Speech

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Thank you for that introduction and for having me here today. At the Division of Enforcement, ensuring that broker-dealers and associated individuals follow our laws and regulations is critical to our mission, so it's only fitting that my first speech as Director is at this event.

While I just referred to it as "our mission" at the Division of Enforcement, what I'd like to talk to you about today is how we all share the responsibility to maintain market integrity and enhance public confidence in our securities markets. But first I must provide the disclaimer that my remarks today express my views, and do not necessarily reflect those of the Commission, the Commissioners, or other members of staff.[1]

- SEC Charges Broker Who Defrauded Seniors Out of Almost $1 Million[2]
- SEC Charges Ernst & Young, Three Audit Partners, and Former Public Company CAO with Audit Independence Misconduct[3]
- SEC Charges Disbarred New York Attorney and Florida Attorney with Scheme to Create False Opinion Letters[4]
- Merrill Lynch Admits to Misleading Customers about Trading Venues[5]
- SEC Charges U.S. Congressman and Others With Insider Trading[6]

These are not headlines from some bygone era of market participants behaving badly; these are all from cases the Commission has brought since 2018. In fact, here's one from just last week: "SEC Charges Investment Bank Compliance Analyst with Insider Trading in Parents' Accounts."[7]

Nearly a dozen years ago, one of my predecessors held a press conference to announce charges against more than twenty defendants, including "Wall Street professionals, corporate insiders, analysts and lawyers," in a pair of alleged insider trading schemes. In explaining the importance of the cases, Director Khuzami said: "There is a basic principle that governs our capital markets, and that is that there is one set of rules, and everyone is expected to play by that one set of rules. That principle gives investors confidence that the markets are fair."[8] He was right then, and his words remain true today: Enforcement is, in significant part, animated by the idea that we will pursue potential violations by any market participant, and, in so doing, attempt to shape the behavior of all participants going forward.

But I believe more is required. Because despite all of the strong enforcement actions the SEC has brought over the years and despite all the speeches that SEC Chairs, Commissioners, Enforcement Directors, and others have given at events like this one, the types of behavior described in the headlines I read to you persist, and as a result, a significant part of the public continues to feel that our markets are essentially a game that is rigged against them. [9]

So rather than issue warnings about how aggressively we will pursue you or your clients if you misbehave—which we, of course, will—I want to invite each of you—the lawyers, counselors, and gatekeepers who have such influence over market behavior—to join me. By working together, we can dispel the notion that the deck is stacked in favor of the few and powerful, promote better conduct among market participants, and ensure that the markets work fairly for all. This, after all, should be our shared mission.

I see three key steps towards achieving this mission, and the first starts with each of you. In a speech he gave in May, Chair Gensler said: "[I]f you're asking a lawyer, accountant, or adviser if something is over the line, maybe it is time to step back from the line. Remember that going right up to the edge of a rule or searching for some ambiguity in the text or a footnote may not be consistent with the law and its purpose."[10] This is a critical point and let me explain why.

This morning you heard discussions on a number of topics, including SPACs, ESG investments, and Regulation Best Interest, or "Reg BI". I defer to your able presenters as to the best substantive takeaways from each of those sessions. But what you should not take away from them is that, if regulators are particularly focused on issues "X" or "Y" in a given area, that means you or your clients may be able to push the envelope on issue "Z" – or the grey areas around X or Y. That approach is a surefire way to foster misconduct and, potentially, lead to an enforcement action.

You should be thinking, instead, about modeling excellence in your compliance efforts, as you do in your performance. This means that firms need to think rigorously about how their specific business models and products interact with both emerging risks and Enforcement priorities, and tailor their compliance practices and policies accordingly. For example, with respect to Reg BI, firms should recognize that the new regime draws upon key fiduciary principles, and is intended to enhance previous broker-dealer standards of conduct significantly beyond the suitability obligation.[11] Armed with this recognition, firms should then give their registered representatives the tools and information that will enable them to identify, disclose, and mitigate conflicts prohibited under Reg BI.

