U.S. Securities and Exchange Commission Enforcement Based on Deficient Disclosure—Practices, Policies, and Insights

Marc I. Steinberg*

---

* Rupert and Lillian Radford Chair in Law and Professor of Law, Southern Methodist University (SMU) School of Law. Earlier in my career, I served as an attorney with the SEC in the Division of Enforcement and the Office of General Counsel. I congratulate the *Journal of Corporation Law* (JCL) on its 50th year anniversary and was delighted to present at its commemorative symposium as well as contribute this Article. I have served on JCL's Editorial Advisory Board since 1981 and have authored seven previous articles in JCL, the first in 1981 and the most recent in 2022. Also, I wish to highlight that my esteemed former colleague, Professor Alan R. Bromberg, who served on the SMU faculty for over 50 years, authored the very first article published in JCL. *See* Alan R. Bromberg, *Curing Securities Violations: Rescission Offers and Other Techniques*, 1 J. CORP. L. 1 (1975). Considered by many today as the preeminent law journal in corporation law, JCL continues to make a significant impact on the development of law and policy in this important area.

I. INTRODUCTION

The U.S. Securities and Exchange Commission (hereinafter the SEC or the Commission) is the principal regulator enforcing the federal securities laws.[1] First established in 1934, the SEC has both its proponents and critics.[2] Undoubtedly, while the Commission's Division of Enforcement vigorously pursues enforcement of the U.S. securities laws, there have been catastrophic lapses (such as the Madoff scandal) that have significantly impaired

1. The U.S. Department of Justice (DOJ) brings criminal prosecutions for violation of the federal securities laws. The SEC does not have authority to institute criminal actions based on violations of the U.S. securities laws. In addition, each state in the United States has its own securities laws. The enforcement of these laws is within the purview of the state securities regulators and state criminal authorities. *See* Joseph C. Long et al., *Blue Sky Law* § 2:1 (2024). Moreover, the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization, oversees broker-dealer conduct. For a comprehensive overview of SEC enforcement as well as securities law enforcement by other regulators, see MARC I. STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT (2d ed. 2001 & 2024–25 supp.).

2. *Compare* Judith Miller, *S.E.C.: Watchdog 1929 Lacked*, N.Y. TIMES, Oct. 31, 1979, at D1 (stating that "the agency created in 1934 to enforce [the federal securities] laws, the Securities and Exchange Commission, is still widely regarded as the nation's finest independent regulatory agency"), *with* Stephen Labaton, *In Stormy Time, S.E.C. Is Facing Deeper Trouble*, N.Y. TIMES, Dec. 1, 2002, at A1 (stating that the SEC "is plagued by problems that go deeper than its leadership difficulties and have undermined its ability to police companies and markets").

its reputation.[3] Nonetheless, the SEC remains an active regulator, instituting several hundred enforcement actions annually.[4]

This Article focuses on SEC enforcement with respect to false disclosure and misrepresentation engaged in by publicly-held companies—in other words, deficient disclosure. Disclosures made in SEC filings and press releases by publicly-traded corporations as well as oral statements by company spokespersons are the focus of the following discussion. First, this Article addresses the SEC's mandatory disclosure framework, with a description of key Commission forms. Second, the applicable statutory and regulatory provisions that the SEC utilizes in its enforcement actions are discussed. Third, the remedies and penalties that the Commission seeks in actions against publicly-held corporations and their insiders are examined. Last, this Article criticizes several aspects of SEC enforcement policy and proffers recommendations for remediation.[5]

II. THE MANDATORY DISCLOSURE FRAMEWORK—SEC FORMS, DISCLOSURES REQUIRED, AND MATERIALITY

The existence of a mandatory securities disclosure framework in the United States for publicly-traded enterprises is firmly entrenched. Adopted pursuant to the enactment of the federal securities laws in the 1930s and as administered by the Commission for almost a century, the presence of the mandatory disclosure framework is a foundational component of U.S. securities law.[6] The central repository for narrative disclosure is SEC Regulation S-K (and for accounting items, Regulation S-X).[7] Regulation S-K serves as the principal source for ascertaining the disclosures that a subject company must make and for seeking

3. *See* Marcy Gordon, *How Ponzi King Bernie Madoff Conned Investors and Seduced Regulators*, FORTUNE (Apr. 15, 2021), https://fortune.com/2021/04/15/how-ponzi-king-bernie-madoff-conned-investors-and-seduced-regulators/ [https://perma.cc/5ZTR-FSAA] (reporting on the Commission's ineptness with respect to the Madoff scheme); Stuart J. Kaswell, *The Bernie Madoff I Knew: How He Gained the Confidence of Regulators and Legislators*, BUS. L. TODAY (June 30, 2021), https://businesslawtoday.org/2021/06/the-bernie-madoff-i-knew-how-he-gained-the-confidence-of-regulators-and-legislators/ [https://perma.cc/2VC3-8Z6F] (explaining how the SEC failed to uncover the Madoff Ponzi scheme because it failed to do due diligence).

4. Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2024 (Nov. 22, 2024), https://www.sec.gov/newsroom/press-releases/2024-186 [https://perma.cc/X7TE-HEJ4] (announcing that the SEC "filed 583 total enforcement actions in fiscal year 2024"); Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2023 (Nov. 14, 2023), https://www.sec.gov/newsroom/press-releases/2023-234 [https://perma.cc/BK49-MMUR] (announcing that the SEC "filed 784 total enforcement actions in fiscal year 2023").

5. A number of these deficiencies are discussed in the author's book, MARC I. STEINBERG, RETHINKING SECURITIES LAW (2021) (awarded best law book of 2021 by American Book Fest).

