

## Speech

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# A New Model for SEC Enforcement: Producing Bold and Unrelenting Results

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## Introduction

Good morning and thank you, Dean [Trevor] Morrison for that very kind introduction. It is a pleasure to be here today and I want to thank the NYU Program on Corporate Compliance and Enforcement and the NYU Pollack Center for Law and Business for co-sponsoring this program. These programs provide important forums for sophisticated dialogue on critical white collar enforcement issues, which have an increased prominence post-financial crisis. I am honored to join your list of distinguished speakers.

Consistent with the core missions of these programs, I will talk to you today primarily about the SEC's enforcement program, but also more broadly, about how best to punish and deter white-collar wrongdoing. As you know, the SEC is the primary regulator and enforcer of the federal securities laws. How we go about our job is thus critical to the protection of investors and the integrity of our capital markets. After nearly four years as Chair of the SEC, following almost nine years as U.S. Attorney for the Southern District of New York, where the criminal prosecution of white collar wrongdoing was – and still is – a major priority, this seemed like the right time to speak here about this important topic. And, as you might guess, after spending much of my career in law enforcement, I have strong views about the importance of strong enforcement in the white collar space and what it takes to achieve that.

During my confirmation hearing, I pledged that I would pursue a “bold and unrelenting” enforcement agenda as SEC Chair.<sup>[1]</sup> And through the hard work and dedication of the staff of the SEC's Enforcement Division – and the many other parts of the agency that support the Division – we have delivered on that promise. By every measure, the SEC's enforcement program has been a resounding success. While numbers are a small part of the story, in the last three fiscal years, we have brought record numbers of enforcement actions, obtained unprecedented monetary remedies in the billions of dollars, and returned hundreds of millions of dollars to harmed investors.<sup>[2]</sup>

We have brought many innovative and first-of-their-kind cases across the spectrum of the securities laws to protect investors, deter misconduct, cover the landscape of the marketplace, shape industry

norms and practices, and send a strong message that the SEC is – and always must be – the tough cop on the financial beat.[3]

These accomplishments have been made possible by a new model for SEC enforcement. Indeed, we have essentially changed the way we do business in enforcement – from the way we identify misconduct, to our investigative processes and tougher settlement approaches, to the types of cases we bring, to our continued focus on individuals in every case, and to our trial work. These changes in the landscape of SEC enforcement have resulted in our renewed identity in the markets as an aggressive, nimble – and importantly – fair regulator. “Tough, but fair,” a label that has sometimes been applied to me,[4] is what we strive for at the SEC, even as we have become bolder and more effective with our new approaches.

To give you a sense of how we at the SEC have changed the way we enforce the federal securities laws, I am going to first discuss Enforcement’s emphasis on the need to be trial-ready, reflective of our new “investigate to litigate” philosophy.

Then, I will cover Enforcement’s new approach to identifying wrongdoing, including harnessing the vast array of financial and marketplace data now available and taking maximum advantage of our game-changing whistleblower program. Next, I will discuss the SEC’s continuing emphasis on cases against individuals – the best form of deterrence against white collar wrongdoing. I will also discuss how the admissions policy I instituted in 2013 has begun to transform the meaning and impact of many of our settlements. [5]

I will discuss our expansion of coverage to areas where our efforts have had demonstrable and almost immediate impact on sectors of the market previously largely untouched by the reach of enforcement. Finally, I will conclude my remarks with brief observations about certain areas where additional measures, some of them controversial, may be necessary in order to further strengthen white collar enforcement, both in the civil and criminal arenas.

This is a lot of ground to cover, so let me get started.

## **“Investigate to Litigate”**

One important change in the way the SEC conducts enforcement that has allowed us to become bolder and more unrelenting is our emphasis on “investigating to litigate,” which, simply put, means that we have asked the staff to conduct all investigations with litigation in mind. During our investigations, we have enhanced our focus on acquiring admissible – and persuasive – evidence of the underlying elements that we will have to prove at trial, so that whenever possible, we produce a trial-ready record that can be used to prevail at trial or to secure a strong settlement. We also have enhanced our trial capacity, increasing our hiring of attorneys who have significant trial experience, often as criminal prosecutors.

### **Use of Reverse Proffers**

Using reverse proffers at key points in our investigations is one way Enforcement leverages the “investigate to litigate” approach. When appropriate, we share with defense counsel significant documents and expected testimony, as well as any analyses we have done. We often do reverse proffers at an advanced stage of an investigation in order to attempt to bring the investigation swiftly to a close on strong settlement terms. But we also sometimes do them much earlier in order to demonstrate the benefits of cooperating with our ongoing investigation. This sort of blunt and bold

transparency – a familiar tool for many prosecutors – drives home to parties in our crosshairs that we are ready, willing, and able to litigate the case – and win.

#### The Importance of Being Trial Ready

Obviously, the true test of an investigate-to-litigate philosophy is how a case stands up in court. Enforcement programs cannot be strong unless we have the ability to prove it in court.<sup>[6]</sup> While the SEC historically has had a strong trial record, we have enhanced that record over the last few years. Indeed, we have not lost a jury trial in federal district court in two and a half years, and the wins have been significant, including our victories in a case against two Texas billionaires accused of violating the laws governing ownership and trading of securities by corporate insiders,<sup>[7]</sup> an insider trading case against two brokerage employees that we successfully tried after the Second Circuit's decision in *United States v. Newman*,<sup>[8]</sup> and a first-ever case against a recidivist municipality and one of its city officials.<sup>[9]</sup>

The agency's trial record is impressive on any scale, but all the more so given the difficulty and complexity of the cases we try. Unlike our colleagues at the Department of Justice, we generally proceed without the benefit of cooperators, wiretaps, and many of the other tools prosecutors have. Our litigated cases, which are typically technically complex, also require us to heavily rely on circumstantial evidence, confront hostile witnesses, and refute testimony by the defendant – a much rarer occurrence in criminal cases.<sup>[10]</sup>

## Use of Data Analytics to Uncover and Investigate Misconduct

Another transformative way our approach to securities enforcement at the SEC has changed is through our vastly increased use of data and data analytics to detect and investigate misconduct. There are now huge quantities of data available for nearly all parts of the market, including corporate equity and bond trading, trading in complex financial instruments, municipal bond trading, and other market activity. More than ever, the SEC is developing in-house innovative analytical tools to take advantage of today's data-rich environment. The result is that the number of cases we are able to originate in-house has risen dramatically.

When I arrived at the Commission, we created the Center for Risk and Quantitative Analytics within the Enforcement Division to help harness the vast data now available to us and, over the last two years, the Center has provided data analytic expertise for over 100 cases against more than 200 entities and individuals in matters involving insider trading, hedge funds, municipal issuers, and complex financial instruments, among others. The Market Abuse Unit in Enforcement also created an Analysis & Detection Center in 2011, today staffed with 10 specialists who use several newly developed tools to analyze trading data, using the billions of lines of bluesheet trading data we now have in-house to build insider and abusive trading cases.

In the last few years, these efforts have resulted in at least nine insider trading cases originating solely from leads generated by these types of tools, many others in the pipeline, and dozens of other cases being expanded using these tools to identify additional unlawful trading.<sup>[11]</sup> Some of you may recall our ground-breaking action, brought in conjunction with the New Jersey and Eastern District of New York U.S. Attorney's Offices, involving dozens of hackers and traders in and outside the U.S., who reaped over \$100 million in illegal profits by hacking into multiple newswire services to steal hundreds of corporate earnings announcements and trading on this information before it was publicly released.