Let me be clear here: I am talking about more than putting together a stock policy and giving a check-the-box training. This requires ***proactive*** compliance, and this type of approach has never been more important than today— a time of rapid and profound technological change. This change is exciting; it can help amplify the dynamism of our markets and increase access for investors. But at the same time it also creates new avenues for misconduct, and new responsibilities for compliance.

Recordkeeping violations may not grab the headlines, but the underlying obligations are essential to market integrity and enforcement. Take for example an enforcement action the Commission brought last year against a California broker-dealer for failing to preserve business-related text messages.[12] The SEC's order found that some of the firm's registered representatives used their personal devices when communicating with each other, with firm customers, and with other third parties concerning, among other things, the size of orders, the timing of trades, and the pricing of certain securities. These messages were potentially responsive to a records request SEC staff made to the firm in an unrelated investigation and the firm's failure to retain and produce them directly impacted that investigation.

Unfortunately, this is not an isolated example. We continue to see in multiple investigations instances where one party or firm that used off-channel communications has preserved and produced them, while the other has not. Not only do these failures delay and obstruct investigations, they raise broader accountability, integrity and spoliation issues.

A proactive compliance approach requires market participants to not wait for an enforcement action to put in place appropriate policies and procedures to preserve these communications and anticipate these emerging challenges. Listen, many of these are not even new technological advances. After all, my 75 year-old mother has been texting my 13-year-old daughter for years, and I am certain many in this room have sent or received professional communications on personal devices or unofficial communications channels. You need to be actively thinking about and addressing the many compliance issues raised by the increased use of personal devices, new communications channels, and other technological developments like ephemeral apps.

Let me turn to the second part of our shared mission, which I'll call proactive enforcement. While this falls primarily on us, each of you have a role to play here as well.

I'm from Jersey, and I know a thing or two about the Turnpike, and the Garden State Parkway, and about enforcement of my State's laws, having served as a County Prosecutor and as Attorney General. And one thing I know is that if you post a 65 mile-per-hour speed limit and don't enforce it, people drive 75. Not me, of course, but other people. And they eventually do so with a sense of impunity. And then after a while they will drive 80 or faster, with a growing sense of confidence. As speeds climb higher and higher, you eventually have situations where accidents increase and heightened enforcement follows. But for all of the victims, it's too late.

It's a stark analogy, but the point is that we are not waiting for accidents to happen. We are trying to address emerging risks before they cause harm to investors. For example, this summer, the Commission brought enforcement actions against a SPAC, its sponsor, its CEO, the proposed merger target, and the target's founder and former CEO.[13] The SEC's settled order against everyone but the target's CEO found that the target had made misleading claims about its technology and

about national security risks associated with its founder and former CEO, and that the SPAC had repeated those misstatements in public filings and failed its due diligence obligations to investors. By bringing this action prior to consummation of the merger, the Commission protected the SPAC's investors from potential harm.

A similarly forward-looking enforcement initiative this past summer involved the new requirement that firms file and deliver Client or Customer Relationship Summaries, known as "Forms CRS." A **Form CRS is designed to help retail investors** better understand the nature of their relationships with financial firms and individual professionals. In July, the Commission brought enforcement actions against more than two dozen firms that had failed to timely file or to deliver their Forms CRS to their clients and customers.[14] As I said when we announced these cases, they "reinforce the importance of meeting [filing and disclosure] obligations and providing retail investors with information that is intended to help them understand their relationships with their securities industry professionals."[15] Providing retail investors that essential information is the point of the Form CRS requirement, and we will continue to ensure that firms are satisfying their obligations to do so because that's what's required to prevent future investor harm.

You also have a key role to play in spotting and addressing emerging risks, and that's both by ensuring that your proactive compliance efforts continue even after violative conduct has occurred and by working with us in addressing that conduct. Firms' cooperation with our investigations, including through voluntary self-reporting of potential violations, benefits all market participants.

Over the last several months, I have heard time and again that we are insufficiently clear regarding our views on cooperation. So let me try and offer some clarity. First, let me be clear about what cooperation is *not*: cooperation is not the mere absence of obstruction. We do not recommend that parties receive credit for simply living up to their legal and regulatory obligations. Cooperation—at least the sort of cooperation that results in credit—means more than responding to lawful subpoenas. It means more than making witnesses available for lawfully-compelled testimony. Any defense counsel who advises that credit may be on the table for taking these standard steps is doing their client a disservice.

