISHMENT 264–65



part, because information about state of mind influences perceptions of and attributions about harm. Perceptions of intentionality, for example, are a key factor in people's attributions of blame and culpability.<sup>317</sup>

The effects of admitting state of mind or making apologies for conduct that is perceived to have been intentional have been less frequently studied empirically. We do know that when injured persons perceive harm as having been intentionally inflicted, they tend to perceive that harm as more severe, be angrier, and be less likely to forgive the offender.<sup>318</sup> But, importantly, they are also more likely to desire an apology when the harm is viewed as having been intentionally inflicted.<sup>319</sup> Offenders, on the other hand, tend to be less inclined toward apologizing for intentional behavior.<sup>320</sup> And apologies made in the face of intentional wrongdoing may face hurdles as compared to those given in response to unintentional wrongdoing.<sup>321</sup>

Given the greater disinclination to apologize for intentional conduct and the greater potential for negative collateral consequences for offenses involving scienter, agencies should expect that targets will be more resistant to making admissions related to state of mind and scienter than they will with regard to other facts. Agencies will have to decide in particular cases how important such admissions are to their overall goals. In some

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(2014) [hereinafter SMITH, JUSTICE THROUGH APOLOGIES] (explaining the importance of mental states in establishing a factual record).

317. See JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 34–37 (2016) (discussing the roles of intent in tort liability); John M. Darley & Thane S. Pitman, *The Psychology of Compensatory and Retributive Justice*, 7 PERSONALITY & SOC. PSYCHOL. REV. 324, 327 (2003) (describing how perceptions of intentionality influence decisions about legal judgments).

318. See, e.g., Daniel L. Ames & Susan T. Fiske, *Intentional Harms Are Worse, Even When They're Not*, 24 PSYCHOL. SCI. 1755, 1756 (2013); John M. Darley & Charles W. Huff, *Heightened Damage Assessment as a Result of the Intentionality of the Damage-Causing Act*, 29 BRIT. J. SOC. PSYCHOL. 181, 181 (1990); Kurt Gray & Daniel M. Wegner, *The Sting of Intentional Pain*, 19 PSYCHOL. SCI. 1260, 1260 (2008); Joost M. Leunissen et al., *The Apology Mismatch: Asymmetries Between Victim's Need for Apologies and Perpetrator's Willingness to Apologize*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 315, 316–17 (2013) (exploring how intentionality influences judgments).

319. Leunissen et al., *supra* note 318.

320. *Id.*

321. See, e.g., C. Ward Struthers et al., *The Effects of Attributions of Intent and Apology on Forgiveness: When Saying Sorry May Not Help the Story*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 983, 990–91 (2008) (exploring the challenges for apologies following an intentional wrong).

instances, obtaining admissions of basic (non-state of mind) facts may be better than nothing; in other cases, the agency's goals might be better served by expecting more.

### 3. Agency Evidence of Target Wrongdoing

Cases, and allegations within cases, will fall on a spectrum in terms of the clarity of the available evidence that supports the allegations. Some allegations will be supported by more clear evidence than others.<sup>322</sup> Thus it may be appropriate to negotiate a set of admissions that admit to certain facts or violations, but not others.

If the putative injurer is unsure of what happened, let him first investigate. If, following such investigation, he concludes that he is clearly responsible for one piece but unsure about some other piece, then let him at least take responsibility for the first piece . . . . [I]t will help to focus subsequent discussions and possible legal proceedings on what they properly should be focused, namely, on issues of fact and law where there is genuine dispute.<sup>323</sup>

Targets, of course, may be less willing to admit to allegations that are less clearly established. But the potential consequences of admissions for targets facing less well-supported allegations may vary as well. For example, research has found that apologies, particularly apologies that admit responsibility, may be most needed and effective when the evidence of the defendant's fault is relatively clear.<sup>324</sup> Indeed, failing to take responsibility in the face of clear evidence of wrongdoing "can be worse than saying nothing at all. It's insulting to merely express sympathy or benevolence when you should be admitting

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322. Cohen, *supra* note 235, at 920 (contrasting complex cases in which fault is ambiguous and not easily established with cases in which "injurers do know that they are at fault for what they have done").

