Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e)

Commissioner Hester M. Peirce

Jan. 30, 2024

I dissent from the Commission's denial of a petition to amend Rule 202.5(e), our so-called gag rule.[1] This *de facto* rule follows from the Commission's enforcement of its policy, adopted in 1972, that it will 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."[2] In that same policy, the Commission articulated its belief "that 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."[3] These two strands—the refusal to settle with persons who deny the allegations and the belief that refusing to admit is a denial—converge in the requirement that to settle with the Commission, a person must either (1) admit the allegations underlying the Commission's enforcement action or (2) state that she neither admits nor denies the allegations.

To compel compliance with the no-deny prong of the policy, the Commission requires settling defendants to agree that they "will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis" and also "will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations."[4] The Commission further requires the settling defendant to "withdraw[] any papers filed in this action to the extent that they deny any allegations in the complaint."[5] Finally, the Commission's mandatory language states that "[i]f Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket."[6] The net result is that the settling defendant, for the action to stay settled, must agree both to rescind her past in-court statements contesting the truth of the Commission's allegations and promise never again to contest the truth of the Commission's allegations herself, or even permit others to contest the allegations.

In October 2018, the New Civil Liberties Alliance (NCLA) asked us to revise Rule 202.5(c) to read as follows:

The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, a defendant or respondent may consent to a judgment or order in which he admits, denies, or states that he neither admits nor denies the allegations in the complaint or order for proceedings.[7]

I agree with the petitioner that this issue warrants a spot on our rulemaking agenda. One thing I love about this country is that Americans can and often do criticize their government. Without fearing reprisal, a person can condemn specific government actions, broad government policies, or the officials who carry out those actions and make those policies. This freedom to speak against the government and government officials is essential in a free society committed to the preeminence of the people. Of course, some criticisms of government policies, practices, or personnel may be baseless, but the American public, not government censors, should be the arbiters of validity. Our prohibition on denials prevents the American public from ever hearing criticisms that might otherwise be lodged against the government, let alone assessing their credibility. The policy of denying defendants the right to criticize publicly a settlement after it is signed is unnecessary, undermines regulatory integrity, and raises First Amendment concerns.

I.

When the Commission adopted the policy in 1972, it included a brief statement explaining why it needed the policy: "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."[8] This concern seems largely theoretical. Even if the concern is real, the imprudent policy adopted in November 1972 is not the right way to protect the Commission's reputation.

The Commission devoted significant resources to evaluating its enforcement program in 1972.[9] In January 1972, Chairman William Casey created a three-member committee to "examine the SEC's enforcement policy and practices, engage in frequent dialogue with the members of the Commission and with our staff, seek and sift the suggestions of the bar and make recommendations to the Commission for worthwhile improvements to our time-honored ways."[10] The June 1, 1972 Report of the Advisory Committee on Enforcement Policies and Practices—now commonly referred to as the Wells Report—included a lengthy discussion about the settlement of Commission enforcement actions, and made several recommendations related to the settlement process.[11] The Commission had decades of experience settling cases, through both settlements on a no-admit/no-deny basis and settlements allowing defendants to deny wrongdoing.[12] With respect to some of these settlements, defendants issued flat denials of wrongdoing.[13] But neither the Wells Report nor Chairman Casey's lengthy ruminations on it discuss problems arising from settling defendants later denying the factual basis of the Commission's case.[14] Given the broad remit of the Committee and its public comment process,[15] if problematic denials were common, the Committee and Commission would have heard about them.[16] In the intervening years, when defendants have made denials contrary to the policy,[17] such denials do not seem to have undermined the Commission's enforcement program. The absence of a public record specific to the adoption of the policy, the conclusory explanation of its necessity, and the absence of actual evidence of a problem weigh in favor of reexamining the policy.