6. *See, e.g.*, SEC v. Zandford, 535 U.S. 813, 819 (2002) (stating that "Congress sought 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* . . . ."); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) (stating that the Securities Act of 1933 "was designed to provide investors with full disclosure of material information concerning public offerings of securities . . . " and that the Securities Exchange Act of 1934 "impose[s] regular reporting requirements on companies whose stock is listed on national securities exchanges"); *see also* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COM., 94TH CONG., FED. REGUL. AND REGUL. REFORM 17 (1976) ("The Securities and Exchange Commission (SEC) has responsibility for implementing and enforcing the Federal securities laws . . . . [and] [t]he [principal] statutes are the Securities Act of 1933 and the Securities Exchange Act of 1934."); STEINBERG, *supra* note 5, at 31.

7. *See* 17 C.F.R. §§ 210, 229 (1972) (Regulations S-X and S-K).

to ensure that the disclosures contained in the various filings with the SEC are as uniform as practicable.[8]

A. SEC Forms

1. Securities Act Forms

Absent an exemption from Securities Act registration, all sales of a security must be made pursuant to an effective registration statement that is filed with the SEC.[9] For registered offerings, the two principal registration forms are Form S-1 and Form S-3. Form S-1 generally is used by companies undertaking an initial public offering (IPO) as well as those enterprises that have gone public pursuant to an IPO but are ineligible to use Form S-3.[10] Form S-1 permits an eligible issuer to incorporate by reference from its Exchange Act periodic reports into its registration statement under specified conditions,[11] which generally are that it:

> (1) has filed [with the SEC] at least one annual report; (2) has filed all required periodic reports and other required materials during the preceding 12 months pursuant to its Exchange Act reporting obligations; (3) has made its Exchange Act reports readily accessible on a website maintained by or for such registrant; and (4) is not a blank check, shell, or penny issuer.[12]

The Form S-3 relies on the efficient market theory, thereby also permitting the use of incorporation by reference from an issuer's Exchange Act reports into its Securities Act registration statement, thus requiring less disclosure to be set forth in the prospectus itself.[13] Generally, the Form S-3 may be used by an issuer that has timely filed its Exchange Act reports for the past 12 months, has a class of equity security (such as common stock)

---

8. *See* STEINBERG, *supra* note 5, at 30.

9. There are several exemptions from registration, the most prominent is Rule 506(b) of Regulation D. This exemption generally is designed to exempt offerings of securities made to accredited investors and to no more than 35 nonaccredited purchasers. *See* 17 C.F.R. § 230.506 (2021). The amount of funds raised pursuant to Rule 506(b) far exceeds the amount that is raised pursuant to registered offerings. Indeed, during fiscal year 2023, over $2.5 trillion U.S. dollars were raised under Rule 506(b). SEC, OFF. OF THE ADVOC. FOR SMALL BUS. CAP. FORMATION, ANNUAL REPORT 18 (2023), https://www.sec.gov/files/2023-oasb-annual-report.pdf [https://perma.cc/CT9V-7C5A].

10. *See* 17 C.F.R. § 239.11 (2014); Securities Offering Reform, Securities Act Release No. 8591, 70 Fed. Reg. 44722 (Aug. 3, 2005); Revisions to the Eligibility Requirements for Primary Securities Offerings on Form S-3 and F-3, Securities Act Release No. 8878, 72 Fed. Reg. 73534 (Dec. 27, 2007); Simplification of Disclosure Requirements for Emerging Growth Companies and Forward Incorporation by Reference on Form S-1 for Smaller Reporting Companies, Securities Act Release No. 10003, 81 Fed. Reg. 2743 (Jan. 19, 2016); Smaller Reporting Company Definition, Securities Act Release No. 10513, 83 Fed. Reg. 31992 (July 10, 2018) (elaborating further on Form S-1).

11. *See* Securities Offering Reform, Securities Act Release No. 8591, 70 Fed. Reg. 44722 (Aug. 3, 2005) (discussing Form S-1 and periodic reports).

12. MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 195 (8th ed. 2023).

13. *See* Adoption of Integrated Disclosure System, Securities Act Release No. 6383, 47 Fed. Reg. 11380, 11382 (Mar. 16, 1982) (explaining that Form S-3's adoption is in reliance on the efficient market theory). The U.S. Supreme Court has given its approbation to the application of the efficient market theory in the securities litigation setting. *See, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 268 (2014) (noting how recent empirical studies have tended to confirm Congress' premise that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations").

listed on a national securities exchange, and, for primary offerings of equity securities, has a public float (i.e., stock held by non-affiliates) of at least $75 million.[14] Under this integrated disclosure approach, as stated by the SEC:

> The prospectus [which comprises part of the registration statement filed pursuant to Form S-3] will not be required to present any information concerning the registrant unless there has been a material change in the registrant's affairs which has not been reported in an Exchange Act filing or [unless] the Exchange Act reports incorporated by reference do not reflect certain restated financial statements or other financial information.[15]

2. *Securities Exchange Act (Exchange Act) Forms and Schedules*

Once a company consummates an IPO or otherwise becomes subject to the Securities Exchange Act,[16] it thereupon is required to file periodic and other reports with the SEC.[17] The key periodic reports are the annual report (Form 10-K),[18] the quarterly report (Form 10-Q),[19] and the current report (Form 8-K).[20] Disclosures set forth in these reports ordinarily are incorporated by reference into a subject company's registration statements.[21] There are also several other Exchange Act filings whereby the applicable form sets forth

---

14. *See* Simplification of Registration Procedures for Primary Securities Offerings, Securities Act Release No. 6965, 57 Fed. Reg. 48970 (Oct. 29, 1992); Adoption of Integrated Disclosure System, Securities Act Release No. 6383, 47 Fed. Reg. 11380 (Mar. 16, 1982). An issuer that meets these requirements but has less than a $75 million float also may use Form S-3 so long as no more than one-third of its public float is offered by such an issuer in primary offerings during any twelve-month period. *See* SEC, FORM S-3, REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933 (2024) (General Instruction I—Eligibility Requirements for Use of Form S-3. Certain additional requirements also apply, including that the issuer is not a blank check company and has not experienced an adverse financial occurrence (such as a default) that renders it ineligible to use Form S-3).