Our cases against these overseas traders would not have happened without our new data analytic tools.<sup>[12]</sup>

## Using Whistleblowers to Detect Misconduct

In addition to the greatly enhanced scale of data we are now accessing and using, whistleblowers have also become key sources of very significant cases. We recently surpassed the \$100 million mark for awards to whistleblowers, and tips in fiscal year 2016 surpassed 4,200, rising over 40 percent from 2012, the first fiscal year the program was in place.<sup>[13]</sup> The whistleblower program has had a transformative impact on enforcement and that impact will only increase in the coming years as the program becomes more well-known and the significant rewards of participating in it become clearer to whistleblowers.

At the same time, we must acknowledge that it is not easy to be a whistleblower. Many financial and psychological barriers remain – barriers we at the SEC have taken aim at in order to change corporate attitudes and enhance protections for whistleblowers.<sup>[14]</sup> Thus far, the Commission has brought two settled actions under the anti-retaliation provisions of the Dodd-Frank Act,<sup>[15]</sup> and five settled actions against companies for violating Rule 21F-17,<sup>[16]</sup> which precludes actions that impede communications with the Commission by whistleblowers. We have been aggressive in enforcing this rule, including against companies that prohibited employees from recovering a whistleblower award as a condition of receiving severance benefits.<sup>[17]</sup> These actions have significantly influenced industry conduct in important ways, including widespread revisions to confidentiality and severance agreements to conform to our rules and stronger internal compliance structures aimed at protecting whistleblowers and prohibiting retaliation against them.

The SEC intends to stay on the whistleblower beat to ensure protection of whistleblowers and that tips on corporate wrongdoing continue to flow to us unimpeded.

## Focusing on Individuals

Holding individuals liable for wrongdoing is a core pillar of any strong enforcement program. A company, after all, can only act through its employees, and to have a strong deterrent effect on market participants, it is absolutely critical that responsible individuals be charged and that we pursue the evidence as high as it can take us. I have obviously recognized the importance of focusing on individuals since my early days as a prosecutor,<sup>[18]</sup> and the Commission's actions over the past three plus years show the priority that we are placing on establishing individual liability.

Financial reporting cases, a critical priority of our enforcement program, is an area where we routinely charge both companies and responsible individuals, including senior executives.<sup>[19]</sup> When I came to the Commission, I came with a plan to refocus Enforcement staff on financial reporting cases, given the importance of financial reporting and auditing to the integrity of our markets and the protection of investors. In response to this initiative, the Financial Reporting and Audit Task Force was created – now a permanent group in Enforcement – and the Division as a whole soon opened new and important financial reporting cases in every office, calling on the talented attorneys and more than 100 skilled accountants in the Division to build these cases.

We have delivered results. In fiscal years 2015 and 2016, the Commission brought over 200 issuer reporting and disclosure actions and charged over 245 individuals, nearly doubling our output over fiscal years 2012 and 2013. We have also proceeded aggressively under Commission Rule 102(e)

against audit firms and their audit personnel in these cases, for both audit failures and independence violations, including against national office personnel.<sup>[20]</sup> These actions are an example of our continuing focus on gatekeepers, who are uniquely in a position to prevent or detect wrongdoing.

In fiscal years 2015 and 2016, the Commission brought 104 accountant proceedings under Rule 102 (e) against 157 respondents, including 121 individuals, again, doubling our output compared to fiscal years 2012 and 2013. These cases send important messages to accountants and other gatekeepers that the Commission will pursue them when they fail to live up to their important obligations and professional standards.<sup>[21]</sup>

## The Transformative Impact of the SEC's Admissions Policy

Another way we have changed the business of enforcement is by demanding additional accountability in our settlements. As many of you know, when I came to the Commission, I instructed the Enforcement Division to change its longstanding policy of settling all cases that did not involve a criminal component on a no admit-no deny basis – the nearly universal protocol used in settlement of civil enforcement cases. The deterrent message of settlements, and the public's confidence in civil law enforcement, can be enhanced significantly by requiring admissions of wrongdoing. 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.<sup>[22]</sup>

In a first for a civil financial regulator, we announced in June 2013 that the SEC would begin to require admissions as a condition for settlement in certain types of cases, including cases with harm to large numbers of investors or significant risk of harm to the market, where the settling party engaged in egregious conduct or obstructed Commission investigations, or where admissions would significantly enhance the deterrent message of the action. We also made clear that the majority of our cases would still be settled on a “no admit, no deny” basis, as we and other civil law enforcement agencies have done historically. That practice allows the Commission to obtain significant relief, eliminate litigation risk, return money to victims more expeditiously, and conserve scarce enforcement resources for other matters.<sup>[23]</sup> But a tougher balance was struck with our new admissions settlement protocol.

The Commission's new approach to admissions has given the Enforcement Division an additional powerful tool to use in appropriate cases, which has strengthened the program by increasing accountability. Since the Commission instituted the admissions policy, we have obtained admissions from 77 defendants and respondents – 30 individuals and 47 entities. We also do not accept “no admit, no deny” settlements where a defendant has been found guilty or admitted relevant facts in a proceeding involving other criminal or civil authorities,<sup>[24]</sup> and there are dozens more of these cases.

Since we initiated the new protocol, we have obtained admissions from a broad spectrum of important market participants – financial institutions, broker-dealers, audit firms, and individuals, and in both scienter-based and nonscienter-based cases.

When we introduced our new admissions policy, I acknowledged that some firms and individuals might opt to litigate rather than settle on our terms.<sup>[25]</sup> And that has happened, but it has not deterred us. Our very significant and recent trial win against the City of Miami (for misstatements in connection with bond offerings) was a trial that occurred primarily because the City would not accept admissions; we have now resolved the case with the City with a \$1 million penalty. Other defendants have balked at admissions during pre-filing settlement discussions, but after we filed our actions and the strength of our case became clear, we also settled these matters with admissions.<sup>[26]</sup>

In another measure of the impact of our new admissions protocol, other civil financial regulators are following our lead and are beginning to require admissions in some of their cases, thus strengthening the impact of civil law enforcement generally.[27]

## The Measurable Impact of SEC Enforcement Activity

In combatting white collar crime, our eye must always be on deterrence of others, as well as punishment of the particular wrongdoer. Although deterrence in law enforcement is very difficult to measure, after decades in the trenches in both the public and private sectors, I am convinced that strong enforcement has a uniquely deterrent value in white collar enforcement – sophisticated and knowledgeable market participants pay very close attention to what the SEC and the Department of Justice are doing and modify their conduct accordingly. Recognizing this leverage to modify behavior, I also concluded that we at the SEC should more proactively aim our enforcement efforts at stopping a wider range of violative practices that harm investors in our markets. We thus increasingly focus attention on areas and cases that have a strong and immediate impact on problematic industry norms and practices – another measure of our success.

Of course, we continue – and always will continue – to relentlessly pursue cases of blatant fraud and where investors are defrauded through misrepresentations by companies, investment advisers and others, and we bring many such cases.[28] In those cases, we often partner with our Department of Justice colleagues to enhance the available sanctions and increase deterrent value – indeed, since I became Chair, the criminal authorities have brought about 500 cases related to conduct under investigation by the SEC.[29]

We have also, however, increasingly brought cases – including those involving negligent actions – that harm investors in other important ways that can be remedied through changes in industry practices in response to our actions, thus benefiting huge segments of investors beyond those harmed in a specific case. While we are always also focused on promulgating new rules to stop or correct various industry practices, we are now, in a more deliberate and creative way, enforcing existing rules to bring about measurable change in the market, as well as deterrence and punishment. Let me show you how well this approach has worked.