323. *Id.* at 952. This may result in "carefully crafted" admissions that are designed to minimize the collateral consequences. *See, e.g.*, ElBoghdady & Douglas, *supra* note 246 (describing a factual admission designed to minimize future liability). The notion of carefully crafted admissions has parallels to the discussion of "safe apologies" in the apologies literature. *See, e.g.*, Cohen, *supra* note 301, at 1067–68; Lee Taft, Essay, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1153–54 n.94 (2000) (criticizing laws that exclude apologies from evidence at trial); Robbennolt, *Legal Settlement*, *supra* note 25, at 473–74 (describing the debate over safe apologies).

324. Robbennolt, *Settlement Levers*, *supra* note 25, at 360–62 (exploring the effects of defendant's fault on perceptions of an apology); *see also* Robbennolt, *Legal Settlement*, *supra* note 25, at 494–95 (finding that apologies that do not include acceptance of responsibility can negatively impact victim perceptions when there is clear evidence of fault).

your fault.”<sup>325</sup> It is in these situations, in particular, that specific admissions—rather than mere platitudes—may be the most necessary. This suggests that admissions may hold the most potential benefit for targets when their litigation prospects are the weakest and the additional or marginal risks posed by making admissions are relatively low given the independent evidence of the transgression.<sup>326</sup>

In contrast, research has found that taking responsibility is less clearly helpful to transgressors when the facts are ambiguous.<sup>327</sup> Correspondingly, the liability risks in such circumstances are greater. Thus, it would not be surprising if it were more difficult for the agency to obtain admissions in such cases.

Consider the SEC’s evolving admissions policy in this regard. The first cases in which the SEC decided to depart from its no-admit-no-deny approach were those cases in which the target had made admissions in settling a criminal case or had been convicted in a criminal action based on the same underlying facts.<sup>328</sup> These are likely to be cases in which the evidence for the allegations is relatively compelling and the public desire for admissions is particularly strong.

#### 4. Negotiated Admissions

Crisis communication experts advise quick and voluntary admissions in the wake of problems.<sup>329</sup> Because admissions in the administrative enforcement context come as part of a negotiated settlement, critics might reasonably ask whether the fact that an admission or apology comes as part of a negotiated settlement with the agency diminishes its credibility and effec-

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325. Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 838 (2002); see also Robbennolt, *Legal Settlement*, *supra* note 25, at 497–98 (finding that when an offender failed to take responsibility in an apology for a severe injury in the face of strong evidence of responsibility, observers tended to attribute *more* responsibility to the offender and saw the offender as *less* likely to be careful in the future).

326. Robbennolt, *Settlement Levers*, *supra* note 25, at 369; see also Cohen, *supra* note 301, at 1028–29 (“Where one’s culpability can readily be proved by independent evidence other than an apology, admitting one’s fault when making an apology will also have little impact on the plaintiff’s ability to prove his case, for he already can.”).

327. Robbennolt, *Settlement Levers*, *supra* note 25, at 369.

328. See *supra* notes 181–84 and accompanying text (describing the origins of the SEC policy requiring admissions).

329. See, e.g., Gillespie & Dietz, *supra* note 250, at 139–40 (recommending a timely diagnosis of fault and a corresponding apology); Pfarrer et al., *supra* note 281, at 730 (proposing a four-stage model for organizational response to a transgression).

tiveness.<sup>330</sup> Research has found, however, that negotiated apologies can be as effective as apologies that are spontaneous.<sup>331</sup> In the same vein, research has found that apologies given by attorneys on behalf of clients during negotiation have beneficial effects, though apologies given by attorneys tend not to be as effective as apologies given directly by the transgressor.<sup>332</sup> Thus, in a world in which an enforcement target has not already made admissions and apologized, doing so as part of or simultaneously with the settlement may still be effective.