Cooperation also means more than "self-reporting" to the SEC only when your violation is about to be publicly announced through charges by another regulator or an article in the news media. And it certainly means more than conducting a purportedly independent investigation and making a presentation to the staff that does not fairly present the facts, but instead is nothing more than an advocacy piece.

The behaviors that can earn cooperation credit are no secret: the *Seaboard Report* turns 20 years old this month;[16] the SEC's Policy Statement Concerning Cooperation by Individuals was issued in 2010;[17] and the Enforcement Manual includes pages of discussion concerning the relevant tools and analytical frameworks.[18] And in several recent orders, the Commission has described the kinds of behavior that can garner cooperation credit.[19] For example, last September, the Commission charged BMW for disclosing inaccurate and misleading sales numbers in connection with a bond offering.[20] The SEC's order detailed the many steps BMW took during the global pandemic to collect, synthesize, translate where necessary, and present significant volumes of relevant materials to staff. The order highlighted how "BMW also made multiple current and former employees available for interviews by the Staff, and provided presentations and narrative submissions that highlighted critical facts." [21] In short, BMW's cooperation "substantially advanced the quality and efficiency of the Staff's investigation and conserved Commission resources," and this was reflected in the Commission's decision to impose a reduced penalty against BMW.

But in case it's helpful, let me also tell you how I specifically think about cooperation. I look to whether the would-be cooperator took significant, tangible steps that enhanced the quality of our investigation, allowed us to conserve resources and bring charges more quickly, or helped us to identify additional conduct or other violators that contributed to the wrongdoing. If any or all of these occurred, then credit may be appropriate.

One last thing on cooperation. If you think you deserve credit, and the staff disagrees, I encourage you take a hard, objective look at your conduct during the investigation before trying to convince me the staff is wrong. As someone who has served as a federal prosecutor, local prosecutor, and state Attorney General, I firmly believe that frontline staff are best-positioned to assess cooperation with the investigations they conduct. They know the record and they know whether you meaningfully benefited those investigations. I respect their experience and will not only seek their input on decisions, but will also generally defer to their expertise and judgment. At the same time, I will not look favorably on attempts to make an end run around staff to present the same, undisputed facts about your conduct to me in hopes of a more sympathetic ear.

Similarly, you should understand that we have a close relationship with our colleagues in EXAMS. If a party or its counsel engage in dilatory or obstructive tactics in an examination that gives rise to a referral, I will take a dim view of arguments that you deserve credit for cooperation with the ensuing enforcement investigation. As I said earlier, a key consideration in

weighing cooperation is whether it conserves Commission resources, and this goes for those of our colleagues across the Commission.

Finally, I want to discuss the third step in our shared mission. This one applies when the first two steps have not worked. In that scenario, all of our enforcement tools are on the table, including monetary penalties.

Penalties are among the most important of our tools, in part because of our ability to tailor them to the violation. When Congress granted the SEC penalty authority in the Remedies Act of 1990, one perceived benefit was the SEC's ability to more finely calibrate its enforcement remedies against regulated entities, including broker-dealers.[22] By granting penalty authority, the Remedies Act empowered the Commission to impose remedies that were substantially more punitive than a censure, but less draconian than revoking a firm's registration or suspending its operations, and thereby potentially harming its customers.[23]

The factors that guide us as we tailor our penalty recommendations are also no secret—we assess the conduct at issue in light of elements including statutory tiers, Commission guidance and judicial opinions, and resolutions in Commission actions involving comparable facts, violations, and parties. One crucial question we also try to answer is what penalty will appropriately deter future misconduct? After all, penalties calibrated to both the offense and the offender, serve two interlocking purposes: punishment of the wrongdoer and deterrence of future misconduct, both by the penalized party and by others in the market.

And central to deterrence is proportionality. The worse the conduct, the more strongly we want to disincentivize market participants from engaging in it. We must design penalties that actually deter and reduce violations, and are not seen as an acceptable cost of doing business.

What does this mean for our approach to penalties in enforcement actions? As Commissioner Crenshaw put it earlier this year: "[C]orporate penalties should be tied to the egregiousness of the actual misconduct."[24] I agree wholeheartedly. But this does not mean that roughly equivalent misconduct by comparable offenders should be penalized in the same amount the hundredth time it occurs as the first. Rather, to achieve the intended deterrent effect, it may be appropriate to impose more significant penalties for comparable behavior over time. Doing so will make it harder for market participants to simply "price in" the potential costs of a violation.

As we evaluate the relevant penalty factors, we will also be closely assessing whether prior penalties have been sufficient to generally deter the misconduct at issue. Where they have not been, you can expect to see us seek larger penalties, both in settlement negotiations and, if necessary, in litigation. Even if a firm or individual hasn't offended before, if they violate a law or rule for which the SEC has previously and publicly charged other actors in their industry, it may be appropriate for penalties or other remedies to be increased in response to the lack of deterrence. So while penalties levied in the past are certainly a relevant data point for our conversations, you should not expect comparable cases to be the beginning and end of our analysis.

Similarly, one factor that has long weighed in our penalty assessments is the recidivism of the specific offender.[25] When a firm repeatedly violates our laws or rules, they should expect to be penalized more harshly than a first-time offender might be for the same conduct. This is the essence of specific deterrence.

I am confident that by engaging in proactive compliance and meaningful cooperation, and, where necessary, imposing significant, but appropriate penalties, through our enforcement efforts, we will not only reinforce market integrity, but also enhance public confidence in our markets. I look forward to working with all of you in achieving this, our shared mission.

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[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] Press Release 2020-132, SEC Charges Broker Who Defrauded Seniors Out of Almost $1 Million (June 12, 2020), *available at* https://www.sec.gov/news/press-release/2020-132.

[3] Press Release 2021-144, SEC Charges Ernst & Young, Three Audit Partners, and Former Public Company CAO with Audit Independence Misconduct (Aug. 2, 2021), *available* https://www.sec.gov/news/press-release/2021-144.

[4] Press Release 2020-300, SEC Charges Disbarred New York Attorney and Florida Attorney with Scheme to Create False Opinion Letters (Dec. 2, 2020), *available* https://www.sec.gov/news/press-release/2020-300.

[5] Press Release 2018-108, Merrill Lynch Admits to Misleading Customers about Trading Venues (June 19, 2018), *available* https://www.sec.gov/news/press-release/2018-108.

[6] Press Release 2018-151, SEC Charges U.S. Congressman and Others With Insider Trading (Aug. 8, 2018), *available* https://www.sec.gov/news/press-release/2018-151.

[7] Press Release 2021-203, SEC Charges Investment Bank Compliance Analyst with Insider Trading in Parents' Accounts and Obtains Asset Freeze (Sept. 29, 2021), *available* https://www.sec.gov/news/press-release/2021-203.

[8] *See* Robert Khuzami, Remarks at November 5, 2009 Press Conference, *available at* https://www.sec.gov/news/speech/2009/spch110509rk.htm.

[9] *See, e.g.*, "Survey: More than half of investors think the stock market is rigged against individuals" (Mar. 24, 2021), *available at* https://www.bankrate.com/investing/stock-market-financial-security-march-2021/; "Earning Investors' Trust: How the Desire for Information, Innovation, and Influence Is Shaping Client Relationships," at 4 (finding that "57% of retail investors with an adviser and just 33% of retail investors without an adviser" trust the financial services industry), *available at* https://trust.cfainstitute.org/wp-content/uploads/2020/05/CFAI_TrustReport2020_FINAL.pdf. *See also* "Redditors Are Right About the Unfairness of the Market," Bloomberg Opinion (Oct. 1, 2021), *available at* https://www.bloomberg.com/opinion/articles/2021-10-01/ordinary-investors-don-t-get-a-fair-shot-when-the-powerful-flout-the-rules?srnd=premium&sref=R3I5j1tS.

[10] Gary Gensler, Remarks at 2021 FINRA Annual Conference (May 20, 2021), *available at* https://www.sec.gov/news/speech/gensler-finra-conference.

[11] *See, e.g.*, Regulation Best Interest, Exchange Act Release No. 86031, at 253 (June 5, 2019) ("The Care Obligation significantly enhances the investor protection provided as compared to current suitability obligations by: (1) explicitly requiring in Regulation Best Interest that recommendations be in the best interest of the retail customer and do not place the broker-dealer's interests ahead of the retail customer's interests; (2) explicitly requiring by rule the consideration of costs when making a recommendation; and (3) applying the obligations relating to a series of recommended transactions (currently referred to as "quantitative suitability") irrespective of whether a broker-dealer exercises actual or de facto control over a customer's account."), *available at* https://www.sec.gov/rules/final/2019/34-86031.pdf.

[12] *See* Administrative Summary File No. 3-20050, "SEC Charges Broker-Dealer with Failing to Preserve Required Electronic Records" (Sept. 23, 2020), *available at* https://www.sec.gov/enforce/34-89975-s.

[13] *See* 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.

[14] *See* Press Release 2021-139, SEC Charges 27 Financial Firms for Form CRS Filing and Delivery Failures (July 26, 2021), *available at* https://www.sec.gov/news/press-release/2021-139.

[15] *Id.*

[16] *See* 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, Securities Exchange Act Release No. 44969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.

[17] Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, Securities Exchange Act Release No. 61340 (Jan. 13, 2010), *available at* http://www.sec.gov/rules/policy/2010/34-61340.pdf.

[18] *See* Securities and Exchange Commission Division of Enforcement, Enforcement Manual, § 6 (Nov. 28, 2017), *available at* https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[19] *See, e.g.*, *See* Press Release 2021-33, SEC Charges Gas Exploration and Production Company and Former CEO with Failing to Disclose Executive Perks (Feb. 24, 2021), *available at* https://www.sec.gov/news/press-release/2021-33; Administrative Summary File No. 3-20105, Denver Investment Adviser Settles Charges for Disclosure Failures (Sept. 30, 2020), *available at* https://www.sec.gov/enforce/ia-5599-s; Press Release 2020-169, Pharmaceutical Company and Former Executives Charged With Misleading Financial Disclosures (July 31, 2020), *available at* https://www.sec.gov/news/press-release/2020-169; Administrative Summary File No. 3-19532, SEC Charges PPG Industries with Fraudulent Financial Reporting (Sept. 26, 2019), *available at* https://www.sec.gov/enforce/33-10701-s.

[20] *See* Press Release 2020-223, SEC Charges BMW for Disclosing Inaccurate and Misleading Retail Sales Information to Bond Investors (Sept. 24, 2020), *available at* https://www.sec.gov/news/press-release/2020-223.

[21] *See In the Matter of Bayerische Motoren Werke Aktiengesellschaft, et al.*, File No. 3-20060 (Sept. 24, 2020), *available at* https://www.sec.gov/litigation/admin/2020/33-10850.pdf.

[22] *See* Philip R. Lochner. Jr., "The SEC's New Powers Under the Securities Enforcement Remedies and Penny Stock Reform Act of 1990," at 12 (Oct. 4, 1990) ("The availability of civil money penalties will provide both the courts and the Commission with greater flexibility to tailor a remedy to the seriousness of the violation. This flexibility will be particularly helpful in administrative proceedings against registered broker-dealers and other regulated entities"), *available at* https://www.sec.gov/news/speech/1990/100490lochner.pdf.

[23] *Id.* at 12-13.

[24] *See* Caroline A. Crenshaw, Moving Forward Together – Enforcement for Everyone (Mar. 9, 2021), *available at* https://www.sec.gov/news/speech/crenshaw-moving-forward-together.

[25] *See, e.g.*, 15 U.S.C. § 78u-2(c)(4) ("In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider . . . whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws . . ."). *See also*, *S.E.C. v. Haligiannis*, 470 F.Supp.2d 373, 386 (S.D.N.Y. 2007) ("In determining whether civil penalties should be imposed, and the amount of the fine, courts look to a number of factors, including . . . whether the defendant's conduct was isolated or recurrent.")