### Equity Market Structure

The equity markets have changed significantly over the last 10 years, as automated trading has become the norm and trading venues have proliferated. As we have adopted new rules to address various market structure issues, the Commission, through the work of our Enforcement Division, has also been quick to bring actions to show that we take these new requirements seriously and to positively influence market participants to correct troublesome market practices.[30]

Take, for example, the Commission's important market access rule.[31] That rule was implemented in 2011, following the 2010 flash crash, and requires brokers and dealers who access the markets to document and maintain a system of risk management controls and procedures that are reasonably designed to manage the financial and regulatory risks of market access and increased automated trading.[32]

During my tenure as Chair, the Commission has brought seven cases under this rule,[33] most recently a settled proceeding involving the largest penalty imposed under the rule against a major financial institution.[34] That firm failed to maintain effective trading controls, leading to erroneous orders being sent to the markets and causing mini-flash crashes.[35] These cases have led to

extensive changes across the industry that have enhanced overall market stability, including tighter controls on erroneous trade entries, capital limits, and software changes.

Other risks to investors from our current market structure can arise from the proliferation of Alternative Trading Systems (ATs) – entities that pair buyers and sellers of securities outside the context of more transparent and highly regulated exchanges. ATs are required, however to make accurate representations to subscribers about how they will handle trading and have safeguards in place to protect subscribers' confidential order and trading information.

Since I became Chair, the Commission has charged seven significant ATs with violations of these rules.[36] These cases too have altered conduct by ATs generally, ensuring that they more clearly and accurately describe for subscribers their trading procedures and that they adequately safeguard the confidentiality of subscriber orders and executions. The cases have, in short, delivered greater investor protection to all investors accessing the markets.

#### Private Equity Enforcement

Private equity enforcement is another example of how our actions have led to significant and nearly immediate positive changes for a broad swath of investors.[37] Over the past three years, we have brought 11 actions against private equity advisers for undisclosed fees and expenses, impermissible shifting and misallocation of expenses, and failure to adequately disclose conflicts of interests to clients. Our strong sense from exams and industry discussions is that, through the Commission's focus on these problematic practices, we have helped to transform the level of transparency of fees, expenses, and conflicts of interest, and have prompted very meaningful change for the benefit of investors.[38]

#### Public Finance Enforcement

Public finance, and the municipal securities market in particular, is another critically important area where we have brought to bear our bolder and more unrelenting approach to enforcement to change industry behavior. As many of you know, the Commission's regulatory jurisdiction over the municipal securities market is more circumscribed than in the public company realm since we cannot directly require municipalities to make periodic disclosures. So, we have to be more innovative in targeting misconduct that is occurring in the municipal market.[39]

We have done this by bringing many first-of-their-kind actions, where we have used a range of legal theories and remedies. These include using controlling person liability to target municipal officials not directly accused of knowledge of misrepresentations in offerings, but who had control over the entities or individuals involved in the misconduct and the bond offerings,[40] using our emergency asset freeze authority to stop a municipal offering that we believed was fraudulent,[41] and proceeding against an audit firm and engagement partner for issuing fraudulent audit reports in connection with municipal bond offerings.[42]

One dramatic example of the Commission's impactful work in this area is the Division's MCDC initiative. MCDC, the Municipalities Continuing Disclosure Cooperation Initiative, is a cooperation initiative which encouraged issuers and underwriters of municipal securities to self-report violations of the federal securities laws related to continuing disclosure.[43] Under the MCDC initiative, the Enforcement staff recommended standardized, favorable settlement terms for municipal issuers and underwriters who self-reported that they made inaccurate statements in bond offerings about their prior

compliance with continuing disclosure obligations and who agreed to enhance their procedures going forward.[44]

While not every self-report resulted in an enforcement action, the Commission charged 72 broker-dealers, representing about 96 percent of the market for municipal underwritings.[45] And, this past August, the Commission charged 71 municipal issuers for making false statements or misleading omissions in their bond offering documents.[46] All indications are that MCDC has vastly increased issuer compliance with their continuing disclosure obligations.[47] It is a good example of our innovative, wide-ranging enforcement program – bolder and unrelenting – that is bringing about new, demonstrable benefits for investors.

## How to Build Even Stronger White Collar Enforcement

The enhancements I have discussed with you today and others we have made have altered SEC enforcement and significantly strengthened our protection of investors and deterrence of wrongdoing. But let me pivot to the future for a couple of minutes. Strong enforcement and deterrence can – and should – always be made stronger. The goal must be zero tolerance for white collar wrongdoing.

As I often said when I was the U.S. Attorney for the Southern District of New York, white collar crime is no place for timidity. Although we have enhanced SEC enforcement in major ways, I am the first to say that there is still more work to be done to further strengthen white collar enforcement, both at the SEC and elsewhere. Indeed, regulators and prosecutors worldwide are especially struggling with how best to deter what seems to be a persistent, post-financial crisis pattern of corporate wrongdoing at our major financial institutions.[48] How can we do that?

### Expanding the Reach of Liability for Senior Executives

If we are to be more effective in pursuing and deterring white collar wrongdoing, we must first be clear-eyed and knowledgeable about what conduct current law reaches – and doesn't – and to be always mindful of relentlessly pursuing the evidence wherever it leads, but doing so fairly. We need to sort through the political rhetoric and decide whether (and how) we want to amend current laws – civil and criminal – to more frequently impose liability on executives and officers for offenses committed by employees “on the watch” of the executives and officers.

As our record in the financial crisis and financial reporting cases attests, the SEC prioritizes bringing charges against individuals, including senior executives, where the evidence supports charges we are authorized to bring.[49] In certain areas, however, such as improper sales and disclosure practices of complex products at major financial institutions, it has been much more difficult to hold senior executives responsible, either because they do not have their fingerprints directly on the conduct or indeed are not involved in it. Most criminal offenses also require proof of scienter, the highest standard of culpability, which is often very hard to prove beyond a reasonable doubt even when it may be present. There is thus growing frustration that current law does not more broadly impose responsibility on senior executives, either for fostering a culture that led to the misconduct or for failing to ensure the existence or proper functioning of controls that could have prevented it.[50]

If we are to hold more senior executives responsible for misconduct that occurs at their companies, we have to think outside the box of our current laws. In this regard, I am drawn to a recently-implemented approach in the United Kingdom. The United Kingdom has implemented what they call the “Senior Manager Regime,” which is designed to incentivize executives and other senior managers to take greater responsibility for their actions (or non-actions) and the actions of their employees. This regime

makes it easier for the authorities to hold more individuals accountable for offenses that occur in areas of the executives' responsibilities, even if the executive is not involved in the misconduct, does not know about it, and does not directly supervise the offending employees.