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This Part has examined what existing empirical research tells us about the potential effects of admissions on assessments of accountability, deterrence, perceptions of agency legitimacy, target reputation, and negotiation dynamics. It is not our purpose to make a normative argument that the value of admissions for accountability, deterrence, or agency legitimacy should take precedence over other considerations or other ways to achieve those goals. Instead, we more precisely articulate what is communicated by admissions, denials, and silence, and the potential effects of these responses, so that regulators and litigants are better able to weigh the costs and benefits of admissions and tailor admissions to the particular administrative context.

With these caveats in mind, however, the existing empirical literature on blame, acknowledgement, claiming, the attrib-

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330. For a discussion of compelled, coerced, and requested apologies, see SMITH, JUSTICE THROUGH APOLOGIES, *supra* note 316, at 51–93; Robyn Carroll, *You Can't Order Sorrow, So Is There Any Value in an Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases*, 33 U.N.S.W. L.J. 360 (2010); Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCHOL. 418, 421 (2007) (exploring reactions to pressured apologies); Jennifer K. Robbennolt, *The Effects of Negotiated and Delegated Apologies in Settlement Negotiation*, 37 LAW & HUM. BEHAV. 128, 133 (2013) (exploring reactions to requested apologies); Alana Saulnier & Diane Sivasubramaniam, *Effects of Victim Presence and Coercion in Restorative Justice: An Experimental Paradigm*, 39 LAW & HUM. BEHAV. 378, 385 (2015) (finding that coercion has “clear and robust negative effects on the quality of apologies”); Carl D. Schneider, *What It Means to Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265, 277 (2000) (advocating apology by civil defendants in mediation); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006) (advocating court-ordered apologies in civil rights cases with government defendants).

331. Robbennolt, *supra* note 330.

332. *Id.*

ution of responsibility, and apologies has a number of implications that should be of particular interest to targets and agencies. Our examination of this literature has also identified a number of interesting empirical questions that arise in this context.

First, facts and explanation matter. It is not enough to say, as some critics have, that factual admissions are the weakest type of admission.<sup>333</sup> Studies in other contexts suggest that information and explanations have value in themselves and that creating “a public record of the conduct”<sup>334</sup> can help to further regulatory goals. Our review of the empirical literature also suggests where more nuanced research is needed. For example, research is needed to explore the effects of detailed factual allegations, particularly where those factual allegations are explicitly neither admitted nor denied;<sup>335</sup> whether explicit non-denial of those detailed facts is similar to or different from silence;<sup>336</sup> and the extent to which explicit factual admissions change perceptions.<sup>337</sup>

Second, targets of enforcement activity do and should have more complicated relationships with admissions than a narrow focus on the particular matter and related short-term litigation risks would suggest. Targets have to weigh the reputational damage of refusing a settlement that requires admissions. Litigation has its own publicity and potential for reputational damage to consider. Admissions will also have multiple audiences. Particularly for legal entities such as corporations, admissions may have internal functions, signaling to employees and other internal audiences something about the organization’s trustworthiness and intentions.<sup>338</sup> Admissions may also have an external function, sending signals to various external audiences, including the public, consumers, and regulators. Moreover, thinking more precisely about the effects of admis-

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333. Letter from Elizabeth Warren, *supra* note 207, at 6 (quoting Stephen Gandel, *Did the SEC Let JPMorgan Off the Hook?*, FORTUNE (Sept. 20, 2013), <http://fortune.com/2013/09/20/did-the-sec-let-jpmorgan-off-the-hook>).

334. White, *supra* note 220 (noting that requiring admissions “creates a public record of the conduct at issue and demonstrates unequivocally the defendant’s acceptance of responsibility for his or her acts”).