15. Adoption of Integrated Disclosure System, Securities Act Release No. 6383, 47 Fed. Reg. 11380, 11383 (Mar. 16, 1982).

16. For example, through a series of exempt offerings, the company may become subject to the Exchange Act's reporting regime by having more than $10 million in total assets and having its common stock held of record by at least either 2,000 persons or 500 persons who are not accredited investors. *See* 17 C.F.R. § 240.12g(1) (2016); 15 U.S.C. § 78l(g)(1) (2015).

17. *See Exchange Act Reporting and Registration*, SEC (Nov. 12, 2024) https://www.sec.gov/resources-small-businesses/going-public/exchange-act-reporting-registration [https://perma.cc/Z276-SE7D] (noting that after a company's registration statement is "effective," the company becomes subject to Exchange Act reporting requirements such as annual reports on Form 10-K and quarterly reports on Form 10-Q).

18. *See* 17 C.F.R. § 249.310 (2025) (outlining Form 10-K, which is an annual report filed that provides detailed information about a company's financial performance, business operations, risk factors, and management discussion for the fiscal year).

19. *See id.* § 249.308a (2025) (outlining Form 10-Q, which is a quarterly report that provides unaudited financial statements and updates on a company's financial position, operations, and material events during the quarter).

20. *See id.* § 249.308 (2025) (outlining Form 8-K which discloses significant events or changes, such as mergers, acquisitions, bankruptcy, changes in management, or other events that impact shareholders or the company's financial condition).

21. *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web Site Access to Reports*, SEC (Apr. 7, 2023) https://www.sec.gov/rules-regulations/2002/09/acceleration-periodic-report-filing-dates-disclosure-concerning-web-site-access-reports [https://perma.cc/HXX4-CV82] ("Issuers that have been subject to the reporting requirements for a certain period of time also can incorporate information from their Exchange Act reports into their registration statements under the Securities Act.").

the information that must be contained in that filing. For example, the definitive proxy statement (Form DEF 14A or Schedule 14A) is a required SEC filing when a shareholder vote is to occur.[22] This form is used, for example, in connection with annual shareholder meetings to elect directors as well as for the approval of merger transactions that require a shareholder vote.[23] As another example, with respect to the making of a tender offer seeking to acquire the shares of an Exchange Act registrant, Schedule TO sets forth the applicable disclosure requirements.[24] In addition, although not defined by the SEC as a "filed" document, an Exchange Act company is required to provide an annual report to shareholders that provides descriptive and financial information regarding its condition and operations.[25]

B. Disclosures Required

The disclosures required by SEC forms and schedules are comprehensive and detailed. Unless specified by the particular item, accurate disclosure must be made irrespective of whether the information is or is not material.[26] By way of example, information called for by the annual report filed with the SEC (Form 10-K) encompasses mandated disclosure of the following information: a description of the company's business and its properties; material legal proceedings with respect to which the company (or any of its subsidiaries) is a party; risk factors that "make an investment in the registrant . . . speculative or risky;"[27] the market price of the company's common stock and the frequency and amount of dividends declared in regard thereto; management's discussion and analysis of the company's financial condition and results of operation; disagreements with the company's accountants with respect to financial and accounting disclosure and any change in the company's accountants; qualitative and quantitative disclosure regarding market risk; the identification, business experience, and involvement in certain legal proceedings of its directors and executive officers; executive compensation; security ownership of the company's voting securities held by its directors and executive officers and certain of its beneficial owners; related party transactions engaged in by company insiders with the corporation; and corporate governance practices and policies (including director independence, the existence, membership, and functions of its audit, compensation, and nominating committees, and the company's board of director leadership structure).[28]

---

22. *See* 17 C.F.R. § 240.14a-101 (2025).

23. Alicia Tuovila, *What Is a Proxy Statement? Definition, What's In It, and Voting*, INVESTOPEDIA (Aug. 8, 2021), https://www.investopedia.com/terms/p/proxystatement.asp [https://perma.cc/WXA4-TTWA] (explaining how proxy statements are used at annual shareholder meetings to elect board members and vote on company issues like mergers).

24. *See* 17 C.F.R. § 240.14d-100 (2025) (disclosing the bidder's identity, terms of the offer, financing, purpose, and plans for the target company).

25. *See id.* § 240.14c-3 (2025) (requiring disclosure of information similar to that in SEC annual reports and proxy statements).

26. *Id.* § 229 (2025) (Regulation S-K); *id.* § 249.310 (2025) (Form 10-K).

27. *Id.* § 229.105 (2020).

28. *See id.* § 229 (2025) (Regulation S-K); *id.* § 249.310 (2025) (Form 10-K). In addition to the disclosures set forth above in the text, mandated disclosure is also called for with respect to several other categories of information.

C. Other Situational Disclosure Examples

In addition to the information required to be disclosed in SEC filings, entities and their insiders, spokespersons, and consultants may engage in actionable misconduct by other means. For example, an issuer that undertakes a private offering where no required disclosure exists by SEC rule may make materially false statements in its private placement memorandum (PPM) that is provided to investors.[29] Second, a publicly-traded company may issue a press release that is materially false and misleading.[30] And, as a third example, a company spokesperson, such as its chief executive officer, may make material misrepresentations and omissions when speaking with independent financial analysts and the press.[31] Each of these situations give rise to liability exposure in an enforcement action brought by the SEC.[32]

D. Concepts of Materiality and the Duty to Disclose

1. The Meaning of Materiality

Many federal securities law statutes and SEC rules require that specified information be disclosed only if it is material.[33] Generally, information is deemed material if its accurate disclosure would be considered important to a reasonable investor in making its investment or voting decision.[34] Stated somewhat differently by the U.S. Supreme Court, "there must be a substantial likelihood that the [accurate] disclosure of the [misrepresented or] omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available."[35] Importantly, this standard does not mandate a "but for" requirement—namely, that but for the misstated or omitted fact, the investor would have refrained from purchasing or selling the subject security. Likewise, in the United States, the materiality analysis ordinarily does not focus on whether the deficient disclosure had price impact.[36] Indeed, the price impact analysis normally occurs in the

29. For example, in a Rule 506(b) or Rule 506(c) offering made solely to accredited investors, there exist no specified disclosure requirements pursuant to SEC rule. *See id.* § 230.502 (2025).