The requirement that defendants must either admit or at least promise not to deny the government's allegations of wrongdoing as a condition of settlement has not been widely adopted by federal agencies.[18] Some agencies even explicitly allow settling defendants to deny the allegations of wrongdoing.[19] As the Federal Trade Commission noted when approving one such settlement in 2012, it was confident in the work of its staff:

it is the evidentiary record developed by FTC staff during the course of its investigation, not any ensuing settlement agreement, that forms the basis for the action by Commission. A respondent's denial of liability in a consent agreement does not diminish staff's extensive investigation or the ability of the Commission to find a reasonable basis to finalize a settlement or to enforce an order that results from settlement negotiations.[20]

The FTC's Consent Order Procedures explicitly allow settlement 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."[21] Our staff's investigative work likewise would stand on its own even if we permitted defendant denials.

II.

Even apart from the scant factual basis for the Commission's given reason for needing the no-deny policy, it should be reexamined because a regulatory policy that prevents people from speaking against government action necessarily raises First Amendment concerns. Prohibiting a person from taking "any action to make . . . any public statement that the complaint is without factual basis" is a plain prior restraint on speech.[22] Prohibiting that same person from "permit[ting] to be made any public statement that the complaint is without factual basis" only exacerbates the problem by imposing on the defendant an obligation to restrain speech by others. Moreover, this content-specific and permanent restraint on speech effectively shields the Commission's allegations from criticism: as long as you live, you are bound not only to say nothing that the Commission believes "directly or indirectly" denies the complaint's allegations, but you also must never say anything that even "create[s] the impression" of a denial.[23] Given the obvious First Amendment ramifications of the no-deny policy, it is unsurprising that a court recently characterized the Commission's use of the no-denial provision as "at a minimum . . . inconsistent with the spirit of the First Amendment and our Nation's time-honored tradition of protecting free expression."[24] The court continued by observing that:

[H]ere, the Provision is used by an agency of the federal government to shield itself from public view. This may inflict precisely the kind of societal harm the Founders adopted the First Amendment to protect against . . . . The upshot: so long as a defendant says what the SEC wants to hear (or says nothing at all), he does not violate the No-Admit-No-Deny Provision. This is quintessential viewpoint discrimination.[25]

In its letter denying the NCLA's rulemaking petition, the Commission sidesteps First Amendment concerns. The Commission explains that "a defendant can waive constitutional rights as part of a civil settlement."[26] In the Commission's telling, "[a]s part of the settlement process, the Commission and a defendant negotiate terms," and "if either party disagrees with terms that the other party views as necessary, [it] can decline to settle, and the Commission must bear its burdens of proof and persuasion in court."[27] The Commission even suggests that *it* is the party making a sacrifice in settling instead of litigating because it is "thereby forgoing its ability to prove its case in court."[28] Never mind that forgoing its day in court yields great benefits for the Commission. When it settles, the Commission does not need to prove the allegations in court—which is expensive, time-consuming, and difficult—and it gets a benefit it could never obtain through litigation—the permanent silence of the defendant.[29]

The Commission's questionable claim that it is the party making significant concessions is not the most concerning aspect of the Commission's reasoning. That distinction goes to its casual assumption that defending litigation with the Commission is just like defending against any other plaintiff in a civil action. One suspects that defendants in Commission enforcement actions might view the matter differently. For most individuals, and even for many well-resourced corporate defendants, the time, expense, and difficulty of litigating against the federal government makes settling the only economically viable option to resolve Commission enforcement actions. Commission investigations preceding the settlement negotiations are themselves long and costly. Retaining counsel to respond to the Commission's document requests and subpoenas, to represent witnesses during sworn testimony, and to prepare and submit a response to a Wells notice (which allows defendants to respond to charges the staff is planning to recommend to the Commission) consumes enormous financial resources. Add to that monetary cost, the intangible yet often even more onerous emotional, physical, and relational tolls of litigation, and it is unremarkable that nearly all defendants in Commission actions settle.