One aspect of the U.K. framework holds senior executives liable for misconduct at their institutions in their areas of responsibility if they did not take "reasonable steps" to prevent the misconduct that occurred.<sup>[51]</sup> Another provision imposes criminal liability on a senior officer, who makes a decision that "falls far below what could reasonably be expected," which causes the failure of the firm.<sup>[52]</sup>

The U.K. regime was introduced for banks more than eight months ago, and in 2018, the regime will be extended to cover all U.K. financial services firms.<sup>[53]</sup> Andrew Bailey, the U.K. Financial Conduct Authority's new chief executive, noted recently that, while there still remained work to be done, preliminary reports indicated that "firms are taking their responsibilities seriously and have broadly got the regime right."<sup>[54]</sup>

At the SEC, we are able to charge and sanction a manager for failing to reasonably supervise a subordinate who has violated the federal securities laws. And we do use that authority, as reflected in cases we bring against senior executives other law enforcement agencies are not able to charge.<sup>[55]</sup> But that offense often relies on ignored red flags to prove the case, and does not extend to executives of non-registrants like public companies. The SEC's authority to hold executives and officers accountable under existing law is thus considerably narrower than our U.K. counterparts now have. At a minimum, we should closely study the track record of the U.K.'s Senior Manager Regime for what it can teach us about implementing a broader and stronger enforcement regime in the United States for holding executives accountable.

A properly-designed compensation and incentive system can also be a strong motivator for good behavior that avoids excessive risk taking and a number of responsive post-crisis measures have been adopted globally.<sup>[56]</sup> There are also ideas for imposing penalties on executive compensation for corporate wrongdoing that does not directly implicate executives.

For example, an approach advocated by Bill Dudley, the President of the Federal Reserve Bank of New York, would require financial institution compensation to include a deferred compensation component that does not begin to vest for several years.<sup>[57]</sup> If, during that deferral period, civil or criminal actions are brought relating to the executive's area, the deferred compensation would be used to pay a portion of any civil or criminal fine imposed on the entity.<sup>[58]</sup> This approach – leveraging deferred compensation as a sort of "performance bond" – is designed to "strengthen the incentives for senior leaders to design and implement the necessary changes to improve their firm's culture."<sup>[59]</sup> This idea, like the U.K. Senior Manager's Regime, would impose liability on executives for misconduct they did not engage in or condone and thus would expand liability considerably beyond current law.<sup>[60]</sup>

Concepts of fundamental fairness and "guilt is individual" rightly run deep in our jurisprudence. But, given the seemingly intractable persistence of serious corporate wrongdoing, the time for deciding whether to impose greater accountability, by expanding the reach of our laws, would seem to be at hand. If we are to strengthen deterrence and incentivize true change in the culture and behavior of our financial institutions, we need to make the difficult decision of whether to consider legislation, appropriately calibrated, to reach further into the C-Suite for accountability.

I can assure you that there would be no lack of will by law enforcement to use such new tools. If we move in that direction, it will be up to all of us to ensure that the expanded authority is also used fairly.

### Increased Penalty Authority

Another, somewhat less controversial proposition is to increase the penalty authority of the SEC. Although I often wish it were otherwise, the SEC does not have the authority to send anyone to jail. So, civil penalties are one of our most important tools for punishing and deterring misconduct. But current law too narrowly limits the amount of penalties that the SEC can seek and recover.

Today, the SEC cannot assess a penalty based on how much investors have lost. Rather, our penalty authority in civil actions is limited to the greater of either an amount set by statute or the defendant's ill-gotten gains, which is often much less than investor losses. Even civil litigants have the ability to obtain recoveries based on investor losses. Surely, Wall Street's cop on the beat should also have that authority.

Bipartisan legislation has been introduced in Congress a number of times to allow us to seek penalties based on either three times the defendants' ill-gotten gains or the amount of investor losses – whichever is greater.<sup>[61]</sup> While we have – and will continue to – make aggressive use of our existing penalty authority, I hope the next Congress makes progress in adding real teeth to the SEC's penalty authority – the subject of previous bills and a component of an otherwise very worrisome broad-based proposal to roll back much of the Dodd-Frank Act.<sup>[62]</sup>

### Preserving Investigative Tools

If we are to remain the strong enforcers that investors and our markets deserve, we also need to be vigilant in preserving our existing law enforcement tools. I will mention two.

During my tenure as Chair, I have sought to work with Congress in its efforts to modernize the Electronic Communications Privacy Act (ECPA), which governs the authority of law enforcement to obtain emails from internet service providers (ISPs). The bills currently pending in Congress to update ECPA would unfortunately pose significant risks to the American investing public by impeding the ability of Commission staff to investigate and uncover insider trading, Ponzi schemes, and other types of fraud where use of personal email is common.<sup>[63]</sup>

As drafted, the proposed bills would require a criminal warrant to seek the content of subscriber emails and other electronic communications from ISPs.<sup>[64]</sup> The SEC, as a civil law enforcement agency, cannot obtain criminal warrants.<sup>[65]</sup> Thus, the SEC would no longer be able to gather these communications directly from an ISP to obtain often critical and otherwise unobtainable evidence of serious wrongdoing.<sup>[66]</sup>

Although I support efforts to update ECPA's privacy protections and evidence collection procedures, I believe there are better ways to update ECPA that offer stronger privacy protections and observe constitutional boundaries, but without putting innocent victims and our capital markets at risk. Any effort to update ECPA can, and should, be done without harming the ability of the SEC to protect our nation's citizens from securities fraud.<sup>[67]</sup> Congress should not make it harder for us to detect frauds that harm innocent investors and to bring white collar wrongdoers to justice. The job is already a very hard one, without adding unnecessary burdens.

In a similar vein, recently, there have been a lot of questions about, and a number of thus far unsuccessful legal challenges to, the Commission's use of administrative proceedings – an alternative forum to district court for adjudicating securities law violations. Administrative proceedings offer a fair and efficient way to determine liability for potential violations through streamlined proceedings ultimately adjudicated by the Commission and reviewable by a Court of Appeals. Due process is

provided in these proceedings and we have recently adopted amendments to our rules to provide additional time and discovery in these proceedings, while preserving their efficiency.<sup>[68]</sup> We should – and will – fight efforts to roll back our authority to bring these important proceedings to protect investors in our markets.

## Conclusion

Let me stop there. I hope my remarks today have given you a sense of how we have changed the business of enforcement at the SEC to fulfill the promise of a “bold and unrelenting” enforcement program. I would hope – and expect – that the significant enhancements we have made will be continued in future years, with the SEC acting as an aggressive and strong regulator of the federal securities laws, consistently looking to broaden our impact and strengthen deterrence of wrongdoing. That is our duty and the SEC should continue to use every tool at its disposal to fulfill it. It would be a serious mistake for investors and our markets to do otherwise.

Thank you for inviting me here today to share my thoughts with you.

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[1] *Nominations Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs* (Mar. 12, 2013) (statement of Chair Mary Jo White), available at [http://www.banking.senate.gov/public/\\_cache/files/619e5603-c2c8-4085-98c6-0014ce29bde7/33A699FF535D59925B69836A6E068FD0.whitetestimony31213.pdf](http://www.banking.senate.gov/public/_cache/files/619e5603-c2c8-4085-98c6-0014ce29bde7/33A699FF535D59925B69836A6E068FD0.whitetestimony31213.pdf).

[2] See Press Release 2016-212, *SEC Announces Enforcement Results for FY 2016* (Oct. 11, 2016), available at <https://www.sec.gov/news/pressrelease/2016-212.html>; Press Release 2015-245, *SEC Announces Enforcement Results For FY 2015* (Oct. 22, 2015), available at <https://www.sec.gov/news/pressrelease/2015-245.html>; Press Release 2014-230, *SEC’s FY 2014 Enforcement Actions Span Securities Industry and Include First-Ever Cases* (Oct. 16, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543184660>.

