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Improving the SEC's Enforcement Program: A Ten-Point Blueprint for Reform

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With any new Presidential administration comes a new Commission at the Securities and Exchange Commission ("SEC") and an opportunity to evaluate the regulatory priorities. The Division of Enforcement is a key component of the SEC's regulatory program and has enormous influence on the behavior of investors and other market participants. Since its creation, the Division of Enforcement has grown in size and power as Congress has authorized the SEC to enforce additional laws and to seek additional remedies. At the same time, the SEC's enforcement practices have shifted in response to various factors, including financial crises, significant financial frauds, and Congress's legislative priorities.

With the transition to a new Commission, the SEC should take the opportunity to review, evaluate and improve its enforcement program. In light of the SEC's mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation, the SEC should take steps to ensure it is allocating resources properly, striking an appropriate balance between regulation and enforcement, and protecting the rights of investors and industry participants. Below is a brief, ten-point summary of suggestions for improving the SEC's enforcement program.

1. Establish Clear Enforcement Priorities Focused on Intentional Violations by Individuals Who Commit Significant Frauds and Refer Criminal Matters to Criminal Agencies

The SEC should prioritize seeking out and penalizing those individuals, such as Bernie Madoff and Allen Stanford, who commit intentional wrongdoing through schemes designed to defraud investors. The "broken windows" approach, promoted by then-SEC Chair Mary Jo White, disproportionately emphasizes small and sometimes unintentional securities law violations in the hope that doing so will deter more significant violations. But a practical consequence of this is the disproportionate expenditure of the SEC's limited resources on small and unintentional violations, often against well-intentioned executives and chief compliance officers for negligence-based violations or honest mistakes. As a result, more significant and intentional violations, such as Ponzi schemes, boiler rooms, and bucket shops, may go undetected, unpunished, and undeterred.

The SEC should coordinate more closely with other federal and state agencies, including the Department of Justice ("DOJ") and State Attorneys General, to pursue and bring to justice Ponzi schemers and other fraudulent schemers. In the past, competition between the SEC and DOJ has prevented the most severe charges from being levied against individuals as the SEC Staff has been reluctant to "lose" a case to the DOJ by involving the DOJ in the investigation. Under

an improved system, the SEC would consult the DOJ and the relevant State Attorney General during the SEC's investigation and not hesitate to refer matters where federal or state criminal charges clearly are warranted.

2. Reconsider the "Broken Windows" Policy

The SEC should reconsider its broad application of the broken windows policy for enforcing the securities laws. The broken windows approach, which is rooted in criminal law, is based on the idea that law enforcement's refusal to tolerate minor violations of the law will aid in preventing major violations of the law. While the broken windows philosophy may have worked well for law enforcement concerned with public safety, it is not an appropriate approach to securities regulation. Petty street crime and major crime share a common element: criminal intent. In contrast, not everyone who violates the securities laws *intends* to do so. For example, an investment adviser who pores over the lengthy, detailed, and complicated regulations applicable to her industry may, despite her best efforts, inadvertently violate a rule. That is much different than the state of mind of a Ponzi schemer who intentionally defrauds individuals out of their life savings. Yet a broken windows approach suggests taking a hard line to enforcement in each case and ignores the mental state of the alleged violator. The SEC should consider abandoning this policy as it applies to unintentional violations of securities law and instead focus its resources on identifying and punishing intentional misconduct while providing useful regulatory guidance to those in the industry who are earnestly trying to comply with the law.