30. *See, e.g.*, *In the Matter of* Co-Diagnostics, Inc., Securities Act Release No. 11209, 2023 WL 4363716 (July 5, 2023) (settlement with respect to which the SEC charged the publicly-traded company with, inter alia, issuing materially misleading press releases).

31. In this regard, SEC Regulation FD, with specified exceptions, prohibits selective disclosure of material nonpublic information by company spokespersons to securities market professionals and holders of the issuer's securities. *See* 17 C.F.R. § 243.100–.103 (2011); *see generally* Marc I. Steinberg & Jason B. Myers, *Lurking in the Shadows: The Hidden Issues of the Securities and Exchange Commission's Regulation FD*, 27 J. CORP. L. 173 (2002).

32. *See generally* STEINBERG & FERRARA, *supra* note 1.

33. CONG. RSCH. SERV., IF11256, SEC SECURITIES DISCLOSURE: BACKGROUND AND POLICY ISSUES 1 (2024), https://sgp.fas.org/crs/misc/IF11256.pdf [https://perma.cc/7UB3-8WUK] ("[F]ederal securities laws require that issuers disclose to investors all material information they need to make sound investment decisions.").

34. *See* TSC Indus., Inc. v. Northway, 426 U.S. 438, 449 (1976) ("An omitted [or misstated] fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to [invest or] vote.").

35. *Id.*

36. *See, e.g.*, Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 472 (2013). Nonetheless, some courts have addressed price impact in determining whether the information at issue was material. *See, e.g.*, Christine Asia Co. v. Yun Ma, 715 Fed. Appx. 20, 22 (2d Cir. Dec. 5, 2017) ("The importance of this information to

private litigation context rather than in the government enforcement setting, such as when plaintiffs seek to prove that the disclosure deficiency proximately caused their financial loss.[37]

In regard to uncertain or contingent events, such as the status of preliminary merger negotiations, the probability/magnitude standard is used.[38] Under this test, whether a misstated or omitted fact is material depends "at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."[39] Accordingly, the greater the anticipated magnitude of the contingent event (for example, the major impact of a prospective merger transaction upon the subject company and its shareholders if consummated), the less the likelihood of its actuality in order for the contingent event to be deemed material.[40] Undoubtedly, application of this standard presents a significant challenge to securities counsel when advising their clients whether disclosure must be made concerning a contingent event that is unlikely to occur but that probably will have considerable importance if it does eventuate.[41]

Moreover, when ascertaining whether a fact is material, both qualitative and quantitative assessments ordinarily must be undertaken. From a quantitative perspective, if a misstatement errs by a relatively small percentage, such as less than 3%, it often is not deemed

---

investors is illustrated by the fact that, when [the allegedly nondisclosed information] was revealed four months subsequent to the IPO, Alibaba's stock dropped 13% in two days, erasing $33 billion in market capitalization.").

37. Hence, loss causation must be proven by a complainant in private litigation under Section 10(b) of the Securities Exchange Act. *See generally* Dura Pharms. Inc., v. Broudo, 544 U.S. 336 (2005). Price impact analysis also occurs in the private litigation setting when, seeking to defeat class certification, a defendant attempts to rebut the presumption of reliance that is recognized pursuant to the efficient market theory. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 263 (2014).

38. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988).

39. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc). Because of the many important subjects that this decision addressed as questions of first impression, it may be considered as the most significant decision under the U.S. securities laws. *See* Marc I. Steinberg, Texas Gulf Sulphur *at Fifty—A Contemporary and Historical Perspective*, 71 SMU L. REV. 625, 626 (2018).

40. *See* SEC v. Geon Indus. Inc., 531 F.2d 39, 47–48 (2d Cir. 1976).

41. This task is made even more arduous due to the Management Discussion and Analysis (MD&A) disclosure required by Item 303 of Regulation S-K. Pursuant to the MD&A, once a trend, event, demand, or commitment is known, the subject issuer, its board of directors, and management must assess:

> (1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
>
> (2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operation is not reasonably likely to occur.

Management's Discussion and Analysis of Financial Condition and Results of Operation; Certain Investment Company Disclosures, Release No. 6835, 54 Fed. Reg. 22427, 22430 (May 18, 1989). Importantly, the materiality threshold under the MD&A is lower than that required by the federal securities acts' antifraud provisions. *See, e.g.*, *In re* NVIDIA Corp. Sec. Litig., 768 F.3d 1046 (9th Cir. 2014). Recently, the U.S. Supreme Court held that pure omissions in a MD&A cannot give rise to a right of action under Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b), which proscribes the making of material misrepresentations and half-truths in connection with the purchase or sale of a security. *See* Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257, 266 (2024) ("Pure omissions are not actionable under Rule 10b-5(b).").

material.[42] However, even with respect to a relatively small percentage misstatement, qualitative criteria also are evaluated. Hence, applying qualitative materiality principles, even a 2% misstatement may be viewed as material when, for example:

> [T]he misrepresentation[] changes a loss into income; masks a change in key trends, including the company's earnings; conceals the commission of an unlawful transaction; affects the company's adherence with regulatory mandates; impacts the company's compliance with its loan covenants; and has the effect of increasing executive remuneration by achieving the standards necessary for the award of incentive compensation (eg, cash bonuses).[43]

In sum, materiality analysis under the U.S. securities laws is a case-by-case evaluation where both quantitative and qualitative criteria are assessed. Nonetheless, as will be seen by the discussion that follows, the U.S. securities laws do not mandate the affirmative disclosure of all material information.