[3] Examples from just this last fiscal year include: insider trading cases against a prominent hedge fund manager and a well-known Las Vegas gambler; Press Release 2016-119, *Hedge Fund Managers and Former Government Official Charged in \$32 Million Insider Trading Scheme* (June 15, 2016), available at <https://www.sec.gov/news/pressrelease/2016-119.html>; Press Release 2016-92, *SEC Announces Insider Trading Charges in Case Involving Sports Gambler and Board Member* (May 19, 2016), available at <https://www.sec.gov/news/pressrelease/2016-92.html>; FCPA cases against a hedge fund and its sitting CEO and CFO, and against a Dutch telecommunications company obtaining almost \$800 million in monetary remedies for U.S. and Dutch regulators; Press Release 2016-203, *Och-Ziff Hedge Fund Settles FCPA Charges* (Sept. 29, 2016), available at <https://www.sec.gov/news/pressrelease/2016-203.html>; Press Release 2016-34, *VimpelCom to Pay \$795 Million in Global Settlement for FCPA Violations* (Feb. 18, 2016), available at <https://www.sec.gov/news/pressrelease/2016-34.html>; a significant financial reporting case involving misstatement of tax reserves against a major oil services company and two senior executives, as well as against a Big Four accounting firm and two of its partners; Press Release 2016-219, *Ernst & Young to Pay \$11.8 Million for Audit Failures* (Oct. 18, 2016), available at <https://www.sec.gov/news/pressrelease/2016-219.html> (“Ernst & Young”) Press Release 2016-194, *Oil Services Company Paying \$140 Million Penalty for Accounting Fraud* (Sep. 27, 2016), available at

<https://www.sec.gov/news/pressrelease/2016-194.html> (“Weatherford”); and a critical customer protection rule case against a major financial institution, which involved admissions of wrongdoing and hundreds of millions of dollars in monetary sanctions. Press Release 2016-128, *Merrill Lynch to Pay \$415 Million for Misusing Customer Cash and Putting Customer Securities at Risk* (Jun. 23, 2016), available at <https://www.sec.gov/news/pressrelease/2016-128.html> (“Merrill Lynch Customer Protection Rule”).

[4] See Ben Protess & Benjamin Weiser, *A Signal to Wall Street in Obama’s Pick For Regulators*, N.Y. Times (Jan. 24, 2013), available at [http://dealbook.nytimes.com/2013/01/24/mary-jo-white-to-be-named-new-s-e-c-boss/?\\_r=0](http://dealbook.nytimes.com/2013/01/24/mary-jo-white-to-be-named-new-s-e-c-boss/?_r=0).

[5] Chair Mary Jo White, U.S. Securities and Exchange Commission, *Deploying the Full Enforcement Arsenal* (Sep. 26, 2013), available at <https://www.sec.gov/News/Speech/Detail/Speech/1370539841202>.

[6] *Id.*

[7] Andrew J. Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Statement on the Jury’s Verdict in Case Against the Wylys* (May 12, 2014), available at <https://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370541799330>; Press Release 2010-137, *SEC Charges Corporate Insider Brothers With Fraud* (Jul. 29, 2010), available at <https://www.sec.gov/news/press/2010/2010-137.htm>.

[8] Andrew J. Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Statement on Jury’s Verdict in Trial of Daryl Payton and Benjamin Durant* (Feb. 9, 2016), available at <https://www.sec.gov/news/statement/statement-jury-verdict-payton-durant.html>; Press Release 2014-124, *SEC Charges Former Brokers with Trading Ahead of IBM-SPSS Acquisition* (Jun. 25, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542161708>.

[9] Andrew J. Ceresney, Director., Division of Enforcement, U.S. Securities and Exchange Commission, *Statement on Jury’s Verdict in Trial of the City of Miami and Michael Boudreaux* (Sep. 14, 2016), available at <https://www.sec.gov/news/statement/ceresney-statement-2016-09-14.html>; Press Release 2013-130, *SEC Charges City of Miami and Former Budget Director With Municipal Bond Offering Fraud* (Jul. 19, 2013), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539727618>.

[10] Chair Mary Jo White, U.S. Securities and Exchange Commission, *The Importance of Trials to the Law and Public Accountability* (Nov. 14, 2013), available at <https://www.sec.gov/News/Speech/Detail/Speech/1370540374908>.

[11] See, e.g., Press Release 2016-96, *Investment Banker and Plumber Charged With Insider Trading* (May 31, 2016), available at <https://www.sec.gov/news/pressrelease/2016-96.html>; Litigation Release No. 23492, *Former Microsoft Corporation Finance Manager Agrees to Settle Insider Trading Charges* (Mar. 18, 2016), available at <https://www.sec.gov/litigation/litreleases/2016/lr23492.htm>; Press Release 2016-44, *Insider Traders Returning Illegal Profits and Kickbacks* (Mar. 9, 2016), available at <https://www.sec.gov/news/pressrelease/2016-44.html>; Press Release 2015-267, *Former Goldman Employee Charged With Insider Trading Before Mergers* (Nov. 25, 2015), available at <https://www.sec.gov/news/pressrelease/2015-267.html>; Press Release 2015-205, *SEC Charges Consultant and Friend With Insider Trading in Advance of P.F. Chang’s Merger* (Sept. 23, 2015), available at <https://www.sec.gov/news/pressrelease/2015-205.html>; Press Release 2015-174, *SEC*

*Charges Former Investment Bank Analyst and Two Others With Insider Trading in Advance of Client Deals* (Aug. 25, 2015), available at <https://www.sec.gov/news/pressrelease/2015-174.html>; Press Release 2015-90, *SEC Charges Father and Son in \$1.1 Million Insider Trading Scheme* (May 14, 2015), available at <https://www.sec.gov/news/pressrelease/2015-90.html>; Press Release 2015-23, *SEC Charges Four in California Insider Trading Ring* (Feb. 5, 2015), available at <https://www.sec.gov/news/pressrelease/2015-23.html>; Press Release 2014-197, *SEC Charges IT Employee at Law Firm With Insider Trading Ahead of Merger Announcements* (Sept. 16, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542965393>.

[12] Press Release 2015-191, *SEC Obtains \$30 Million From Traders Who Profited on Hacked News Releases* (Sep. 14, 2015), available at <https://www.sec.gov/news/pressrelease/2015-191.html>; Press Release 2015-163, *SEC Charges 32 Defendants in Scheme to Trade on Hacked News Releases* (Aug. 11, 2015), available at <https://www.sec.gov/news/pressrelease/2015-163.html>; Chair Mary Jo White, U.S. Securities and Exchange Commission, *Remarks at a Press Conference Announcing Enforcement Charges Involving an International Hacking Trading Scheme* (Aug. 11, 2015), available at <https://www.sec.gov/news/statement/press-conference-remarks-massive-hacking-trading-scheme.html>; Litigation Release No. 23682, *Russian Traders Agree to Settle Claims Relating to Hacked News Release Scheme; SEC's Recovery to Date Exceeds \$53 Million* (Nov. 2, 2016), available at <https://www.sec.gov/litigation/litreleases/2016/lr23682.htm>; Chair Mary Jo White, U.S. Securities and Exchange Commission, *Remarks at the International Institute for Securities Market Growth and Development* (Apr. 8, 2016), available at <https://www.sec.gov/news/statement/speech-mjw-040816.html>.

[13] U.S. Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* at 1 (Nov. 15, 2016), available at <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf>; Press Release 2016-173, *SEC Whistleblower Program Surpasses \$100 Million in Awards* (Aug. 30, 2016), available at <https://www.sec.gov/news/pressrelease/2016-173.html>.

