UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F STREET, N.E.
WASHINGTON, D.C. 20549

OFFICE OF
THE SECRETARY

January 30, 2024

Margaret A. Little
New Civil Liberties Alliance
1125 19th Street NW, Suite 450
Washington, D.C. 20036

Re: Rulemaking Petition File No. 4-733

Dear Ms. Little:

This letter responds to the petition to amend a rule filed by the New Civil Liberties Alliance (NCLA) pursuant to Commission Rule of Procedure 192(a), 17 C.F.R. 201.192(a). The NCLA asks the Commission to amend Rule 202.5(e), 17 C.F.R. 202.5(e), which addresses the terms on which the Commission will accept settlements of enforcement actions. More specifically, Rule 202.5(e) reflects the Commission's policy that it will not agree to a settlement imposing a sanction, including a consent judgment in federal court, if a defendant can then publicly deny the Commission's allegations. For the reasons explained below, the Commission denies the petition and declines to amend Rule 202.5(e).[1]

BACKGROUND

Congress authorized the Commission to conduct investigations and determine whether violations of the securities laws have occurred, 15 U.S.C. 78u(a), and when it appears that a violation has occurred, the Commission may, in its discretion, bring an enforcement action in federal court, 15 U.S.C. 78u(d)(1). *See also* 17 C.F.R. 200.1. The Commission has exercised this enforcement authority for nearly 90 years. In order for Enforcement staff to file a complaint, the Commission must approve the action by a majority vote of the present Commissioners.

The Commission does not litigate every action to judgment. Rather, the Commission and a defendant may agree to settle. *SEC v. Citigroup Glob. Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) ("[The] factors that affect a litigant's decision whether to compromise a case or litigate it to the end include the value of the particular proposed compromise, the perceived likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt." (cleaned up)). As part of the settlement process, the Commission and a defendant negotiate terms,

[1] The Commission notes that the discussion in this letter exceeds the "brief statement of the grounds for denial" required by 5 U.S.C. 555(e).

including sanctions. The Commission's decision to settle reflects considerations including its judgment that obtaining an immediate result by consent serves the public interest. Among other things, if the Commission settles, it cedes its opportunity to prove the allegations that result from its investigative efforts—the Commission yields its day in court.

The Commission generally settles district court actions by seeking entry of consent judgments, which have "attributes both of contracts and of judicial decrees." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). They resemble contracts because they "are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981) ("The entry of a consent decree necessarily implies that the litigants have assented to all of its significant provisions.") (cleaned up). And they are decrees because they are memorialized in a judgment over which a court retains jurisdiction. *Armour*, 402 U.S. at 681-82. The Commission settles cases by this method rather than entering into out-of-court, non-public settlements followed by a voluntary dismissal.

Usually, when the Commission settles, a defendant signs a consent that describes the terms of the settlement to which the parties agreed and reflects the defendant's agreement that the defendant is entering into the settlement voluntarily. And then the Commission (sometimes jointly with the defendant) asks the district court to enter a consent judgment that incorporates the terms of the consent and to retain continuing jurisdiction. Just as the Commission must approve the filing of a complaint, it must approve a settlement.

Over fifty years ago, the "Wells Committee" examined the Commission's enforcement practices. Letter from William J. Casey, Chairman, Mar. 2, 1972, available at https://www.sechistorical.org/collection/ papers/1970/1972_0302_Casey.pdf. The committee produced a report in September 1972, and shortly thereafter, the Commission issued a policy regarding settlements. 37 Fed. Reg. 25224 (Nov. 29, 1972), codified at 17 C.F.R. 202.5(e).[2] The policy is one of several "informal and other procedures" that concern enforcement activities. 17 C.F.R. 202.5. It reflects the Commission's view that in any civil lawsuit or in any administrative proceeding of an accusatory nature, "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." 17 C.F.R. 202.5(e).

[2] Congress bestowed upon the Commission "the power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which [it is] responsible or for the execution of the functions vested in them by this title." 15 U.S.C. 78w(a); *see also* 15 U.S.C. 77s, 78s, 80a-37, 80b-11. The Commission has exercised this authority to adopt formal rules of procedure, 17 C.F.R. 201.100 *et seq.*, as well as the informal procedures that includes Rule 202.5(e). Rule 202.5(e) is a policy that implements and aids in the execution of the Commission's enforcement powers under Section 21 of the Exchange Act, 15 U.S.C. 78u, and other enforcement-related provisions. In announcing Rule 202.5(e) in 1972, the Commission did not engage in notice-and-comment rulemaking because the APA does not require such procedures for "general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). Rule 202.5(e) is a rule of agency procedure and practice; it announces the Commission's practices regarding what settlements it will accept.