2. The Duty to Disclose Material Information

As mandated in many developed markets, absent justifiable business reason, a subject company must publicly disclose all material information.[44] That is not the law in the United States. As a generalization, provided that the affected company has adequately and accurately disclosed the information required pursuant to SEC regulations and has not otherwise spoken on the subject matter, it has no obligation to disclose all material information. As stated by a federal appellate court, "an issuer of securities owes no absolute duty to disclose all material information."[45] And, as phrased by the U.S. Supreme Court, the securities laws' antifraud provisions "do not create an affirmative duty to disclose any and all material information."[46] This substantial gap enables publicly-held corporations to maintain silence as to certain adverse financial conditions, even where there exists no business justification for nondisclosure. This approach is unacceptable as it deprives the investing public and the securities markets from receiving important information that directly impacts the subject company's financial condition as well as the market price of its securities.[47]

42. *See, e.g.*, *In re* SCB Comput. Tech., Inc., 149 F. Supp. 2d 334 (W.D. Tenn. 2001) (holding that an overstatement of revenue of less than 3% is not material).

43. Marc I. Steinberg, *US Prospectus Liability—An Overview and Critique*, 14 J. EUR. TORT L. 124, 143 (2023) (*citing* Litwin v. Blackstone Grp., L.P., 634 F.3d 706 (2d Cir. 2011); Ganino v. Citizens Utils. Co., 228 F.3d 154 (2d Cir. 2000); SEC Staff Accounting Bulletin 99, 64 Fed. Reg. 45150 (Aug. 12, 1999)).

44. *See, e.g.*, Prospectus Regulation 2017/1129, art. 6(1), 2017 O.J. (168/12) (EU); *Corporations Act 2001* (Cth) s 674(2) (Austl.); Securities Act, R.S.O. 1990, c S.5, § 75 (Can. Ont.) (there is not a national securities law in Canada).

45. Cooperman v. Individual Inc., 171 F.3d 43, 49 (1st Cir. 1999); *see* Chiarella v. United States, 445 U.S. 222, 230 (1980) (opining that, unless there exists a duty to disclose, silence is not actionable under § 10(b) of the Exchange Act).

46. Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011) (stating that "§ 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information").

47. I have made this assertion in several of my prior articles and books. *See, e.g.*, STEINBERG, *supra* note 5, at 46 (asserting that "the failure to require disclosure of all material information (absent a justifiable reason) by publicly-held companies signifies that, with frequency, the securities of these companies do not trade at prices that accurately reflect their value"); discussion *infra* notes 128–35 and accompanying text.

III. APPLICABLE STATUTES AND RULES

This discussion focuses on the principal securities statutes and SEC rules that are invoked when the Commission institutes enforcement actions alleging that culpable defendants engaged in false disclosure and misrepresentation in SEC filings and other communications to the public. The focus of the following discussion is on alleged misconduct committed by companies in their SEC filings, issuance of press releases, and other public statements. Not all relevant statutes and rules are addressed herein.[48]

A. Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5

Unquestionably, the principal provisions are Section 10(b) of the Exchange Act[49] and SEC Rule 10b-5 promulgated by the Commission pursuant thereto.[50] These provisions proscribe fraudulent, deceptive, and manipulative conduct in connection with the purchase or sale of any security, irrespective of whether such security is traded on the New York Stock Exchange or is sold pursuant to the sale of a privately-held business comprised of a single shareholder.[51] Key elements that the SEC must prove in an enforcement action alleging violation of Section 10(b) and Rule 10b-5 are materiality[52] and scienter, meaning knowing or intentional misconduct.[53]

Section 10(b) (and Rule 10b-5) frequently are the provisions of choice when the SEC brings an enforcement action alleging false disclosure and misrepresentation engaged in by companies in their SEC filings. These provisions also are employed with respect to a wide array of other alleged misconduct, including, for example, stock manipulation, insider trading, and broker-dealer misconduct,[54] which are beyond the scope of this Article.

---

48. As examples, other provisions include: Section 14(a) of the Securities Exchange Act (15 U.S.C. § 78n(a)) and SEC Rule 14a-9 (17 C.F.R. § 240.14a-9) that address deficient disclosure contained in proxy statements, Section 206(1) of the Investment Advisers Act (15 U.S.C. § 80b-6(1)) which makes it unlawful for an investment adviser "to employ any device, scheme, or artifice to defraud any client or prospective client," and Section 34(b) of the Investment Company Act (15 U.S.C. § 80a-34) which prohibits misrepresentations with respect to a subject security's guaranty of payment by the U.S. government or by a bank or other specified entity.

49. 15 U.S.C. § 78j(b) (2023).

50. 17 C.F.R. § 240.10b-5 (2025). *See generally* ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG AND LOWENFELS ON SECURITIES FRAUD (2nd ed. 2024).

51. *See, e.g.*, Landreth Timber Co. v. Landreth, 471 U.S. 681, 697 (1985) (holding that the Securities Acts of 1933 and 1934 governed the purchase of the stock at issue because it had the characteristics typically accompanying common stock).

52. The element of materiality is discussed herein at *supra* notes 33–47 and accompanying text.

53. *See* Aaron v. SEC, 446 U.S. 680, 700–01 (1980) (requiring the SEC to prove scienter in enforcement actions based on an alleged violation of § 10(b) and Rule 10b-5); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976) (requiring a plaintiff in a private action seeking damages to prove scienter in order to establish a violation of § 10(b) and Rule 10b-5). In SEC enforcement actions, reckless misconduct constitutes scienter. *In re* IKON Office Sols., Inc., 277 F.3d 658, 667 (3d Cir. 2002). Generally, recklessness in this context means "conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or [was] so obvious that the defendant must have been aware of it." Chill v. General Electric Co., 101 F.3d 263, 269 (2nd Cir. 1996).

54. For the author's treatise on insider trading, see generally MARC I. STEINBERG & WILLIAM K.S. WANG, INSIDER TRADING (3d ed. 2010).

B. Section 17(a) of the Securities Act

Section 17(a) of the Securities Act largely tracks the language of Rule 10b-5, with the important distinction that this statute encompasses only offers to sell and sales of securities. Improper conduct by a person that occurs in connection with its purchase of securities is beyond the statute's reach.[55] Because false disclosure and misrepresentation often are perpetrated by persons in the sale of securities, the statute is frequently invoked by the SEC in its enforcement proceedings.

Similar to Section 10(b) and Rule 10b-5, a false or misleading statement must be material to be actionable under Section 17(a).[56] Nonetheless, an important distinction is that violation of Section 17(a)(2) (prohibiting material misstatements and half-truths) and Section 17(a)(3) (prohibiting the commission of any practice, transaction, or course of business "which operates or would operate as a fraud or deceit [upon the purchaser]") only require negligence, rather than scienter, to constitute a violation.[57] This negligent culpability level provides a useful vehicle for the Commission to pursue allegedly careless conduct by publicly-held companies with respect to their disclosure obligations.

Viewed from a different perspective, Section 17(a) is utilized as a negotiation tactic when a party seeks to settle an SEC enforcement action. Over 90% of SEC enforcement actions settle rather than end with a trial,[58] with the defendant neither admitting nor denying the Commission's allegations.[59] Astute securities counsel often will seek to persuade the SEC that a Section 17(a)(2) or 17(a)(3) violation should be alleged in lieu of Section 10(b) (or Rule 10b-5) which requires knowing or intentional misconduct. By settling to a Section 17(a)(2) or 17(a)(3) alleged violation without admitting fault, the subject party thus has been accused by the SEC of engaging in negligent conduct—a far less severe allegation than being charged with fraud as would be the situation under Section 10(b) and Rule 10b-5. Indeed, in many enforcement actions, this acknowledgment is contained in the Commission's Final Order. For example, in the *Under Armour* proceeding, the company consented to, among other claims, violating Section 17(a)(2) and 17(a)(3). The Order thereupon

55. *See* 15 U.S.C. § 77q(a) (2011); *see generally* United States v. Naftalin, 441 U.S. 768 (1979) (interpreting Section 17(a) and noting the focus on sales and offers to sell). Unlike Section 10(b) and Rule 10b-5, investors do not have a private right of action based on alleged violation of Section 17(a). *See, e.g.*, Landry v. All Am. Assurance Co., 688 F.2d 381, 391 (5th Cir. 1982). *See generally* Marc I. Steinberg, *Section 17(a) of the Securities Act of 1933 After* Naftalin *and* Redington, 68 GEO. L.J. 163 (1979).

56. *See supra* notes 33–47 and accompanying text.

57. *Aaron*, 446 U.S. at 696–97. On the other hand, the SEC must prove scienter to prove a violation of Section 17(a)(1) which prohibits the employment of "any device, scheme, or artifice to defraud." *Id.* at 696.

58. Indeed, an SEC Commissioner estimated that 98% of all SEC enforcement actions settle. *See* Luis A. Aguilar, Comm'r, SEC, A Stronger Enforcement Program to Enhance Investor Protection, 20th Annual Securities and Regulatory Seminar (Oct. 25, 2013), https://www.sec.gov/newsroom/speeches-statements/2013-spch102513laa [https://perma.cc/PT99-PUQ8].

59. Generally, settlement without the defendant admitting or denying the SEC's allegations enables the Commission to devote its resources to the pursuit of other enforcement matters. For settling litigants, it enables them to resolve the matter more expeditiously and perhaps less onerously than proceeding to trial, lessens the prospect of more adverse publicity, and avoids the collateral estoppel impact if an adverse judgment is rendered. Nonetheless, with some frequency, the SEC (in what it views as appropriate cases) requires the defendant to admit wrongdoing as a condition of settlement. Factors considered by the SEC in this assessment are "the need for public acknowledgment and accountability, the egregiousness of the offense, and the amount of harm to investors." Yin Wilczek, *White Announces Revision of SEC 'No Admit' Settlement Policy*, 45 BNA SEC. REG. & L. REP. (June 24, 2013) (on file with the *Journal of Corporation Law*).

provides: "A violation of these provisions does not require scienter and may rest on a finding of negligence."[60]

C. Section 13(a) of the Securities Exchange Act

Section 13(a) of the Exchange Act provides that each reporting company must file with the SEC the documents and information contained in such documents in accordance with the SEC's rules and regulations.[61] This statute and accompanying Commission rules (such as Rules 12b-20, 13a-1, 13a-11, and 13a-13)[62] have been invoked in several SEC enforcement actions that have settled pursuant to the consent negotiation process.[63] For defendants, one of the benefits of settling to allegedly violating these provisions is that they are not based on fraud. Rather, negligent conduct is sufficient to constitute a violation.[64] A recent settled SEC enforcement action illustrates this point:

> Section 13(a) of the Exchange Act requires [subject companies] to file such periodic and other reports as the Commission may prescribe and in conformity with such rules as the Commission may promulgate. Exchange Act Rules 13a-1, 13a-11, and 13a-13 require the filing of annual, current, and quarterly reports, respectively. The obligation to file such reports embodies the requirement that they be true and correct. In addition to the information expressly required to be included in such reports, Rule 12b-20 of the Exchange Act requires issuers to add such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading. A violation of these reporting provisions does not require scienter and may rest on a finding of negligence.[65]

Hence, like Section 17(a)(2) and 17(a)(3), Section 13(a) and rules adopted thereunder provide a feasible way for defendants and the Commission to resolve enforcement actions in a manner that meets the SEC's objectives while limiting the adverse consequences that may ensue if a Section 10(b) fraud claim is alleged.

D. Section 20(a) of the Securities Exchange Act—Control Person Liability

Section 20(a) of the Exchange Act focuses on control person liability. The statute provides that:

---

60. *In the Matter of* Under Armour, Inc., Securities Exchange Act Release No. 91741, 2021 WL 1737508, at *9 (May. 3, 2021) (citing Aaron v. SEC, 446 U.S. 680, 685, 701–02 (1980)). *See also* Wendy Gerwick Couture, *Prosecuting Securities Fraud Under Section 17(a)(2)*, 50 LOY. U. CHI. L.J. 669, 684 (2019) (noting "Section 17(a)(2) requires that the defendant have been at least negligent about truth or falsity"); Andrew N. Vollmer, *SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5*, 10 VA. L. & BUS. REV. 273, 278 (2016) (noting "[s]trict liability might exist, even though courts of appeals require the Commission to prove negligence").

61. 15 U.S.C. § 78m(a) (2022).

62. 17 C.F.R. §§ 240.12b-20, .13a-1, .13a-11, .13a-13 (2025).

63. *See, e.g.*, *In the Matter of* Newell Brands Inc., Securities Exchange Act Release No. 98629, 2023 WL 6373141 (Sept. 29, 2023); *In the Matter of* Under Armour, Inc., Securities Exchange Act Release No. 91741, 2021 WL 1737508 (May 3, 2021).

64. *See, e.g.*, SEC v. Wills, 472 F. Supp. 1250, 1268 (D.D.C. 1978).

65. *See* Newell Brands Inc., *supra* note 63, at *8.

> Every person who . . . controls any person liable under any provision of this [Act] . . . shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.[66]

Hence, pursuant to this statute, the SEC has the authority to sue control persons, such as chief executive officers and chairs of boards of directors, when the corporations for which they serve engage in false disclosure and misrepresentation with the requisite intent.

Invocation of the control person provision occurs with regularity in federal securities law private litigation, including class actions.[67] The reason is straightforward: as construed by many federal court decisions, once a primary violation is proven, a control person also becomes liable unless such control person affirmatively establishes that they acted in good faith and did not induce the primary violator to engage in the misconduct.[68] As applied to the Commission:

> [U]nder the control person provision of Section 20(a), the SEC is not required to plead whether the participant had the requisite intent; nor must the Commission determine whether the control person actually engaged in the violative conduct—control person liability can be asserted simply because the control person had the requisite power to control the activities of the person who engaged in the misconduct.[69]

Although invoked with frequency by private securities litigants, the SEC customarily refuses to invoke the Section 20(a) control person provision against corporate directors and executive officers in its enforcement actions alleging false disclosure and misrepresentation.[70] The Commission thus declines to deploy an important resource in its "tool chest." As elaborated upon later in this Article, the SEC's inaction is disappointing for a federal agency whose principal mission is to protect investors and the integrity of the securities markets.[71]

---

66. 15 U.S.C. § 78t(a) (2010). The statute is clear that the SEC has the authority to pursue control persons. Under SEC Rule 405, the term "control" is defined to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person." 17 C.F.R. § 230.405 (2024).

67. Indeed, Section 20(a) control person claims in private litigation are regularly brought in every single U.S. circuit. *See* cases cited in Marc I. Steinberg & Forrest C. Roberts, *Laxity at the Gates: The SEC's Neglect to Enforce Control Person Liability*, 11 VA. L. & BUS. REV. 201, 238 n.178 (2017).

68. *See, e.g.*, Hollinger v. Titan Cap. Corp., 914 F.2d 1564, 1575 (9th Cir. 1990) (en banc) (recognizing that a good faith defense exists for control persons). Some courts require a plaintiff to plead that the control person engaged in "culpable conduct," meaning that such control person "was in some meaningful sense a culpable participant" in the misconduct at issue. *See* SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1472 (2d Cir. 1996) (illustrating the culpable person standard).

69. Steinberg & Roberts, *supra* note 67, at 240.

70. Over the years, there have been few exceptions. *See, e.g.*, SEC v. ITT Educ. Services, Inc., SEC Litigation Release No. 24188, 2018 WL 3344233 (July 9, 2018) (alleging pursuant to the settlement § 20(a) liability against the company's chief executive officer and chief financial officer).

71. *See infra* notes 146–59 and accompanying text. With respect to smaller publicly-held companies, the SEC, with some frequency, brings enforcement actions against CEOs and CFOs for making allegedly false certifications in their respective company's SEC periodic reports, thereby violating Rule 13a-14, 17 C.F.R. § 240.13a-14. *See, e.g.*, SEC v. Gault, 751 Fed. Appx. 974 (9th Cir. 2018) (bringing action against former CEO); SEC v. Jensen, 835 F.3d 1100 (9th Cir. 2016) (bringing action against former CEO and former CFO); SEC v. Das, 723

E. Aiding and Abetting Liability

Pursuant to statute, the SEC has authority to institute enforcement actions against alleged aiders and abettors.[72] Generally, the requirements for imposing liability upon an aider and abettor in cases of false disclosure and misrepresentation are: the commission of a primary violation; substantial assistance provided by the aider and abettor to the primary violator; and the aider and abettor acting with knowing or reckless misconduct.[73] Although the Commission often employs its aider and abettor authority, it seldomly does so in actions against corporate directors and officers.

F. Summation

The preceding discussion addressed the principal securities law statutes and rules that the SEC invokes in its enforcement actions. Generally, Section 17(a) of the Securities Act and Section 10(b) (and Rule 10b-5) are most frequently employed by the Commission when alleging false disclosure and misrepresentation by companies in their disclosure documents and other communications. In addition, to an increasing degree, in settled actions, the SEC is utilizing Section 13(a) of the Exchange Act (and rules promulgated thereunder). Like Section 17(a)(2) and 17(a)(3), an alleged violation of Section 13(a) does not give rise to the implication that the defendant engaged in fraudulent conduct.[74]

The discussion that follows focuses on the remedies and sanctions that the SEC seeks against alleged violators. As will be seen, the Commission's toolbox is amply supplied, providing the SEC with the wherewithal to procure meaningful relief.

