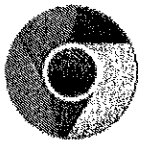



# SEC Lobs Another Soft Admission With Credit Suisse Deal

Share us on: By **Carmen Germaine**

Law360, New York (October 6, 2016, 11:10 PM EDT) -- The U.S. Securities and Exchange Commission may be justifiably pleased about snagging yet another admission of wrongdoing with Wednesday's Credit Suisse settlement, but experts say the bank's admission to negligence-based fraud shows a cozier side of the agency's enforcement efforts.

In the settlement, Credit Suisse AG **agreed to pay** an impressive $90 million fine and give the agency a rare admission of wrongdoing by conceding that it veered from its publicly disclosed method for calculating a key metric for assessing its wealth management business — new net assets — in order to meet metric targets. As a result of the misleading disclosures, the SEC said, Credit Suisse violated securities laws.

This is just the latest mea culpa the SEC has wrangled from a company since Chair Mary Jo White announced three years ago that the agency would require more such admissions. Since then, the agency has touted some of its bigger deals to show the policy's success.

In June, SEC Enforcement Director Andrew Ceresney told Law360 that the requirement "has resulted in a strong record of additional accountability and deterrence."

But experts said that the latest deal, in which Credit Suisse admitted to allegations of negligence-based fraud rather than deliberate — or scienter-based — fraud, is another example of a major financial firm making some concessions to the agency in order to escape a much more significant penalty.

"It's almost a win-win for the SEC and Credit Suisse," said David Chase, a former SEC enforcement attorney and special assistant U.S. attorney who is now in private practice.

Credit Suisse admitted that disclosures about how it calculated the new net assets metric were misleading because, in several instances, it reclassified client assets in order to meet metric targets set by senior management. As a result, the bank admitted, its disclosures violated Sections 17(a)(2) and (3) of the Securities Act of 1933.

Such admissions of wrongdoing can be serious, said John S. Lutz, a former SEC trial attorney and federal prosecutor.

"The risk of admitting something is that you can have shareholder lawsuits or other actions which can rely on your admission as part of their proof of your wrongdoing," said Lutz, now a director at Fairfield and Woods PC.

But although Sections 17(a)(2) and (3) prohibit untrue statements, omissions, fraud or deceit in the sale of securities, Lutz and other experts noted that violations can be established by negligence and do not require proving scienter. Nor do the sections in question give rise to private rights of action or automatically disqualify a company from the "safe harbor" provisions allowing unregistered private offerings, unlike scienter-based fraud allegations.

In other words, firms like Credit Suisse have a powerful incentive to admit to negligence-based fraud allegations if it means escaping scienter-based claims.

"To some extent I think Credit Suisse's lawyers did a nice job here, really getting a victory of sorts in being able to plead to a negligence-based charge," Chase said.

While it's difficult to say whether the SEC could have even charged Credit Suisse with intent-based fraud based on the evidence at hand, Chase and other experts said there's one aspect of the case that suggests the agency and the bank may have done more than a little horse-trading: The settlement order said the SEC had considered Credit Suisse's remedial efforts and "meaningful cooperation with the commission staff."

Among other things, the agency said, Credit Suisse had produced witnesses and documents located outside of the United States, voluntarily conducted an internal investigation, updated the practices that led to the violations, and retained an independent consultant to review and assess the bank's procedures.

"A settlement such as this, and the company going in early and cooperating, also enables the company to participate actively in the formulation of the language of the final order," said Jacob Frenkel, a partner at Dickinson Wright PLLC.

For its part, the SEC hasn't exactly been shy about its own pragmatic approach to cases. Although the agency says that once it decides to require an admission of wrongdoing, it's prepared to litigate for it, making the call depends on a complex calculus of whether the case is worth expending additional resources and of the risks of litigation.

Christopher Steskal, chair of the white collar and regulatory defense group at Fenwick & West LLP, noted that an initial criticism of the SEC's admission policy was that it could "drive settlements to a halt, because companies would not want to settle where they would be exposed to liability" by their admissions.

From that perspective, palatable settlement terms are attractive not just to the firm, but to the agency itself. While Credit Suisse wins by avoiding scienter-based fraud allegations, Chase said, the SEC wins by getting an admission and avoiding the costs of a trial.

"What they get in return — and it's probably more important for their overall enforcement policy — is to get an

admission from one of the large international financial institutions," Chase said.

But while the SEC and Credit Suisse may have reached a result both parties can live with, not everyone will be impressed with the admission.

Frenkel compared Wednesday's case to the agency's settlement **last week** with Och-Ziff Capital Management Group LLP, where the hedge fund paid nearly $413 million to the SEC and the U.S. Department of Justice to settle claims it bribed African officials.

The charges included allegations that Och-Ziff violated Section 206(1) of the Advisers Act, which prohibits using a device or scheme to defraud clients and automatically disqualifies the fund from using the safe harbor provision. Although an Och-Ziff subsidiary pled guilty to criminal charges, however, the parent firm neither admitted nor denied the SEC's allegations.

"On its face, putting [Credit Suisse's] settlement next to [Och-Ziff's] settlement only can leave heads scratching about consistency in the expectation of admission," Frenkel said.

The SEC's decision to pursue an admission in Credit Suisse's case is even more confusing, Frenkel said, considering that the bank instituted remedial measures that were "palpable and timely." The difference highlights that the SEC's use of admissions is both at the discretion of the agency, and "perceptively inconsistent," he added.

That's not the only aspect of the case that experts called inconsistent.

"The interesting thing is that the individual who entered a plea, his plea was without admitting or denying, but the company's plea was making an admission," Lutz said.

The SEC's announcement on Wednesday included a settlement with the chief operating officer of the bank's private banking division, Rolf Bögli, who was accused of helping cause Credit Suisse's violations by pressuring employees to reclassify assets of some high-net-worth clients in order to meet new-net-asset targets. Bögli agreed to pay $80,000 — but neither admitted nor denied the allegations.

The SEC has said it's committed to holding individuals responsible, and has required individuals to admit wrongdoing in past cases, but the agency's policy on individual actors and company executives seems even murkier than its approach to companies — something Lutz says is part of a bigger problem.

"If you don't charge the individuals, then you haven't really dealt with the problem," Lutz said.

Credit Suisse said Wednesday it cooperated with the SEC's inquiry and has undertaken appropriate remedial efforts.

"It is important to note that there are no allegations of intentional misconduct or that [new net asset] numbers were incorrectly reported," the bank said in a statement. "Credit Suisse clients were not harmed."

An attorney for Bögli, Kenneth Breen of Paul Hastings LLP, said his client "looks forward to moving on."

The SEC is represented by Matthew R. Estabrook, David S. Karp, Scott W. Friestad and Laura B. Josephs.

Credit Suisse is represented by Peter Bresnan of Simpson Thacher & Bartlett LLP.

Bögli is represented by Kenneth Breen of Paul Hastings LLP.

The cases are In the Matter of Credit Suisse AG and In the Matter of Rolf Bögli, case numbers 3-17617 and 3-17618, at the U.S. Securities and Exchange Commission.