Accordingly, the Commission announced a "policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint" or administrative order. *Id.* The Commission further noted that, in its view, "a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations." *Id.*

This policy has become known as the "no admit/no deny policy." In most settlements, the Commission does not require admissions. But the Commission also will not agree to a settlement—it will not forgo its opportunity to present evidence and prove its claims in federal court—unless the defendant agrees not to publicly deny the allegations in the complaint. The policy binds the Enforcement staff, but it does not require defendants to settle; a defendant is always free to eschew settlement and litigate.

In practice, the policy is given effect through contractual language that appears in the consent and the judgment presented to the district court for entry. Generally, the defendant states that, without admitting or denying the allegations of the complaint (except as to jurisdiction, which are admitted), the defendant consents to the entry of a judgment and accepts the agreed-upon sanctions. The defendant further agrees to comply with Rule 202.5(e) and not to make any public statements denying the allegations in the complaint. The consent grants the Commission a limited remedy in the event a defendant breaches the agreement by publicly denying the allegations: the Commission may petition the district court to vacate the final judgment and restore the action to the active docket. *E.g.*, Pet. 4.

Thus, in the event of a denial, the Commission's recourse is to ask the court to vacate the settlement. The Commission may not avail itself of its contractual remedy if it decides not to dedicate resources to reviving a once-settled case. Moreover, if the Commission seeks this relief, the district court may deny it.[3]

For over 40 years, federal district courts have entered hundreds of consent judgments in which defendants did not have to make admissions but also agreed not to deny the allegations in the complaints against them. In the past decade, however, some have questioned the Commission's practice of allowing defendants to settle enforcement actions without requiring them to admit the allegations in the complaint. *See SEC v. Citigroup Glob. Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) (holding that a district court abused its discretion when it refused to enter a "no admit/no deny" consent judgment because the defendant did not admit the allegations in the complaint). And defendants have unsuccessfully challenged no-deny provisions to which they voluntarily agreed by seeking relief years—or even decades—later in which they ask a court to line-edit the consents, eliminating the no-deny provision while retaining all the other agreed terms of the settlement. *See SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021); *SEC v. Novinger*, 40 F.4th 297 (5th Cir. 2022).

[3] When the Commission accepts offers to settle administrative adjudications, it does so pursuant to Rule 202.5(e) and respondents voluntarily agree not to publicly deny the allegations in the order instituting proceedings, and further agree that if they breach that agreement, Enforcement staff can ask the Commission to reopen the action against them.

The NCLA's petition asks the Commission to amend Rule 202.5(e) to provide that a defendant can consent to a judgment in which the defendant admits, denies, or neither admits nor denies the allegations in the complaint. While couched as a "modest" change, Pet. 6, the proposed amendment would, in effect, eliminate the policy because it would allow defendants to consent to a judgment while denying the allegations with no recourse for the Commission to return to active litigation.

DISCUSSION

After careful consideration, the Commission declines to amend Rule 202.5(e). Rule 202.5(e) is a proper exercise of the Commission's authority to decide how it will pursue its enforcement mission and settle cases. The no-deny policy allows the Commission to seek its day in court if a defendant later chooses to deny the factual basis for the enforcement action. None of the constitutional or statutory arguments presented by the petition has merit, and several contravene established precedent regarding waiver of rights.

The Commission's policy preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations. When the Commission settles, it cedes its ability to prove its allegations. A breach of the no-deny provision provides the Commission with the opportunity to ask a district court to return the case to the active docket. The court, in its discretion, may grant the request, reverting the parties to their positions before the entry of the consent judgment. This remedy for breach is not self-executing, and the Commission would have to decide, based on the facts and circumstances, whether to invoke that remedy following a public denial that violates the consent judgment.

This relief is thus closely tied to the purpose of the settlement—voluntarily resolving a matter without further litigation. It is reasonable for the Commission to agree to settle only if the defendant agrees that, upon a public denial, the Commission can seek to challenge that denial in court. The Commission is not required to choose a path whereby it waives its right to try a case while the defendant is free to publicly deny the allegations without any real ability for the Commission to respond in court. The petition suggested that the Commission, in the face of a public denial after the Commission has waived its right to try its case, can "issue its own statement" and "the public can sort out the truth in the free marketplace of ideas." Pet. 30. But the Commission does not try its cases through press releases. The no-deny provision ensures that if a defendant reneges on a settlement and publicly denies the allegations, the Commission has the opportunity to ask a court to permit it to test that denial, controlled by the rules of procedure and evidence.

Moreover, if a defendant settles without admissions and then later denies the allegations, that turnabout can negatively impact the public interest. The filing of a complaint memorializes the results of an investigation and reflects a determination by the Commission that the evidence reveals a violation of the securities laws. In settlements without admissions, a defendant who later denies the allegations in the complaint can create the incorrect impression that there was no basis for the Commission's enforcement action. Because such a denial would come only after the Commission had relinquished the

opportunity to prove its case in court with evidence, it could undermine confidence in the Commission's enforcement program.