3. Place Less Emphasis on Enforcement Statistics and Penalty Amounts

The SEC should develop and use better metrics for measuring success. Last October, at the end of its 2016 fiscal year, the SEC issued a press release announcing that the 868 enforcement actions it filed in 2016 were a "new single year high."[1] It also announced that it had obtained approximately $4 billion in disgorgement and penalties. This was the third year in a row that the SEC announced a record number of enforcement actions.[2]

The number of enforcement actions and the amount of disgorgement and penalties purportedly demonstrate the success of the SEC's enforcement program. But if the aim of the program is to protect investors and *deter* wrongdoing, then the high numbers of enforcement actions and penalties are, at best, a poor way to measure that protection and deterrence. At

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[1] *See* Press Release, SEC, *SEC Announces Enforcement Results for FY 2016* (Oct. 11, 2016), Release No. 2016-212, *available at* https://www.sec.gov/news/pressrelease/2016-212.html.

[2] *See* Press Release, SEC, *SEC's FY 2014 Enforcement Actions Span Securities Industry and Include First-Ever Cases* (Oct. 16, 2014), Release No. 2014-230, *available at* https://www.sec.gov/news/press-release/2014-230 ("In the fiscal year that ended in September, the SEC filed a record 755 enforcement actions . . . ."); Press Release, SEC, *SEC Announces Enforcement Results for FY 2015* (Oct. 22, 2015), Release No. 2015-245, *available at* https://www.sec.gov/news/pressrelease/2015-245.html ("In the fiscal year that ended in September, the SEC filed 807 enforcement actions . . . .").

worst, record numbers are an indication that securities law violations are increasing in number and severity. After all, few would consider a local police force successful in deterring crime if it announced record numbers of arrests year after year. In addition, the SEC's focus on achieving record numbers could have the practical effect of disproportionately allocating scarce resources to pursuing a large volume of minor or unintentional violations involving large companies (and thus leading to large penalty figures) at the expense of pursuing fewer but more complicated cases involving intentional wrongdoing such as Ponzi schemes, boiler rooms, and bucket shops, which have a disproportionately negative impact on retail investors. A focus on enforcement statistics also may lead the SEC to develop and pursue theories of liability that exceed the bounds of the SEC's congressionally-authorized enforcement power.[3]

The SEC's past emphasis on obtaining large penalties against corporations, coupled with press releases that identify its Enforcement Staff attorneys by name,[4] creates incentives that may be misaligned with the core mission of the SEC of protecting investors, namely the innocent shareholders who must bear the cost of a corporate monetary penalty.

4. Update the Benefits for Assisting the SEC as Articulated in the Seaboard Report

Since 2001, the SEC has had a written policy, often known as the Seaboard Report[5], for determining whether, and how much, to credit self-policing, self-reporting, remediation, and cooperation. When it issued the Seaboard Report, the SEC stated that such credit could range from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents used to announce and resolve enforcement actions.

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[3] This so-called "regulation by enforcement" is contrary to the SEC's rulemaking authority and violates fundamental principles of due process that require regulatory agencies to provide a notice and comment period for new or modified rules. *See* Bradley J. Bondi, *Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions*, 6 N.Y.U. J. Law & Bus. 1, 16 n.64 (2009) (quoting then-Commissioner Paul Atkins, who said, "[i]f we are to enforce the rule of law, we must follow the rule of law in our approach"); *see also Theodore W. Urban*, SEC Administrative Proceeding File No. 3-13655, Initial Decision Release No. 402 (September 8, 2010), *dismissed* by Exchange Act Release No. 66359 (January 26, 2012).

[4] Similarly, the SEC should remove the names of Enforcement Staff from SEC releases. The University of Southern California famously does not put players' names on the back of its football jerseys. The purported reason is to emphasize the achievement of the team and not any individual player. The SEC should take a similar approach to its releases announcing enforcement actions. Currently, these releases identify the individual attorneys who supervised, led, and assisted in the investigation. This individual recognition can incentivize the Staff to pursue headline-grabbing enforcement actions and sanctions, such as a record penalty amount. Former Enforcement Staff members often tout these high-profile actions on their law firm profiles after they leave government service. The incentive to seek recognition for bringing a high-profile enforcement action can cloud the Staff's focus when determining, for example, whether to commence an investigation against a high-profile company or individual, the scope of such an investigation, the appropriate time to close such an investigation, and the size of the penalty to be imposed if a securities law violation has occurred. The mission of the SEC would be better served by removing individual incentives to seek public recognition.