The inevitable mismatch between the Commission and most defendants in its enforcement actions carries through to the settlement process.[30] Even when the disparities in bargaining power between the Commission and the defendant are less pronounced, the no-deny clause is a mandatory, non-negotiable term. The Commission admits as much in its denial letter: "[t]he policy binds the Enforcement staff" and the Commission "will not agree to a settlement . . . unless the defendant agrees not to publicly deny the allegations in the complaint."[31] As one judge recently put it, the mandatory nature of the no-deny policy presents defendants with no real choice; it demands: "If you want to settle, . . . 'Hold your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC."[32]

The demand by the government that a defendant waive a fundamental constitutional right as a condition of settlement ought to be supported by a compelling rationale. Yet, as discussed above, the Commission's rationale of record—that the no-deny policy is necessary 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"—lacks firm footing. It would look bad if the SEC's settlements were shown to be baseless, unfairly negotiated, or legally flawed. The most logical solution to that concern, however, is to make sure that settlements are rooted in fact, are fairly negotiated, and are legally sound. Employing superior bargaining power to extract an agreement that defendants agree not to denigrate the settlement is a suboptimal solution.

In the end, far from shoring up the Commission's integrity, the reliance on these no-denial conditions undermines it. More than a decade ago, a court aptly explained the problematic perceptions that flow from the Commission's practice of settling without admissions and prohibiting denials:

[H]ere an agency of the United States is saying, in effect, "Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it. "[33]

Why should the public put much weight on allegations so flimsy that they need the protection of a contractual obligation not to deny them? Stated differently, "What is the SEC so afraid of? Any criticism, apparently—or, rather, anything that may even 'create the impression' of criticism—of that government agency."[34] The public cannot be sure what to believe if the government actively seeks to squelch contrary voices. As the FTC has observed, a government regulator that is confident in its investigative work, procedural practices, and legal analysis does not need to demand silence on the part of settling defendants.[35] Other commentators have pointed out that "[d]efendants who have been through an agency's enforcement process are often the most informed and in the best position to raise red flags about that process," so, by silencing them, "the agencies insulate themselves from criticism and the public scrutiny that accountability demands."[36] Allowing people to talk freely about their experiences with the Commission would aid us in carrying out our mission.[37]

III.

Because no-admit/no-deny settlements are the most common resolution of SEC enforcement actions, the rule at issue affects countless potential speakers. Given that all of these silenced speakers have been on the wrong end of an enforcement action, we can assume that some might have negative things—whether accurate or not—to say about the government. The gravity of silencing this subset of people weighs heavily on me.

Defenders of our policy might take comfort in the scope of the policy—after all, you can say bad things about the agency, just not about your settlement. To the contrary, the Commission's mandatory language is so ambiguous as to only aggravate my concerns. Defendants must agree that they will not "indirectly" deny "any allegation in the complaint." What is an "indirect" denial? Defendants must also agree not to "take any action" that "create[s] the impression that the complaint is without factual basis." What is an action that "create[s] the impression" that the complaint lacks a factual basis? A defendant looking at this language is not going to have any idea where it ends. Could she say that "The Commission's enforcement process is a joke. Nobody should trust it to produce just results."? What if she stands outside the Commission's headquarters with a pile of salt, a copy of the complaint, and a sign that states "Take these together." What if she places on a billboard the message "SEC = Seriously Erroneous Complaints"? In either case, has she "create[d] the impression that the complaint is without factual basis"? Can a defendant tell a post-settlement joke: "How many SEC Commissioners does it take to screw in a lightbulb? Zero, because they prefer to let the truth languish in the dark."? What if she publishes a book with additional facts that were not included in the complaint, and those facts cast the entire case in an entirely different light? Has she then "create[d] the impression" that the complaint lacked a factual basis?

The Commission's requirement that a defendant agree not to "permit" denials of the allegations in the complaint is equally problematic. This language suggests that defendants have an affirmative obligation to stop other people from saying things that might cast doubt on the complaint's allegations. Must a settling defendant stop her

husband from posting on social media his disagreement with the charges in his wife's settlement with the Commission? Must a defendant require subsequent employers to link to the settlement in the otherwise flattering profiles they post on their websites? Probably not, but the mandatory language nevertheless is troublingly nebulous. To obtain Commission authorization to file an enforcement action in district court, the Division of Enforcement is required to submit to the Commission an action memorandum that "provides a comprehensive explanation of the . . . factual and legal foundation" for the recommended civil action.[38] The Enforcement Manual, however, does not require that the Division include with the action memorandum a copy of the district court complaint.