[14] As I remarked in a speech last year, “[w]e want whistleblowers – and their employers – to know that employees are free to come forward without fear of reprisals.” Chair Mary Jo White, U.S. Securities and Exchange Commission, *The SEC as the Whistleblower's Advocate* (Apr. 30, 2015), available at <https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html>.

[15] Press Release 2016-204, *SEC: Casino-Gaming Company Retaliated Against Whistleblower* (Sep. 29, 2016), available at <https://www.sec.gov/news/pressrelease/2016-204.html>; Press Release 2014-118, *SEC Charges Hedge Fund Adviser With Conducting Conflicted Transactions and Retaliating Against Whistleblower* (Jun. 16, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542096307>.

[16] Press Release 2016-196, *SEC Charges Anheuser-Busch InBev With Violating FCPA and Whistleblower Protection Laws* (Sep. 28, 2016), available at <https://www.sec.gov/news/pressrelease/2016-196.html>; Press Release 2016-164, *Company Punished for Severance Agreements that Removed Financial Incentives for Whistleblowing* (Aug. 16, 2016), available at <http://www.sec.gov/news/pressrelease/2016-164.html> (“Health Net”); Press Release 2016-157, *Company Paying Penalty for Violating Key Whistleblower Protection Rule* (Aug. 10, 2016), available at <https://www.sec.gov/news/pressrelease/2016-157.html>; Merrill Lynch Customer Protection Rule, *supra* note 3; Press Release 2015-54, *SEC: Companies Cannot Stifle Whistleblowers in*

*Confidentiality Agreements* (Apr. 1, 2015), available at <https://www.sec.gov/news/pressrelease/2015-54.html>.

[17] See, e.g., *Health Net*, *supra* note 16.

[18] See, e.g., Chair Mary Jo White, U.S. Securities and Exchange Commission, *Opening Remarks at the 21st Annual International Institute for Securities Enforcement and Market Oversight* (Nov. 2, 2015), available at <https://www.sec.gov/news/statement/remarks-21st-international-institute-for-securities-enforcement.html>; Chair Mary Jo White, U.S. Securities and Exchange Commission, *Three Key Pressure Points in the Current Enforcement Environment* (May 19, 2014), available at <https://www.sec.gov/news/speech/2014-spch051914mjw.html>.

[19] See, e.g., Press Release 2016-210, *Credit Suisse Paying \$90 Million Penalty for Misrepresenting Performance Metric* (Oct. 5, 2016), available at <https://www.sec.gov/news/pressrelease/2016-210.html> (charges against former COO of firm's private banking division); *Weatherford*, *supra* note 3 (charges against former vice president of tax and former tax manager); Press Release 2016-62, *SEC: Navistar International and Former CEO Misled Investors About Advanced Technology Engine* (Mar. 31, 2016), available at <https://www.sec.gov/news/pressrelease/2016-62.html> (charges against former CEO); Press Release 2016-25, *Monsanto Paying \$80 Million Penalty for Accounting Violations* (Feb. 9, 2016), available at <https://www.sec.gov/news/pressrelease/2016-25.html> (charges against two accounting executives and sales executive); Press Release 2016-7, *SEC Charges 11 Bank Officers and Directors With Fraud* (Jan. 13, 2016), available at <https://www.sec.gov/news/pressrelease/2016-7.html> (charges against former CEO and Chairman, former CFO and former general counsel of bank's holding company, former market executive, two outside directors, and former president and CEO, former chief credit officer and former president of bank); Press Release 2015-180, *SEC Charges Bankrate and Former Executives With Accounting Fraud* (Sept. 8, 2015), available at <https://www.sec.gov/news/pressrelease/2015-180.html> (charges against former CFO, former director of accounting, and former vice president of finance); Press Release 2015-179, *SEC Charges Sports Nutrition Company With Failing to Properly Disclose Perks for Executives; Former Audit Committee Chair Among Four Individuals Charged* (Sep. 8, 2015), available at <https://www.sec.gov/news/pressrelease/2015-179.html> (charges against CEO, former CFOs, and Chair of Audit Committee); Press Release 2014-269, *SEC Announces Fraud Charges Against Two Executives in Scheme Involving Fake Occupants at Senior Residences* (Dec. 3, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543576909> (charges against former CEO and former CFO); Press Release 2014-4, *SEC Charges Diamond Foods and Two Former Executives Following Accounting Scheme to Boost Earnings Growth* (Jan. 9, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540598296> (charges against former CEO and former CFO).

[20] See, e.g., *Ernst & Young*, *supra* note 3; Press Release 2016-187, *Ernst & Young, Former Partners Charged With Violating Auditor Independence Rules* (Sep. 19, 2016), available at <https://www.sec.gov/news/pressrelease/2016-187.html>; Press Release 2015-272, *SEC: Grant Thornton Ignored Red Flags in Audits* (Dec. 2, 2015), available at <https://www.sec.gov/news/pressrelease/2015-272.html>; Press Release 2015-184, *SEC Charges BDO and Five Partners in Connection With False and Misleading Audit Opinions* (Sept. 9, 2015), available at <https://www.sec.gov/news/pressrelease/2015-184.html>.

[21] See Andrew J. Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *The SEC Enforcement Division's Focus on Auditors and Auditing* (Sep. 22, 2016),

available at <https://www.sec.gov/news/speech/ceresney-enforcement-focus-on-auditors-and-auditing.html>; Andrew J. Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Directors Forum 2016 Keynote Address* (Jan. 25, 2016), available at <https://www.sec.gov/news/speech/directors-forum-keynote-ceresney.html>.

[22] Chair White, *The Importance of Trials to the Law and Public Accountability*, *supra* note 10; Chair White, *Deploying the Full Enforcement Arsenal*, *supra* note 5.

[23] Chair White, *Deploying the Full Enforcement Arsenal*, *supra* note 5.

[24] Robert Khuzami, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Public Statement by SEC Staff: Recent Policy Change* (Jan. 7, 2012), available at <https://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1365171489600>.

[25] Chair White, *Deploying the Full Enforcement Arsenal*, *supra* note 5.

[26] See, e.g., Litigation Release No. 23647, *SEC Obtains Final Judgments Against Promoters of Pyramid Scheme Targeting Latino Communities* (Sep. 19, 2016), available at <https://www.sec.gov/litigation/litreleases/2016/lr23647.htm>; Litigation Release No. 23548, *SEC Obtains Final Judgment Against Massachusetts-Based Promoter of Pyramid Scheme Targeting Latino Communities* (May 27, 2016), available at <https://www.sec.gov/litigation/litreleases/2016/lr23548.htm>; Litigation Release No. 23351, *SEC Obtains Final Judgment Against Promoter of Pyramid Scheme Targeting Latino Communities* (Sep. 17, 2015), available at <https://www.sec.gov/litigation/litreleases/2015/lr23351.htm>; Press Release 2014-263, *Wedbush Securities and Two Officials Agree to Settle SEC Case; L.A.-Based Broker-Dealer Admits Wrongdoing and Will Pay Financial Penalty for Market Access Violations* (Nov. 20, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543504806>.

[27] For example, the CFTC has required admissions in a few cases and entered into its first admissions settlement in October 2013. See Release PR6737-13, *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), available at <http://www.cftc.gov/PressRoom/PressReleases/pr6737-13>; see also Max Stendahl, *CFTC Mimics SEC Policy Shift With JPMorgan 'Whale' Pact*, Law360 (Oct. 16, 2013), available at <http://www.law360.com/articles/480686/cftc-mimics-sec-policy-shift-with-jpmorgan-whale-pact>. Similarly, the CFPB has required admissions in two cases and entered into its first admissions settlement in February 2014. See Press Release, *CFPB Takes Action Against Mortgage Lender for Illegal Payments* (Feb. 24, 2014), available at <http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-mortgage-lender-for-illegal-payments/>.