When the Commission brings an action, the Commission and the defendant can elect to settle on terms to which both agree. Alternatively, if either party disagrees with terms that the other party views as necessary, they can decline to settle, and the Commission must bear its burdens of proof and persuasion in court. The petition seeks to alter this calculus by foreclosing the Commission from agreeing to settle—and thereby forgoing its ability to prove its case in court—only if the defendant also agrees not to publicly deny the allegations later on. The Commission may make a reasonable determination to require, as a condition of settlement that, if a settling defendant makes a public denial, the Commission can seek a return to the judicial forum to challenge assertions that the Commission's enforcement action lacked a foundation in fact or law.

The petition's constitutional arguments are not persuasive. There is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain. As the Second Circuit held when it confirmed the constitutionality of the no-deny policy, "[i]n the course of resolving legal proceedings, parties can, of course, waive their rights, including such basic rights as the right to trial and the right to confront witnesses." *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022).

Romeril followed the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987), where the court held that there is no "per se rule of invalidity" for waivers of constitutional rights. The Court did not analyze the settlement containing a waiver in prior-restraint terms, which would effectively impose something close to a per se rule against settlements. Rather, the Court established a balancing test for deciding whether *to enforce* waivers—which presumes that rights *can* be waived—and then upheld the enforcement of a waiver under the facts presented in that case. *Id.*[4]

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[4] *Rumery* and *Romeril* are part of a well-established line of precedent. *INS v. St. Cyr*, 533 U.S. 289, 321-22 (2001) ("In exchange for some perceived benefit, defendants waive several of their constitutional rights including the right to a trial."); *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184-87 (1972) (holding that due process rights can be waived); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) ("Because the defendant has, by the decree, waived his right to litigate the issuer raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected."); *Barker v. Wingo*, 407 U. S. 514, 529, 536 (1972) (waiver of speedy trial rights); *Brady v. United States*, 397 U. S. 742, 748 (1970) (allowing plea bargains to waive a defendant's trial rights and the right against self-incrimination); *Illinois* v. *Allen*, 397 U.S. 337, 342-343 (1970) (right to be present at trial); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (rights to counsel and against compulsory self-incrimination); *Fay* v. *Noia*, 372 U.S. 391, 439 (1963) (habeas corpus); *Rogers* v. *United States*, 340 U.S. 367, 371 (1951) (right against compulsory self-incrimination); *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007) (nothing in federal law prohibits constitutional waivers); *Lake James Cmty. Volunteer Fire Dep't v. Burke Cnty.*, 149 F.3d 277, 280 (4th Cir. 1998) ("[S]imply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable."); *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993), *as amended* (Mar. 8, 1994); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *United States v. Int'l Bhd. of Teamsters*, 931

"[T]he First Amendment is no exception." *Romeril*, 15 F.4th at 172. In *Romeril*, the Second Circuit followed *Rumery* and explained that "parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings." *Id.* Courts have presumed that waivers in the civil context must have the same safeguards as the criminal context—they must be "knowing, voluntary, and intelligent," *D.H. Overmyer*, 405 U.S. at 185—and when defendants in Commission actions sign consents, they represent that they are entering into the settlement voluntarily. *See Novinger*, 40 F.4th at 302-03 (noting defendants' stipulation that they entered into consent judgments with no-deny provisions "'voluntarily'"). Thus, settling defendants make a "highly rational judgment" that the advantages of settlement exceeded any costs of waiver. *Rumery*, 480 U.S. at 394.

When a defendant settles with the Commission, the parties reach a mutually acceptable resolution. *Armour*, 402 U.S. at 681; *Citigroup*, 752 F.3d at 295; *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983). The Commission is not bestowing a benefit on the defendant, but rather is acting in the public interest to minimize litigation risk, maximize limited resources, and accelerate the resolution of the case. *Citigroup*, 752 F.3d at 295-96. All settlements involve undertakings and waivers of constitutional rights, and courts have held that there is no per se rule against such agreements. *Rumery*, 480 U.S. at 393; *Romeril*, 15 F.4th at 172. There is no support for the notion that the parties cannot agree that if the defendant wishes to publicly deny after the Commission yields its opportunity to litigate its allegations, the Commission will have the ability to seek a return to the courtroom where the denials can be tested under the rules of evidence and procedure.

For the foregoing reasons, the Commission denies the petition to amend Rule 202.5(e).

By the Commission,

Vanessa A. Countryman
Secretary

F.2d 177, 187–88 (2d Cir. 1991); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942) (holding that a party to a consent decree "is in no position to claim that such decree restricts his freedom of speech" because the party "has waived his right and given his consent to its limitations").