The petitioner is correct that reconsideration of the rule is a pressing matter that belongs on the Commission's current notice-and-comment rulemaking agenda. Or, if my colleagues have concluded that our agenda is too packed with other projects, perhaps we can just drop the no-deny rule in the same unceremonious way we adopted it.

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[1] Letter from Vanessa Countryman to Margaret A. Little, New Civil Liberties Alliance (Jan. 30, 2024) ("Denial Letter") (available at https://www.sec.gov/files/rules/petitions/2024/4-733-letter-013024.pdf).

[2] 17 C.F.R. § 202.5(e); *see also* Consent Decrees in Judicial or Administrative Proceedings, Rel. No. 33-5337, 37 Fed. Reg. 25224 (Nov. 29, 1972).

[3] *Id.*

[4] Final Judgment as to Defendant Fernando Motta Moraes at 9, *SEC v. Moraes*, No. 22-Civ.-08343 (S.D.N.Y. Oct. 28, 2022), ECF No. 13 (Consent of Defendant Fernando Motta Moraes, ¶ 11). The Commission employs substantively identical language in the Offers of Settlements leading to settled Orders Instituting Proceedings. *See*, *e.g.*, FTE Networks, Form 8-K, Ex. 10.1 (Offer of Settlement of FTE Networks, Inc., Part VI), filed Sept. 11, 2014 (available at sec.gov/Archives/edgar/data/1122063/000114420414055309/v388919_ex10-1.htm).

[5] Final Judgment at 9, *supra* n.4. The Commission's mandatory language has two narrow carve-outs: "Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party." *Id.* at 10.

[6] *Id.* at 9-10.

[7] File No. 4-733, New Civil Liberties Alliance Petition to Amend at Ex. A., submitted Oct. 30, 2018 (available at https://www.sec.gov/files/rules/petitions/2018/petn4-733.pdf).

[8] Consent Decrees in Judicial or Administrative Proceedings, Rel. No. 33-5337, 37 Fed. Reg. 25224 (Nov. 29, 1972). The Commission's explanation for the policy was part of the rule it adopted in 1972 and remains part of the rule today.

[9] The Commission's Division of Enforcement came into existence in August 7, 1972 as part of an administrative reorganization. 38th Annual Report of the Securities and Exchange Commission, at 133 (available at https://www.sec.gov/files/1972.pdf).

[10] William J. Casey, Chairman, Sec. & Exch. Comm'n, The Securities Bar and the Securities Laws, Address to the New York State Bar Association, at 5 (Jan. 27, 1972) (available at https://www.sec.gov/news/speech/1972/012772casey.pdf).

[11] Wells Report, at v-vi and 34-43. The Wells Report is available through the Securities and Exchange Commission Historical Society's website. *See* https://www.sechistorical.org/museum/galleries/enf/enf03a_wells-commission.php.

[12] *See*, *e.g.*, *First National City Bank and Merrill Lynch, Pierce, Fenner and Smith, Inc.*, Lit. Rel. No. 4534, 1970 WL 104562 (Feb. 6, 1970) (announcing settled district court action where "Defendants state that they deny that there is any validity in the claims asserted by the Commission in the complaint or any illegality or impropriety in any of defendants' past acts or practices"); *W. Allen Raleigh*, Rel. No. 34-7483, 1964 WL 66599 (Dec. 9, 1964) (no-admit/no-deny); *Keystone Securities Corp.*, Rel. No. 34-7095, 1963 WL 63774 (July 8, 1963) (no-admit/no-deny); *Tanya Kaye*, Rel. No. 6033, 1959 WL 59455 (Aug. 5, 1959) (no-admit/no-deny); *SEC v. Interstate Syndications, Inc.*, (N.D. Ga. C75-5 A), Lit. Rel. No. 6692, 1945 WL 26488 (Jan. 28, 1945) (no-admit/no-deny); *Illinois-Indiana Oil Basin Corp.*, Rel. No. 33-2280, 1940 WL 6989 (June 12, 1940) (no-admit/no-deny).