[28] See, e.g., Press Release 2015-120, *Investment Advisory Firm's Former President Charged With Stealing Client Funds* (Jun. 15, 2015), available at <https://www.sec.gov/news/pressrelease/2015-120.html>; Press Release 2015-94, *SEC Charges Brokerage Firm Co-Owners With Defrauding Investors* (May 20, 2015), available at <https://www.sec.gov/news/pressrelease/2015-94.html>; Press Release 2013-266, *SEC Charges ConvergeX Subsidiaries With Fraud for Deceiving Customers About Commissions* (Dec. 18, 2013), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540521484>; Press Release 2013-168, *SEC Charges San Diego-Based Investment Adviser in Cherry-Picking and Soft Dollar Schemes* (Aug. 30, 2013), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539795856>.

[29] From fiscal year 2013 through fiscal year 2015, there have been 387 criminal actions related to conduct under investigation by the SEC. See U.S. Securities and Exchange Commission, *FY 2015 Annual Performance Report & FY 2017 Annual Performance Plan* at 41 (Feb. 9, 2016), available at <https://www.sec.gov/about/reports/sec-fy2015-fy2017-annual-performance.pdf>. In addition, for FY 2016, there were 109 criminal actions related to conduct under investigation by the SEC.

[30] See Andrew J. Ceresney, Director Division of Enforcement, U.S. Securities and Exchange Commission, *Market Structure Enforcement: Looking Back and Forward* (Nov. 2, 2015), available at <https://www.sec.gov/news/speech/ceresney-speech-sifma-ny-regional-seminar.html>.

[31] See 17 C.F.R. § 240.15c3-5.

[32] *Id.*

[33] Press Release 2016-192, *Merrill Lynch Charged With Trading Controls Failures That Led to Mini-Flash Crashes* (Sep. 26, 2016), available at <https://www.sec.gov/news/pressrelease/2016-192.html> (“Merrill Lynch Market Access Rule”); *Barclays Capital Inc.*, Securities Act Release No. 10010 (Jan. 31, 2016), available at <https://www.sec.gov/litigation/admin/2016/33-10010.pdf>; Press Release 2015-221, *Latour Trading Charged With Market Structure Rule Violations* (Sep. 30, 2015), available at <https://www.sec.gov/news/pressrelease/2015-221.html>; Press Release 2015-133, *SEC Charges Goldman Sachs With Violating Market Access Rule* (Jun. 30, 2015), available at <https://www.sec.gov/news/pressrelease/2015-133.html>; Press Release 2014-274 *SEC Penalizes Morgan Stanley for Violating Market Access Rule* (Dec. 10, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543668817>; Press Release 2014-115, *SEC Announces Charges Against Wedbush Securities and Two Officials for Market Access Violations* (Jun. 6, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542011614>; Press Release 2013-222, *SEC Charges Knight Capital With Violations of Market Access Rule* (Oct. 16, 2013), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539879795>.

[34] *Merrill Lynch Market Access Rule*, *supra* note 33.

[35] *Id.*

[36] Press Release 2016-16, *Barclays, Credit Suisse Charged With Dark Pool Violations* (Jan. 31, 2016), available at <https://www.sec.gov/news/pressrelease/2016-16.html> (“Barclays/Credit Suisse”); Press Release 2015-164, *SEC Charges ITG With Operating Secret Trading Desk and Misusing Dark Pool Subscriber Trading Information* (Aug. 12, 2015), available at <https://www.sec.gov/news/pressrelease/2015-164.html>; Press Release 2015-7, *SEC Charges UBS Subsidiary With Disclosure Violations and Other Regulatory Failures in Operating Dark Pool* (Jan. 15, 2015), available at <https://www.sec.gov/news/pressrelease/2015-7.html>; Press Release 2014-147, *Citigroup Business Unit Charged With Failing to Protect Confidential Subscriber Data While Operating Alternative Trading System* (Jul. 25, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542371114>; Press Release 2014-114, *SEC Charges New York-Based Dark Pool Operator With Failing to Safeguard Confidential Trading Information* (June 6, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542011574>.

[37] See generally Andrew J. Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Securities Enforcement Forum West 2016 Keynote Address: Private Equity*

*Enforcement* (May 12, 2016), available at <https://www.sec.gov/news/speech/private-equity-enforcement.html>.

[38] *Id.* (citing Luisa Beltran, *ILPA releases Fee Transparency Initiative*, PE Hub Network (Sep. 3, 2015), available at <https://www.pehub.com/2015/09/ilpa-releases-fee-transparency-initiative/>; Timothy W. Martin, *States, Cities to Ask SEC to Beef Up Disclosures for Private-Equity Firms*, Wall St. J. (Jul. 21, 2015), available at <http://www.wsj.com/articles/states-cities-to-ask-sec-to-beef-up-disclosures-for-private-equity-firms-1437522627>; Mark Maremont & Mike Spector, *Buyout Firms Disclose More Fees*, Wall St. J. (Nov. 20, 2014), available at <http://www.wsj.com/articles/buyout-firms-disclose-more-fees-1416510945> ).

[39] See generally Andrew J. Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *The Impact of SEC Enforcement on Public Finance* (Oct. 13, 2016), available at <https://www.sec.gov/news/speech/speech-ceresney-10132016.html>.

[40] See, e.g., Press Release 2016-93, *Mayor in Illinois Settles Muni Bond Fraud Charges* (May 19, 2016), available at <https://www.sec.gov/news/pressrelease/2016-93.html>; Press Release 2014-249, *SEC Charges Allen Park, Mich. And Two Former City Leaders in Fraudulent Muni Bond Offering for Movie Studio Project* (Nov. 6, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543373355>.

[41] See, e.g., Press Release 2014-122, *SEC Obtain Court Order to Halt Fraudulent Bond Officer by City of Harvey, Ill.* (June 25, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542163027>.

[42] See, e.g., Press Release 2016-229, *Firm and Partner Charged With Issuing Fraudulent Audit Reports* (Oct. 31, 2016), available at <https://www.sec.gov/news/pressrelease/2016-229.html>.

[43] Press Release 2014-156, *SEC Enforcement Division Modifies Municipal Disclosure Initiative* (Jul. 31, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542578459>; Press Release 2014-46, *SEC Launches Enforcement Cooperation Initiative for Municipal Issuers and Underwriters* (Mar. 10, 2014), available at <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541090828>; Statement by Division of Enforcement, *Municipalities Continuing Disclosure Cooperation Initiative* (Mar. 10, 2014), available at <https://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml> (“MCDC Statement”).

[44] *MCDC Statement*, *supra* note 43.

[45] Press Release 2016-18, *SEC Completes Muni-Underwriter Enforcement Sweep* (Feb. 2, 2016), available at <https://www.sec.gov/news/pressrelease/2016-18.html>.

[46] Press Release 2016-166, *SEC Charges 71 Municipal Issuers in Muni Bond Disclosure Initiative* (Aug. 24, 2016), available at <https://www.sec.gov/news/pressrelease/2016-166.html>.