[5] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Rel. No. 44969 (Oct. 23, 2001), *available at* https://www.sec.gov/litigation/investreport/34-44969.htm.

For the SEC, the policy helps uncover and prevent activity harmful to investors that might otherwise go unreported. But companies likely will come forward only to the extent the cooperation policy provides predictable benefits for alerting the SEC to concerns. Some commentators have observed that, under the Seaboard framework, companies and their counsel are unable to assess the implication of self-reporting, which has resulted in a hesitation to take steps that ultimately would benefit the SEC and investors. Others have observed that the "carrots," which the SEC established to encourage cooperation and conserve government and shareholder resources, have become smaller or less certain while the "stick" for failing to cooperate has gotten larger.

The SEC should revisit and update the Seaboard Report to clarify (1) the benefits available for companies that self-police, self-report, cooperate with the SEC, and remediate misconduct and (2) how companies can qualify to receive these benefits, leading to improved investor protection.

5. Evaluate and Clearly Articulate the Reasons for Imposing a Monetary Penalty on Shareholders

In 1990, Congress passed the Remedies Act, which enabled the SEC to seek monetary penalties. At the time, the Senate Committee on Banking, Housing, and Urban Affairs cautioned that the costs of monetary penalties might be passed on to shareholders, and the Committee expected that the SEC would seek a monetary penalty only when the securities law violation had resulted in an improper benefit to shareholders.[6] In cases in which shareholders are the principal victims of the violations, the Committee expected that the SEC, when appropriate, would seek penalties from the individual offenders acting for a corporate issuer.

From 1990 to 2002, the SEC imposed penalties sparingly. The SEC's April 2002 case against Xerox Corporation marked a shift to seeking penalties more frequently and in higher amounts. The $10 million penalty imposed on Xerox for financial fraud was an unprecedented amount at the time and about three times larger than the previous record amount for a similar case.[7] Since the Xerox case, the SEC has levied many civil penalties of $10 million or larger. In 2003, the year after the Xerox case, the total amount of monetary penalties (excluding disgorgement) imposed by the SEC on companies increased to approximately $1.1 billion from approximately $101 million in the prior year.[8]

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[6] S. Rep. No. 101-337, at 17 (1990).

[7] *See* Press Release, SEC, *Xerox Settles SEC Enforcement Action Charging Company With Fraud* (Apr. 11, 2002), Release No. 2002-52, *available at* https://www.sec.gov/news/headlines/xeroxsettles.htm; *see also* James Bandler and Mark Maremont, *Xerox Will Pay $10 Million Penalty to Settle SEC Accounting Charges*, Wall St. J. (Apr. 2, 2002), *available at* https://www.wsj.com/articles/SB1017682255642049000.

[8] *See SEC 2002 Annual Report*, at 1 (Jan. 1, 2002,) *available at* https://www.sec.gov/pdf/annrep02/ar02full.pdf ("Civil penalties ordered in SEC proceedings totaled approximately $101 million."); *SEC 2003 Annual Report*, at 15 (Jan. 1, 2003), *available at* https://www.sec.gov/pdf/annrep03/ar03full.pdf ("Obtained orders in SEC judicial and administrative proceedings requiring securities violators . . . to pay penalties of approximately $1.1 billion.").

The total annual penalties in fiscal years 2004 and 2005 were approximately $1.2 billion and $1.5 billion, respectively.[9] Then, in January 2006, a unanimous Commission issued the Statement of the Securities and Exchange Commission Concerning Financial Penalties, often known simply as the SEC's "Penalty Statement."[10] The purpose of the Penalty Statement was to provide the maximum possible degree of clarity, consistency, and predictability in explaining how the SEC exercises its corporate penalty authority. In the Penalty Statement, the SEC identified two principal considerations for determining whether a monetary penalty against a company is appropriate: (1) the presence or absence of a direct benefit to the company as a result of the securities law violation and (2) the degree to which the penalty will recompense or further harm the injured shareholders. After the Penalty Statement, annual monetary penalty amounts dropped significantly. In 2008, for example, the SEC imposed approximately $256 million in monetary penalties.[11]

In recent years, some commissioners have disavowed the Penalty Statement. In September 2013, then-Chair Mary Jo White observed that the Penalty Statement is non-binding and, while recognizing that it sets forth useful considerations, stated that each commissioner has discretion within his or her statutory authority to reach a conclusion on whether a penalty is appropriate and how high it should be.[12] A few weeks later, then-Commissioner Luis Aguilar agreed with Chair White's assessment and stated that the Penalty Statement "constituted a fatally flawed approach to assessing the appropriateness of corporate penalties" because it focused on whether the company had benefited from the misconduct and shareholder harm instead of punishing misconduct and deterring future violations.[13] Since 2013, the average annual amount of monetary penalties (excluding disgorgement) imposed has been approximately $1.25 billion.[14] The disavowal of the Penalty Statement creates unpredictability regarding the criteria the SEC considers when determining whether to impose a penalty. For an agency that demands from companies that their disclosures be transparent, the SEC historically has offered little transparency of its own.

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[9] *See United States Securities and Exchange Commission 2004 Enforcement and Market Data*, *available at* https://www.sec.gov/files/secpar04stats%2C0.pdf; *Select SEC and Market Data Fiscal 2005, available at* https://www.sec.gov/files/secstats2005%2C0.pdf.

[10] *See* Press Release, SEC, *Statement of the Securities and Exchange Commission Concerning Financial Penalties* (Jan. 4, 2006), Release No. 2006-4, *available at* https://www.sec.gov/news/press/2006-4.htm.

[11] *See Select SEC and Market Data Fiscal 2008*, *available at* https://www.sec.gov/files/secstats2008.pdf.

[12] Mary Jo White, Chair, SEC, Remarks before the Council of Institutional Investors Fall Conference: *Deploying the Full Enforcement Arsenal* (Sept. 26, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370539841202.

[13] Luis A. Aguilar, Commissioner, SEC, Remarks before the 20th Annual Securities Litigation and Regulatory Enforcement Seminar: *A Stronger Enforcement Program to Enhance Investor Protection* (Oct. 25, 2013), *available at* https://www.sec.gov/news/speech/2013-spch102513laa.

[14] The penalty amount was $1.167 billion in 2013, $1.378 billion in 2014, $1.175 billion in 2015, and $1.273 billion in 2016. *See Select SEC and Market Data Fiscal 2013*, *available at* https://www.sec.gov/files/secstats2013.pdf; *Select SEC and Market Data Fiscal 2014, available at* https://www.sec.gov/files/secstats2014.pdf; *Select SEC and Market Data Fiscal 2015, available at* https://www.sec.gov/files/secstats2015.pdf; and *Select SEC and Market Data Fiscal 2016, available at* https://www.sec.gov/files/2017-03/secstats2016.pdf.

The amount of the monetary penalty is also unpredictable because the SEC in recent years has not articulated criteria or metrics for calculating how much it will penalize a company. This unpredictability negatively impacts companies. For example, the inability to predict the size of a potential penalty hinders the market for mergers and acquisitions because successor companies cannot accurately forecast their regulatory exposure.

This lack of transparency and predictability with respect to monetary penalties is contrary to the SEC's mission to maintain fair, orderly, and efficient markets and facilitate capital formation. In July 1934, Joseph P. Kennedy, the first chairman of the SEC, stated there would be no concealed punishment for businesses subject to the SEC's jurisdiction.[15] In that spirit of transparency, the SEC should provide clear, principled guidance regarding when it will seek a penalty and how it will calculate the amount.

6. Restore Credibility to Administrative Proceedings

The SEC has the authority to pursue enforcement actions in administrative proceedings over which an administrative law judge appointed by the SEC presides. Historically, only registered individuals and entities such as broker-dealers and investment advisers were subject to enforcement actions in administrative proceedings. By registering with the SEC, these entities effectively agreed to be subject to the SEC's administrative enforcement jurisdiction in a manner analogous to an attorney who agrees to be subject to the rules of the bar of the state where he or she is licensed to practice.

In 1990, the Remedies Act authorized the SEC to impose monetary penalties on regulated entities in administrative proceedings. It also authorized the SEC to pursue remedial relief such as "cease-and-desist" and disgorgement orders against non-regulated entities, but it did not authorize the SEC to seek monetary penalties against issuers in administrative proceedings. The concern among members of Congress and internally at the SEC was that if the same remedies against issuers were available to the SEC under both judicial and administrative proceedings, then the SEC might be perceived to have an incentive to conduct more enforcement actions through its own administrative proceedings, rather than before a federal district court judge.[16] The Dodd-Frank Act of 2010 removed this important distinction by authorizing the SEC to impose monetary penalties against issuers in administrative proceedings.

In recent years, several respondents have challenged the constitutionality of the SEC's administrative proceedings by filing lawsuits in federal district court arguing that administrative proceedings threaten to deprive them of liberty and property without due process and that the SEC had unfairly singled them out in administrative proceedings in violation of the equal protection clause. To date, most courts have rejected these arguments. Nevertheless, some

[15] Joseph P. Kennedy, Chairman, SEC, Remarks before the National Press Club (July 15, 1934) at 3, *available at* https://www.sec.gov/news/speech/1934/072534kennedy.pdf.

[16] Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 Fordham J. Corp. & Fin. L. at 393-94.

market participants continue to believe that administrative proceedings are unfair because respondents in administrative proceedings do not enjoy all of the procedural safeguards that are afforded to defendants in federal district court, especially with respect to depositions, document discovery, rules of evidence, and the ability to confront accusers.

This perceived unfairness may be due to the fact that the SEC wins more frequently in administrative proceedings than in district court. In 2015, *The Wall Street Journal* reported that from October 2010 through March 2015, the SEC won 90% of its administrative proceedings, while in the same period the SEC prevailed in only 69% of the cases it brought in federal district court.[17] Further, a 2016 study suggested that, after Dodd-Frank, the SEC has shifted weaker cases from district court to administrative proceedings or has brought actions as administrative proceedings that it would not have brought at all before Dodd-Frank.[18]

In July 2016, the SEC adopted amendments updating its rules of practice governing administrative proceedings.[19] Most importantly, the amended rules extend the length of the prehearing period to allow respondents more time to prepare for administrative hearings; allow for depositions in complex cases (not just when witnesses are unavailable to testify at the hearing); and permit the exclusion of "unreliable" evidence. While the amendments provide new safeguards to respondents, they fall short of the procedural safeguards afforded to defendants in federal district court. And they do not establish criteria for determining when the SEC will bring a case in an administrative proceeding rather than in federal court.

The SEC could enhance the perception of fairness of its administrative proceedings by adopting additional procedural safeguards that more closely align the proceedings with those in federal district court and by clearly articulating the criteria it uses for determining whether to bring a case in an administrative proceeding instead of in federal district court.

7. Establish an Advisory Committee To Evaluate the Enforcement Program

In July 2008, then-Commissioner Paul Atkins and I called for an independent advisory committee to evaluate the SEC's enforcement program.[20] Such an advisory committee could be useful at this stage to the SEC. In the spirit of the Wells Committee convened by Chairman William Casey in 1972, the new advisory committee could conduct an independent review of the SEC's enforcement program and recommend any changes needed to modernize enforcement practices. The charge to this advisory committee should be: "What changes

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[17] Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), *available at* http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

[18] Adam C. Pritchard & Stephen Choi, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment* (2016), Law & Economics Working Papers, Paper 119, *available at* http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1233&context=law_econ_current.

[19] *See* Press Release, SEC, *SEC Adopts Amendments to Rules of Practice for Administrative Proceedings* (July 13, 2016), Release No. 2016-142, *available at* https://www.sec.gov/news/pressrelease/2016-142.html.

[20] Paul S. Atkins & Bradley J. Bondi, *Needed: Independent Panel to Evaluate SEC Enforcement Program*, Forbes (July 7, 2008), *available at* https://www.forbes.com/2008/07/05/atkins-bondi-sec-oped-cx_pabb_0707atkins.html.

should be made to make the SEC's enforcement program more effective in its efforts to deter misconduct and to encourage compliance with federal securities laws, while keeping with the SEC's stated mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation?" As the Wells Committee did, this advisory committee also could examine whether the SEC is taking appropriate steps to protect the rights of respondents and to provide appropriate due process. The advisory committee could be composed of a diverse cross-section of private-practice attorneys, former SEC officials, economists, and academicians – each bringing to the table a unique perspective.

8. Rescind the Delegation of Formal Order Authority

Historically, the Commission approved formal orders of investigation after the Enforcement Staff prepared a memorandum for the Commission summarizing the facts known at the time and the possible securities law violations. The historical process had at least three important benefits.21 First, under the prior system, before seeking a formal order the Enforcement Staff often would engage in informal detective work. This frequently involved seeking information, on a voluntary basis, from the entity under investigation. This informal work sometimes provided the Enforcement Staff assurance that there had been no wrongdoing and allowed the Staff and the entity to forego a more elaborate and costly investigation. Second, under the prior system the Commission was involved in the early stages of enforcement cases, allowing it to provide guidance to the Enforcement Staff prior to the time that the Staff was authorized to compel testimony and issue wide-ranging document subpoenas. The Commission's approval of a formal order also provided an important check on the Enforcement Staff's investigative power and may have prevented questionable investigations. Third, under the prior system, the fact that the Enforcement Staff had opened an investigation was raised to the highest levels of the SEC, including to the Commission, senior officers in the Division of Enforcement, directors of the other divisions, as well as anyone who attended the closed Commission meeting where the matter was discussed. This allowed enhanced communication and expertise to be incorporated into the early decision-making and formulation of the investigative plan.

In 2009, the Commission delegated authority to the Director of Enforcement to open formal orders of investigation and issue subpoenas. The Director then subdelegated this authority to Regional Directors, Associate Directors, and Specialized Unit Chiefs. This delegation reduced the Enforcement Staff's incentive to conduct informal, initial detective work, removed the beneficial early involvement of the Commission, and eliminated a critical opportunity for the Enforcement Staff to communicate and cooperate regarding investigations.

In February 2017, the Commission rescinded the subdelegation of formal order authority. Now, requests for formal orders will be approved by the Director of Enforcement. The Commission should go one step further and rescind the delegation of formal order authority entirely,

[21] For additional information, *see* Bradley J. Bondi, *A Questionable Delegation of Authority: Did the SEC Go Too Far When It Delegated Authority to the Division of Enforcement to Initiate an Investigation?* Center for Financial Stability, (Sept. 20, 2016), *available at* http://www.centerforfinancialstability.org/research/Bondi_092016.pdf.

thereby restoring the benefits associated with encouraging the Enforcement Staff to conduct investigations informally, involving the Commission early in the investigative process, and communicating and cooperating with other Enforcement Staff.

9. Re-evaluate the SEC's Admissions Policy

The SEC should re-evaluate how it determines whether to require a party to admit fault as a condition of settlement. Since the establishment of the Division of Enforcement in 1972, the SEC routinely has allowed parties to settle enforcement actions without admitting fault.[22] The neither-admit-nor-deny concept grew out of the practical reality that the Enforcement Staff would be more likely to obtain a settlement and thus conserve SEC resources if the Staff did not insist on an admission of wrongdoing, which can have damaging collateral consequences.

In 2013, the SEC modified this practice by announcing that it would seek more admissions of wrongdoing from individuals and entities as a condition of settling enforcement cases. And the Director of Enforcement at the time stated that the SEC would not consider the collateral consequences to an individual or entity when determining whether to seek an admission. This policy created four primary concerns. First, it marked a fundamental shift in emphasis from protecting investors to attempting to punish wrongdoers, which may be at odds with the SEC's goals of protecting investors and facilitating capital formation. An admission of wrongdoing may result in additional harm to shareholders by exposing a company to costly shareholder litigation or depriving it of the ability to obtain government contracts. Second, the admissions policy lacks clear guidance and fails to consider the collateral consequences to the shareholders of the alleged wrongdoer company. This makes the admissions policy susceptible to subjective application without considering the individualized conduct of the responding party. Third, the admissions policy is susceptible to being used directly or indirectly as a negotiating tool by which the SEC may seek a higher penalty in exchange for not seeking an admission. For example, the Enforcement Staff may make overtures that, if a party were to agree to a higher penalty, the Staff would not push for an admission of wrongdoing. Fourth, pursuing admissions of wrongdoing consumes valuable SEC time and resources.

One suggestion that would allow the policy to remain intact while taking into consideration the above observations would be to remove any discretion from the investigative staff and place that discretion into the hands of the trial unit to evaluate whether the evidence is so strong that it would risk taking the matter to trial. Another possible solution would be for the Enforcement Staff to obtain from the Commission at the start of settlement negotiations a determination regarding whether the Commission would insist on an admission of wrongdoing.

That course would enable the parties to negotiate under the same understanding of whether an admission is, in fact, likely to be sought.

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[22] For additional information, *see* Bradley J. Bondi, *An Evaluation of the SEC's Admissions Policy*, Center for Financial Stability (July 7, 2016), *available at* http://www.centerforfinancialstability.org/research/Bondi_070716.pdf.

10. Expand the Division of Enforcement's Trial Unit and Integrate the Trial Attorneys into the Investigative Units

Assuming the SEC focuses more on intentional wrongdoing by individuals, as recommended in Point 1 above, the SEC's trial load will increase. The SEC should increase the number of attorneys in its trial unit to meet the increased caseload.

At the same time the SEC expands the trial unit, SEC trial unit attorneys should be more fully integrated into the investigative units of the Division of Enforcement. During her tenure, Chair White made some progress in this regard after the SEC suffered a series of defeats at trial, but more integration can be done.[23] Structurally, the Division of Enforcement's trial attorneys are separate from the investigative attorneys. This antiquated organizational structure has resulted in inefficiencies and loss of information that have impacted the Division of Enforcement's effectiveness. With this bifurcated structure, enforcement actions run the risk of proceeding to trial without sufficient "trial" evidence obtained during the investigation. By more fully integrating trial attorneys into the investigative units, the attorneys tasked with proving securities law violations at trial will have a greater role in charging decisions and gathering evidence of violations early in investigations.[24] This likely will strengthen the development of admissible evidence during the investigation and result in stronger enforcement actions. In addition, trial attorneys provide an important check on the investigative staff to ensure that the elements of a securities law violation are met prior to initiating a lawsuit or settling an enforcement action.

[23] *See* Jean Eaglesham, *SEC Takes Steps to Stem Courtroom Defeats*, Wall St. J. (Feb. 13, 2014), *available at* https://www.wsj.com/articles/sec-takes-steps-to-stem-courtroom-defeats-1392336091.

[24] *See also* Troy A. Paredes, Commissioner, SEC, Remarks at the 2009 Southeastern Securities Conference (Mar. 19, 2009), *available at* https://www.sec.gov/news/speech/2009/spch031909tap.htm.