[13] Terry Robards, *Bank and Broker Accused by S.E.C.: National City and Merrill Lynch Agree to Put End to Investment Unit*, N.Y. Times, Feb. 7, 1970 ("[First National City Bank] issued a statement that said in part: 'We believe the commission's claims have no validity and we have denied them. However, in order to avoid lengthy litigation, we have agreed to terminate the S.I.A.S. and to offer customers an alternative service that we believe meets the investor needs.' . . . Merrill Lynch also issued a statement, asserting that it 'sees no merit in the arguments advanced by the S.E.C.' . . . 'It is clear that in making its arguments, the S.E.C. is in fact attempting to make new law.'").

[14] William J. Casey, Chairman, Sec. & Exch. Comm'n, Ruminations and Action on Enforcement, Address at the New York Law Journal Enforcement Conference (Sept. 29, 1972) (available at https://www.sec.gov/news/speech/1972/092972casey.pdf).

[15] Chairman Casey issued a public request for comment to the committee on March 2, 1972. *See* https://www.sechistorical.org/collection/papers/1970/1972_0302_Casey.pdf.

[16] In more recent years, one authority contended that "by 1972, it had become obvious that as soon as courts had signed off on [no-admit/no-deny] settlements, the defendants would start public campaigns denying that they had ever done what the S.E.C. had accused them of doing," but it did so without citation or attribution. *SEC v. Vitesse Semiconductor Corp.*, 771 F.Supp.2d 304, 308 (S.D.N.Y. 2011). Other discussions have repeated this assertion, but have not supplemented it with concrete examples. *See*, *e.g.*, David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution that Wasn't*, 103 Iowa L. Rev. 113, 118-19 (2017); Matthew G. Neumann, *Neither Admit nor Deny: Recent Changes to the Securities and Exchange Commission's Longstanding Settlement Policy*, 40 J. Corp. L. 793, 797-98 (2015); Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. Mich. J.L. Reform 535, 537-38 (2015).

[17] *See*, *e.g.*, Floyd Norris, *Morgan Stanley Draws SEC's Ire*, N.Y. Times, May 2, 2003, at Section A., Col. 1, Business/Financial Desk p. 1; *Figure in SEC Insider Case Withdraws a Statement*, Wall St. J., July 13, 1988, at 10, col. 3. It is possible that some defendants would seek to distance themselves from the allegations in a settlement for nefarious purposes. For example, a serial fraudster might settle and then tell investors that the allegations are untrue and that she settled only to be able to focus on providing investors with the next great investment. The solution to this legitimate concern—one that does not implicate a defendant's constitutional rights—may be to demand admissions when such a future offense is probable. Subsequent denials would not be prohibited, but they would be read against the backdrop of the admissions in the settlement.

[18] I am aware of only one other federal agency—the Commodity Futures Trading Commission—that has issued a similar policy statement. 17 C.F.R. Part 10, App. A. The CFTC went through the notice and comment process to adopt its policy. CFTC: Proposed Rules: Rules of Practice; Proposed Amendments, 63 Fed. Reg. 16453, 16459 (April 3, 1998); CFTC: Rules and Regulations: Rules of Practice; Final Rules, 63 Fed. Reg. 55784, 55790, 55796 (Oct. 19, 1998); CFTC: Rules and Regulations: Rules of Practice: Correction, 64 Fed. Reg. 30902 (June 9, 1999). Two other agencies appear to have somewhat similar rules, but do not appear to have accompanying policy statements. *See* 40 C.F.R. § 22.18(b)(2) [Environmental Protection Agency] *and* 45 C.F.R. § 672.11(b)(2) [National Science Foundation].

[19] *See* Consent Order, *United States v. Countrywide Financial Corp*., 11-cv-10540 (C.D. Cal. Dec. 28, 2011), ECF No.4, at 4 ("Defendants Deny all the allegations and claims of a pattern or practice of discrimination in violation of the FHA and the ECOA as set forth in the United States' Complaint.") (available at https://www.justice.gov/sites/default/files/crt/legacy/2012/01/27/countrywidesettle.pdf); Agreement Containing Consent Order, *Facebook, Inc*., FTC File No. 092 3184 ("Proposed Respondent expressly denies the allegations set forth in the complaint, except for the jurisdictional facts.") (available at https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf).