[47] See, e.g., Ceresney, *The Impact of SEC Enforcement on Public Finance*, *supra* note 39 (citing Jack Casey, *How MCDC Has Changed Continuing Disclosure Practices*, The Bond Buyer (Sep. 21, 2016), available at <http://www.bondbuyer.com/news/washington-enforcement/how-has-mcdc-changed-continuing-disclosure-practices-1114036-1.html>; Jack Casey, *MCDC Has Improved Disclosure but Issues Remain*, The Bond Buyer (Apr. 22, 2016), available at <http://www.bondbuyer.com/news/washington-securities-law/mcdc-has-improved-disclosure-but-issues->

[remain-1101990-1.html](#); *MCDC Credited with Boosting Muni Disclosure*, The Bond Buyer (Feb. 3, 2016), available at <http://www.bondbuyer.com/news/washington-securities-law/mcdc-credited-with-boosting-muni-disclosure-1095588-1.html>).

[48] See, e.g., Tracey McDermott, Director, Enforcement and Fin. Crime, U.K. Fin. Conduct Auth., *Learning the lessons of the past as an industry* (Apr. 2, 2015), available at <https://www.fca.org.uk/news/speeches/learning-lessons-past-industry> ; Martin Wheatley, Chief Executive, U.K. Fin. Conduct Auth., *Nothing to fear from high standards* (Mar. 16, 2015), available at <https://www.fca.org.uk/news/speeches/nothing-fear-high-standards> ; Tracey McDermott, Director, Enforcement and Fin. Crime, U.K. Fin. Conduct Auth., *The regulatory* (Feb. 24, 2015), available at <https://www.fca.org.uk/news/speeches/regulatory-challenge> ; William C. Dudley, President and Chief Executive Officer, Fed. Reserve Bank of N.Y., *Enhancing Financial Stability by Improving Culture in the Financial Services Industry* (Oct. 20, 2014), available at <http://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html> .

[49] To date, the SEC has charged 93 CEOs, CFOs, and other senior corporate officers with conduct related to the financial crisis. See U.S. Securities and Exchange Commission, *SEC Enforcement Actions Addressing Misconduct That Led to or Arose From the Financial Crisis*, available at <https://www.sec.gov/spotlight/enf-actions-fc.shtml>.

[50] Although Section 304 of Sarbanes-Oxley provides authority to obtain clawbacks from CEOs and CFOs of incentive-based compensation and profits from stock sales – authority that the Commission has used consistently in the last few years – the SEC can only obtain such clawbacks in the event that a restatement is required as a result of misconduct. The Commission has proposed rules directing national securities exchanges and associations to establish listing standards requiring companies to adopt policies that require executive officers to pay back incentive-based compensation that they were awarded erroneously. Press Release 2015-136, *SEC Proposes Rules Requiring Companies to Adopt Clawback Policies on Executive Compensation; Proposed Rules Designed to Improve Quality of Financial Reporting and Enhance Accountability Benefiting Investors* (Jul. 1, 2015), available at <https://www.sec.gov/news/pressrelease/2015-136.html>. Under the proposed new Rule 10D-1, listed companies would be required to develop and enforce recovery policies that in the event of an accounting restatement, “claw back” from current and former executive officers incentive-based compensation they would not have received based on the restatement. Recovery would be required without regard to fault. The proposed rules would also require disclosure of listed companies’ recovery policies, and their actions under those policies.

[51] Financial Service (Banking Reform) Act, 2013, c. 33, § 32 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2013/33/contents/enacted>.

[52] *Id.* § 36.

[53] U.K. Fin. Conduct Auth., Press Release, *New accountability regime for banks and insurers comes into force* (Mar. 7, 2016), available at <https://www.fca.org.uk/news/press-releases/new-accountability-regime-banks-and-insurers-comes-force> .

[54] Andrew Bailey, *The FCA is making senior management responsible for the culture in their firms*, The Guardian (Sept. 27, 2016), available at <https://www.theguardian.com/business/2016/sep/27/the-fca-is-making-senior-management-responsible-for-the-culture-in-their-firms> .

[55] See, e.g., Press Release 2016-3, *Steven A. Cohen Barred From Supervisory Hedge Fund Role; SEC Examinations and Independent Consultant Reviews Also Part of Settlement* (Jan. 8, 2016), available at <https://www.sec.gov/news/pressrelease/2016-3.html>; Press Release 2015-217, *SEC Charges UBS Puerto Rico and Two Individuals in Actions Relating to Former Broker's Fraud; UBSPR Reaches \$34 Million Settlement With SEC, FINRA* (Sep. 29, 2015), available at <https://www.sec.gov/news/pressrelease/2015-217.html>; Press Release 2015-153, *Former Oppenheimer Employees Settle Charges Involving Unregistered Sales of Penny Stocks* (Jul. 23, 2015), available at <https://www.sec.gov/news/pressrelease/2015-153.html>.

[56] For example, this is the premise of Section 304 of the Sarbanes-Oxley Act of 2002, which provides authority to obtain clawbacks from CEOs and CFOs of incentive-based compensation and profits from stock sales if an issuer is required to prepare an accounting restatement due to material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws. See Sarbanes-Oxley Act of 2002 § 304, Pub. L. No. 107-204, 116 Stat. 745, 778 (Jul. 30, 2002) (codified at 15 U.S.C. § 7243). This authority, however, requires a restatement and is limited to CEOs and CFOs. *Id.*

[57] Dudley, *Enhancing Financial Stability by Improving Culture in the Financial Services Industry*, *supra* note 48.

[58] *Id.*

[59] *Id.*

[60] For example, in the United States, the doctrine of the responsible corporate officer has been used to hold senior officers who had authority to prevent or correct a violation criminally liable even absent a showing that they were aware of the wrongdoing. The doctrine developed from two cases imposing misdemeanor liability for violations of the Food, Drug, and Cosmetic Act. See *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943). The doctrine has been expanded to other areas, including environmental laws. See e.g., *United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991) (holding official strictly liable for violations of the Clean Water Act).

[61] Chair White, *Deploying the Full Enforcement Arsenal*, *supra* note 5; see also Chair Mary Jo White, U.S. Securities and Exchange Commission, *Perspectives on Strengthening Enforcement* (Mar. 24, 2014), available at <https://www.sec.gov/News/Speech/Detail/Speech/1370541253621>.

[62] See Financial CHOICE Act of 2016, H.R. 5983, 114th Cong. § 801, available at <http://financialservices.house.gov/uploadedfiles/bills-114hr-hr5983-h001036-amdt-001.pdf>.

[63] Chair Mary Jo White, U.S. Securities and Exchange Commission, *Privacy Rules Shouldn't Handcuff the S.E.C.*, N.Y. Times (May 12, 2016), available at [http://www.nytimes.com/2016/05/13/opinion/privacy-rules-shouldnt-handcuff-the-sec.html?\\_r=0](http://www.nytimes.com/2016/05/13/opinion/privacy-rules-shouldnt-handcuff-the-sec.html?_r=0).

[64] Andrew J. Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Testimony on Updating the Electronic Communications Privacy Act* (Dec. 1, 2015), available at <https://www.sec.gov/news/testimony/testimony-ceresney-12015.html>; Andrew J. Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *Testimony on Updating the Electronic Communications Privacy Act* (Sep. 16, 2015), available at <https://www.sec.gov/news/testimony/testimony-electronic-communications-privacy-act.html>.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Press Release 2016-142, *SEC Adopts Amendments to Rules of Practice for Administrative Proceedings* (Jul. 13, 2016), available at <https://www.sec.gov/news/pressrelease/2016-142.html>.

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