335. See *supra* Part II.A.1.

336. See *supra* Part II.A.3.

337. See *supra* Part IV.A.3.

338. See Bachmann et al., *supra* note 278, at 1136 (noting both internal and external audiences); Gillespie & Dietz, *supra* note 250, at 142 (focusing, in particular, on employees).

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sion, silence, and denial and thinking in a more nuanced way about the content of admissions gives targets and agencies a range of options that may be useful in accomplishing their goals in particular cases. Finally, targets must consider how the meaning of admissions may be amplified or modified by other communications, such as apologies.

Third, although it may seem that targets of agency enforcement will always want to deny facts or responsibility, denial, or even silence, will sometimes be a bad choice for targets. This may be particularly true when a target of civil enforcement has already pled guilty to a crime based on the same conduct. Similarly, in the context of a broader settlement with multiple agencies, it may be that once the target has made admissions in one instance, it is better off in terms of public reputation if it makes admissions—and, perhaps, takes other remedial steps—in other settlements as well. Remaining silent or making overt denials, particularly in the face of admissions elsewhere, of the exact facts at issue, may unnecessarily complicate negotiations with the agency and hurt the target's credibility, in addition to creating legitimacy problems for the agency.<sup>339</sup>

#### CONCLUSION

*Should agencies require admissions of wrongdoing from the targets of civil enforcement?* In this Article we step beyond a narrow focus on the SEC and other financial regulators and put the policy decision about whether to require admissions into the broader administrative context. Moreover, we step beyond a simple discussion of admissions and provide a more nuanced account of what it means to make and require admissions. We draw on empirical studies of blame, acknowledgement, claiming, the attribution of responsibility, and apologies to shed light on the function and potential value of admissions by targets of civil enforcement.

The failure of the SEC and other financial regulators to require admissions of wrongdoing has garnered the spotlight on this issue, triggering cries of rigged justice and calls for greater public accountability. Even the former chair of the SEC has

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339. More systematic research on the effects of failure to obtain admissions on perceptions of agency legitimacy would be informative. *See generally* Bibas, *supra* note 32, at 1386 (“*Alford* and *nolo contendere* pleas send mixed messages, breeding public doubt, uncertainty, and lack of respect for the criminal justice system.”).

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said, “[T]here is nothing quite like a company or corporate executive who violated the securities laws openly and publicly admitting their guilt.”<sup>340</sup> Judges and legislators have piled on, as exemplified by Judge Rakoff’s vocal critique in the *Citigroup* case and the 2012 Congressional hearings on financial agencies’ settlement practices.<sup>341</sup> This public pressure on the admissions policies of financial regulators is understandable, particularly in the long aftermath of a financial crisis. The SEC is a particularly useful example for thinking about admissions in civil enforcement, as the public debate forced explicit discussion of the role of settlement and consideration of whether and when enforcement targets should admit wrongdoing.

The SEC and other financial regulators, however, are only the tip of the iceberg. The SEC’s no-admit-no-deny policy is visible above water and salient in certain recent moments when it looks like it is directly in our path. But many of this Article’s examples are of settlements with agencies outside the financial sector, including the EPA, FTC, DOE, FCC, and the DOJ’s Civil Division. Settlement—ordinarily occurring without admissions and sometimes even with explicit denials—is the engine for much of administrative enforcement. Accordingly, policy choices about how to manage the interactions between admissions and settlement implicate one of the main mechanisms of administrative enforcement.

The stakes are also high because the choice of admissions policy goes to the heart of the nature of civil enforcement. Civil enforcement by administrative agencies operates at the intersection of two sets of norms: the criminal law enforcement model, in which admissions are generally required; and the private settlement model, in which disclaimers of liability are an ordinary part of settlements between private parties. Policies about whether to require admissions sit uneasily at this intersection. Which agencies and which cases provoke calls for targets to admit wrongdoing may turn in part on their perceived relationship to these two poles.

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340. White, *supra* note 132.

341. SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *vacated*, 752 F.3d 285 (2d Cir. 2014); *Hearing on Settlement Practices*, *supra* note 33.