[20] Statement of the [Federal Trade] Commission, *Facebook, Inc*., Docket No. C-4365 (Aug. 10, 2012) (available at https://www.ftc.gov/system/files/documents/public_statements/293551/120810facebookstatement.pdf).

[21] 16 C.F.R. § 2.32.

[22] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976) (The First Amendment "afford[s] special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech."); *see also SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J. concurring) (stating about the Commission's no-deny policy that "[a] more effective prior restraint is hard to imagine").

[23] *See*, *e.g*., Brief of Constitutional Law & First Amendment Scholars as Amici Curiae in Support of Petitioner at 3, *Romeril v. SEC*, No. 21-1284 (S.Ct.) ("[T]he SEC Gag Rule is not just any prior restraint, but a prior restraint on 'steroids,' fatally infected by content and viewpoint discrimination. The SEC Gag Rule is content-based and viewpoint-based on its face. Moreover, it is animated by the government's self-serving desire to shield itself from criticism, implicating powerful First Amendment norms against viewpoint discrimination.") (available at https://www.supremecourt.gov/DocketPDF/21/21-1284/221659/20220422092456314_42285%20pdf%20Ebner%20combined.pdf).

[24] *SEC v. Moraes*, 2022 WL 15774011, *3 (S.D.N.Y. Oct. 28, 2022).

[25] *Id*. at *4, 5.

[26] Denial Letter pg. 5.

[27] *Id*. pg. 1, 5.

[28] *Id*. pg. 5

[29] The Commission's insistence on shielding the allegations from criticism "belies the truth of a mainstay of settlement negotiation—that frequently both sides understand that the government cannot carry its burden as to every allegation. And it is particularly pernicious in light of a sobering truth—hardly any individual, and even most corporate entities—cannot afford protracted litigation. SEC should not be allowed to bargain for something that is wholly outside of what it could receive in a prosecution, even if it won every facet of its case, since win or lose, the accused could speak post-prosecution." Brief for Amicus Curiae Due Process Institute in Support of Petitioner at 15 (citation omitted), *Romeril v. SEC*, No. 21-1284 (S.Ct.) (available at https://www.supremecourt.gov/DocketPDF/21/21-1284/221721/20220422143248434_21-1284%20Amicus%20Brief%20of%20Due%20Process%20Institute.pdf).

[30] *Report on the Task Force on SEC Settlements*, 41 Bus. Law 1083, 1093-94 (1991) (observing that defendants have high incentive to settle due to the financial and personal costs of litigation, and that "[t]he divergence of the parties' marginal propensity towards settlement creates uneven bargaining power, with the Commission holding the upper hand").

[31] Denial Letter pg. 3.

[32] *Novinger*, 40 F.4th at 308 (Jones, J., concurring).

[33] *Vitesse*, 771 F. Supp. 2d at 309.

[34] *Moraes*, 2022 WL 15774011 at *5.

[35] *Supra* n.20 and accompanying text.

[36] *See, e.g.*, James Valvo, *The CFTC and SEC are Demanding Unconstitutional Speech Bans in their Settlement Agreements*, Notice & Comment: Yale Journal of Regulation (Dec. 4, 2017) (available at https://www.yalejreg.com/nc/the-cftc-and-sec-are-demanding-unconstitutional-speech-bans-in-their-settlement-agreements-by-james-valvo/#_ftn1).

[37] *See, e.g.*, Brief of Mark Cuban, Phillip Goldstein, Elon Musk, Nelson Obus, and Investor Choice Advocates Network as Amicus Curiae in Support of Petitioner at 7, *Romeril v. SEC*, No. 21-1284 (S.Ct.) ("The SEC should welcome scrutiny of its allegations, particularly unproven allegations in settled cases, to ensure that justice is done and any shortcomings in its cases are publicly aired.") (available at https://www.supremecourt.gov/DocketPDF/21/21-1284/221678/20220422123803543_No.%2021-1284%20Amicus%20Brief.pdf).

[38] SEC Division of Enforcement: Enforcement Manual ¶ 2.5.1 The Action Memo Process (Nov. 28, 2017) (available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf).