Speech

Remarks at SEC Speaks 2021

Gurbir Grewal, Director, Division of Enforcement

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Thank you for that introduction and good morning everyone. It's an honor and privilege to speak with both my SEC colleagues and so many from the securities industry and defense bar about a topic that affects all of us: trust. More specifically, the decline in trust in our financial markets and what we can do to restore it. But before I begin, as you heard me say yesterday, I'll remind you that these views are my own.[1]

Many Americans' trust in our institutions is faltering. From Congress to law enforcement to the courts, no sector is immune from this trend. According to a recent Gallup poll, only a small percentage of Americans have any significant level of confidence in banks, technology companies, or big business.[2] These levels, in fact, are near historic lows.[3]

This decline in trust is bad for everyone. When it comes to the financial markets, it undermines the investor confidence needed for the fair, efficient, and orderly operation of our capital markets. Put simply, if the public doesn't think the system is fair, at a minimum, they are not going to invest their hard-earned money. This hurts all those companies, professionals, and other market participants who are playing by the rules and doing the right thing every day. And all of this has the potential to be detrimental to our economy.

While there's no single cause for this decline when it comes to our financial institutions, part of it is due to repeated lapses by large businesses, gatekeepers, and other market participants, coupled with the perception that we—the regulators—are failing to hold them appropriately accountable, or worse still, the belief by some that there are two sets of rules: one for the big and powerful and another for everyone else.

Each day, however, the Enforcement Division's staff work tirelessly to enhance that trust and make clear that there is only one set of rules by prosecuting the bad actors who break them, without fear or favor. Despite the challenges of a once in a lifetime pandemic, they did so over the last fiscal year by bringing more standalone enforcement actions than the prior year, including cases involving auditor misconduct, insider trading, bribery schemes, and misleading claims surrounding SPAC transactions.[4]

But of course, the risks we protect against are not fixed and what's important to investors and the market can evolve over time. That's why the Division is – as it always has – taking proactive steps to police those issues as well by bringing a number of first of their kind enforcement actions. For example, in the crypto space, the Commission recently brought the first enforcement action involving securities using decentralized finance, or "DeFi," technology;[5] took enforcement actions against trading platforms that illegally facilitate or tout trading in crypto securities;[6] and charged the promoters of a fraudulent $2 billion digital asset securities offering.[7] We also brought the first enforcement action involving Regulation Crowdfunding[8] and the first enforcement action against an alternative data provider, where we charged App Annie and its co-founder and former CEO with engaging in deceptive practices.[9]

I'm proud of the dedication of our team in Enforcement and believe that by both continuing these types of proactive enforcement efforts and sharpening our focus in additional areas, we will enhance Americans' trust in our financial institutions. And it's those additional areas of focus that I want to turn to next. They include emphasizing corporate responsibility, gatekeeper accountability and appropriate remedies, particularly prophylactic ones.

Corporate Responsibility

With respect to corporate responsibility, Congress has enacted many laws and the SEC has adopted many rules to ensure that corporations are being responsible and playing fair. But too often, they ignore these rules and fail to implement

sufficient controls or procedures to ensure compliance. In some cases, firms are practically inviting fraud or waiting for misconduct to occur; in others, they are actively covering it up or minimizing it. All of this serves to undermine public trust and confidence. Enhancing it will require, among other things, robust enforcement of laws and rules concerning required disclosures, misuse of nonpublic information,[10] violation of record-keeping obligations,[11] and obfuscation of evidence from the SEC or other government agencies.[12]

We'll consider all of our options when this sort of misconduct occurs prior to or during our investigations. For example, if we learn that, while litigation is anticipated or pending, corporations or individuals have not followed the rules and maintained required communications, have ignored subpoenas or litigation hold notices, or have deliberately used the sort of ephemeral technology that allows messages to disappear, we may well conclude that spoliation of evidence has occurred and ask the court for adverse inferences or other appropriate relief. These rules are not just "check the box" exercises for compliance departments; they are important to ensure that the SEC and other law enforcement agencies can understand what happened and make appropriate prosecutorial decisions. When that doesn't happen, there can and should be consequences.

And with respect to disclosures, timely and accurate disclosures of material events are essential to investor protection and enhancing trust and confidence in the markets. They not only enable average investors to make informed investing decisions, but also ensure that informed investors are able to hold management and boards accountable when they fall short. As an example, cybersecurity is a critical issue in our securities markets and our economy as a whole. And we have been vigilant in both ensuring that market participants safeguard essential data and systems[13] and pursuing public companies that do not reasonably disclose material cybersecurity incidents. This includes charging public companies for misleading disclosures about cybersecurity events, or for inadequate controls related to such disclosures.[14]

Gatekeeper Accountability

But restoring trust requires more than SEC enforcement actions. We must all work together to ensure that companies are following the rules. And this leads me to my second point: the essential role that gatekeepers like so many of you play.

When gatekeepers are living up to their obligations, they serve as the first lines of defense against misconduct. But when they don't, investors, market integrity, and public trust all suffer. Encouraging your clients to play in the grey areas or walk right up to the line creates significant risk. It's when companies start testing those lines that problems emerge and rules are broken. And even if that's not the case, the public loses faith in institutions that appear to be trying to get away with as much as they can. That's why gatekeepers will remain a significant focus for the Enforcement Division, as evidenced by some of our recent actions.

For example, the Commission recently charged an attorney with playing a critical role in the unregistered sale of millions of shares of securities by two groups engaged in securities fraud.[15] This kind of behavior is an abuse of the public trust, and has no place in the legal profession.

But it's not just the lawyers. We have also brought number of enforcement actions involving significant misconduct by audit partners at major accounting firms.[16] It's also not just the cases with salacious facts that warrant our attention. The Commission recently charged an accountant with failing to register his firm with the Public Company Accounting Oversight Board and comply with PCAOB auditing standards in his audit of a public company client.[17] These basic requirements are essential to the gatekeeping function.

Crafting Appropriate Remedies

Finally, in addition to punishing misconduct, our remedies must deter it from happening in the first place. If the public understands that our decisions are motivated by these principles, it also increases their trust that institutions are playing by the rules and being held accountable when they do not.

When it comes to accountability, few things rival the magnitude of wrongdoers admitting that they broke the law, and so, in an era of diminished trust, we will, in appropriate circumstances, be requiring admissions in cases where heightened accountability and acceptance of responsibility are in the public interest. Admissions, given their attention-getting nature, also serve as a clarion call to other market participants to stamp out and self-report the misconduct to the extent it is occurring in their firm.

Officer and director bars, likewise, are a critical tool in our efforts. The authority to impose them in cases involving scienter-based violations is broad and there is no legal requirement that the individual be an officer or director of a public company, or indeed a public company employee at all, for a bar to be appropriate.[18] Rather, when considering whether to recommend

seeking a bar, we generally think about whether the individual is likely to have an opportunity to become an officer or director of a public company in the future. We also think about a number of factors that courts have laid out, although as courts have made clear, those factors are "neither mandatory nor exclusive."[19]

My point here is this: if there is egregious conduct and a chance the person could have the opportunity to serve at the highest levels of a public company, we may well seek an officer and director bar to keep that person from being in a position to harm investors again.

Another related tool we have to help prevent future misconduct is the conduct based injunction, which enjoins a defendant from engaging in specific conduct in the future. Conduct based injunctions can apply to a wide variety of areas, including restrictions on stock trading and participating in securities offerings. In the case I mentioned a moment ago against the attorney who facilitated the unregistered sales of securities by fraudsters, the settlement included a five-year conduct based injunction that restricts his ability to prepare opinion letters.[20] This sort of conduct-specific relief is key to preventing bad actors from repeating their misconduct.

Undertakings are also an important remedy aimed at future compliance with the securities laws. In certain cases, our settlements include undertakings that are tailored to address the underlying violations and affect future compliance, which can include limiting the activities, functions, or operations of a company. In addition, the Commission can require the settling party to hire an independent compliance consultant to review policies and procedures and to determine improvements that can prevent future misconduct. Where we see misconduct that has harmed investors, we will look hard at whether undertakings will be required to prevent that conduct – or similar conduct – from happening again.

You should expect to see us recommend aggressive use of these prophylactic tools to protect investors and the marketplace, and relatedly the public's trust that all institutions and individuals are playing by the same rule set. And we'll take a particularly hard look at whether we need to deploy these tools if the specific offender is a recidivist. When a firm repeatedly violates our laws or rules, they should expect that the remedial relief we seek will take that repeated misconduct into account.

Trusting and Empowering SEC Staff

Before I close, I want to address another area where trust is key. And that is the trust that my Deputy Director, Sanjay Wadhwa, and I have in our colleagues. The SEC's Enforcement staff are extraordinarily talented and possess great experience and judgment. Sanjay and I want to empower them by, among other things, adjusting certain substantive decision-making processes around the Division. Sanjay will talk about some of these changes in more detail, but one that I'll mention relates to Wells meetings.

While I appreciate the importance of the Wells process, there are ways we can make that process more streamlined and efficient for everyone, starting with the Wells meeting itself. There are certainly cases that present novel legal or factual questions, or raise significant programmatic issues. In those cases the Director or Deputy should be directly participating in the Wells meeting, and there should be robust engagement. But many cases do not present such issues, and in those cases, I don't believe that it is a productive use of anyone's time for the Director or Deputy Director to sit in on a second or third meeting with defense counsel at the end of an investigation. In those circumstances, it is more efficient and appropriate for the Associate Director or Unit Chief to take the Wells meeting and engage in a dialogue, alongside the staff who are best positioned to assess the record.

Sanjay and I will still review Wells submissions, and we will, of course, still provide them to the Commission in connection with the related recommendations, but don't expect a meeting in each and every case. And when we do take a Wells meeting, there are certain things that will make those meetings more productive and efficient for everyone, as Sanjay will discuss in a moment.

There are also some well-established – but not always observed – rules about Wells submissions themselves that can lead to their rejection by the staff, such as attempts to limit their use or admissibility, or attempts to include a settlement offer, as you'll hear more about from Jonathan Hecht later in this panel's discussion.

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The decline in public trust in our institutions is real and it hurts everyone. And it's our shared responsibility to address it. I've outlined the many steps that we're taking to do so, but I am confident that together we can do even more. Thank you for joining us today and I look forward to working with each of you on this collective endeavor.

[1] The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or Commissioner. This speech expresses the author's views and does not necessarily reflect those of the Commission, the Commissioners, or other members of the staff.

[2] *See* "Americans' Confidence in Major U.S. Institutions Dips" (July 14, 2021), *available at* https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx (finding that, in 2021, 33% of respondents have "a great deal" or "quite a lot" of confidence in banks; 29% in technology companies; and 18% in big business).

[3] *See* "Confidence in Institutions," *available at* https://news.gallup.com/poll/1597/confidence-institutions.aspx.

[4] *See* Press Release 2021-144, SEC Charges Ernst & Young, Three Audit Partners, and Former Public Company CAO with Audit Independence Misconduct (Aug. 2, 2021), *available at* https://www.sec.gov/news/press-release/2021-144; Press Release 2021-56, Auditor Charged for Failure to Register with PCAOB and Multiple Audit Failures (Apr. 5, 2021), *available at* https://www.sec.gov/news/press-release/2021-56; Press Release 2021-32, SEC Charges Two Former KPMG Auditors for Improper Professional Conduct During Audit of Not-for-Profit College (Feb. 23, 2021), *available at* https://www.sec.gov/news/press-release/2021-32; Press Release 2021-203, SEC Charges Investment Bank Compliance Analyst with Insider Trading in Parents' Accounts and Obtains Asset Freeze (Sept. 29, 2021), *available at* https://www.sec.gov/news/press-release/2021-203; Press Release 2021-181, SEC Charges Former Pharmaceutical Global IT Manager in $8 Million Insider Trading Scheme (Sept. 17, 2021), *available at* https://www.sec.gov/news/press-release/2021-181; Press Release 2021-158, SEC Charges Netflix Insider Trading Ring (Aug. 18, 2021), *available at* https://www.sec.gov/news/press-release/2021-158; Press Release 2021-103, Six Charged in Silicon Valley Insider Trading Ring (June 15, 2021), *available at* https://www.sec.gov/news/press-release/2021-103; Press Release 2021-112, SEC Charges Amec Foster Wheeler Limited With FCPA Violations Related to Brazilian Bribery Scheme (June 25, 2021), *available at* https://www.sec.gov/news/press-release/2021-112; Press Release 2021-124, SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination (July 13, 2021), *available at* https://www.sec.gov/news/press-release/2021-124.

[5] Press Release 2021-145, SEC Charges Decentralized Finance Lender and Top Executives for Raising $30 Million Through Fraudulent Offerings (Aug. 6, 2021), *available at* https://www.sec.gov/news/press-release/2021-145.

[6] *See* Press Release 2021-147, SEC Charges Poloniex for Operating Unregistered Digital Asset Exchange (Aug. 9, 2021), *available at* https://www.sec.gov/news/press-release/2021-147; Press Release 2021-125, ICO "Listing" Website Charged With Unlawfully Touting Digital Asset Securities (July 14, 2021), *available at* https://www.sec.gov/news/press-release/2021-125.

[7] Press Release 2021-172, SEC Charges Global Crypto Lending Platform and Top Executives in $2 Billion Fraud (Sept. 1, 2021), *available at* https://www.sec.gov/news/press-release/2021-172; Press Release 2021-90, SEC Charges U.S. Promoters of $2 Billion Global Crypto Lending Securities Offering (May 28, 2021), *available at* https://www.sec.gov/news/press-release/2021-90.

[8] Press Release 2021-182, SEC Charges Crowdfunding Portal, Issuer, and Related Individuals for Fraudulent Offerings (Sept. 20, 2021), *available at* https://www.sec.gov/news/press-release/2021-182.

[9] Press Release 2021-176, SEC Charges App Annie and its Founder with Securities Fraud (Sept. 14, 2021), *available at* https://www.sec.gov/news/press-release/2021-176.

[10] *See, e.g.*, 15 U.S.C. § 80b-4a.

[11] *See, e.g.*, 15 U.S.C. § 78q(a).

[12] *See, e.g.*, Fed. R. Civ. P. 37(e).

[13] *See, e.g.*, Press Release 2021-169, SEC Announces Three Actions Charging Deficient Cybersecurity Procedures (Aug. 30, 2021), *available at* https://www.sec.gov/news/press-release/2021-169.

[14] *See, e.g.*, Press Release 2021-154, SEC Charges Pearson plc for Misleading Investors About Cyber Breach (Aug. 16, 2021), *available at* https://www.sec.gov/news/press-release/2021-154; Press Release 2021-102, SEC Charges Issuer With Cybersecurity Disclosure Controls Failures (June 15, 2021), *available at* https://www.sec.gov/news/press-release/2021-102.

[15] *See* Litigation Release No. 25199, SEC Charges Attorney with Participation in Illegal, Unregistered Securities Offerings (Sept. 8, 20201), *available at* https://www.sec.gov/litigation/litreleases/2021/lr25199.htm.

[16] *See* Press Release 2021-144, SEC Charges Ernst & Young, Three Audit Partners, and Former Public Company CAO with Audit Independence Misconduct (Aug. 2, 2021), *available at* https://www.sec.gov/news/press-release/2021-144; Press Release 2020-115, SEC Charges Three Former KPMG Audit Partners for Exam Sharing Misconduct (May 18, 2020), *available at* https://www.sec.gov/news/press-release/2020-115.

[17] *See* Press Release 2021-56, Auditor Charged for Failure to Register with PCAOB and Multiple Audit Failures (Apr. 5, 2021), *available at* https://www.sec.gov/news/press-release/2021-56.

[18] *See* 15 U.S.C. § 77t(e); 15 U.S.C. § 78u(d)(2).

[19] *SEC v. Bankosky*, 716 F.3d 45, 48 (2d Cir. 2013).

[20] *See* Litigation Release No. 25199, SEC Charges Attorney with Participation in Illegal, Unregistered Securities Offerings (Sept. 8, 2021), *available at* https://www.sec.gov/litigation/litreleases/2021/lr25199.htm.