IV. SEC REMEDIES AND SANCTIONS

The following discussion addresses the remedies and sanctions that the SEC may obtain in its enforcement actions alleging false disclosure and misrepresentation by publicly-traded companies. Prior to engaging in this endeavor, the following discussion addresses

---

F.3d 943 (8th Cir. 2013) (bringing action against former CEO and former CFOs); *see generally* Marc I. Steinberg & A.B. Steinberg, *Unflexed Muscle: SEC Enforcement and Officer SOX 302 Certifications*, 80 U. MIA. L. REV. 1 (forthcoming, 2025) (addressing SEC enforcement of the SOX CEO and CFO certification requirements).

72. *See, e.g.*, § 20(e) of the Securities Exchange Act, 15 U.S.C. § 78t(e) (2010) (providing the SEC with authority to impose liability against those who knowingly or recklessly provide substantial assistance in securities law violations). With respect to violations of Section 10(b), Rule 10b-5, and other Securities Act and Exchange Act claims, aiding and abetting liability has been rejected in private litigation. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994) (holding no aiding and abetting liability under Section 10(b) in private actions); Marc I. Steinberg, *The Ramifications of Recent U.S. Supreme Court Decisions on Federal and State Securities Regulation*, 70 NOTRE DAME L. REV. 489, 505–16 (1995) (analyzing a shift prompted by *Central Bank of Denver*, noting that the Supreme Court limiting aiding and abetting liability under Section 10(b), drove enforcement and litigation by private plaintiffs from federal to state courts).

73. *See* § 20(e) of the Securities Exchange Act, 15 U.S.C. § 78t(e) (2010) (providing assistance standard); SEC v. Apuzzo, 689 F.3d 204, 212–13 (2d Cir. 2012) (also holding that proximate causation is not required to be proven for aider and abettor liability in Commission enforcement actions).

74. Although Section 17(a)(2) and 17(a)(3) may be premised on negligence, the fact remains that Section 17(a) may be viewed as a fraud provision, particularly Section 17(a)(1) which requires scienter to prove liability under that subsection. *See* United States v. Naftalin, 441 U.S. 768, 773–74 (1979) (discussing liability under Section 17(a)(1)).

three key themes that prevail in SEC enforcement actions: settlement, cooperation, and administrative vs. judicial proceedings.

A. Settlement, Cooperation, and Administrative vs. Judicial Proceedings

1. SEC Settlements

As discussed earlier in this Article, SEC enforcement actions nearly always settle, with the defendant neither admitting nor denying the allegations set forth in the Commission's complaint. Indeed, over 90% of SEC actions settle.[75] Occasionally, the SEC requires that, pursuant to a settlement, the subject party admit wrongdoing.[76] Defendants tend to negotiate a consent settlement with the Commission rather than elect to proceed to trial for several reasons, including: they may believe that the SEC has a convincing case; the high financial costs associated with litigating to trial and, if necessary, appeal; minimizing adverse publicity that would be exacerbated by the presence of prolonged litigation; disruption of the company's operations if high level executives are implicated or otherwise significantly involved in the SEC's enforcement proceeding; and the risk that, if the SEC wins at trial, claimants in private damages actions will seek to estop defendants from contesting issues that were adjudicated against them in the SEC trial.[77]

2. Self-Policing, Self-Reporting, Remediation, and Cooperation with the SEC

In determining whether to institute an enforcement action against an entity or individual as well as the type and severity of the sanctions sought, the SEC evaluates the subject person's cooperation and its implementation of corrective measures in response to the misconduct at issue. As the Commission has stated, "[s]elf-policing, self-reporting, remediation and cooperation" are important factors in its enforcement determinations.[78]

With respect to individuals, relevant criteria include: the danger that was posed to investors by that person's misconduct; the culpability of the individual and whether the misconduct was an isolated instance or constituted a pattern of violative conduct; the individual's remorse and acceptance of responsibility for the misconduct; and the value, nature, and degree of the individual's assistance in aiding the Commission's investigation.[79]

---

75. *See* discussion *supra* note 58 and accompanying text.

76. *See* Dave Michaels, *SEC to Shift Its Policy on Accountability*, WALL ST. J., Oct. 14, 2021, at A4 (reporting on the SEC's decision to reinstate an Obama-era policy requiring parties to admit wrongdoing as a condition for settling civil enforcement actions); David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 IOWA L. REV. 113, 113 (2017); Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 ARIZ. L. REV. 1, 15 (2018) (finding 96 stand-alone settlements with admissions of legal wrongdoing during SEC fiscal years 2010–2017); discussion *supra* notes 56, 59.

77. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–32 (1979) (holding that, in appropriate situations, a plaintiff may invoke offensive collateral estoppel in a private action for damages against a defendant who was found liable on that same issue in an SEC enforcement action); MARC I. STEINBERG, *SECURITIES AND EXCHANGE COMMISSION V. CUBAN*: A TRIAL OF INSIDER TRADING 327 (2019) (discussing that billionaire Mark Cuban reportedly spent $12 million in his defense of insider trading charges brought by the SEC).

78. 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).

79. *See* 17 C.F.R. § 202.12 (2025) (Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions); Press Release, SEC, SEC

In regard to entities, such as publicly-traded companies that allegedly engaged in false disclosure and misrepresentation in their SEC filed documents (such as in their Form 10-Ks, and Form 10-Qs), pertinent factors include whether the company had: implemented reasonably effective compliance procedures and practices (referred to as self-policing); promptly self-reported upon discovering the misconduct to the public, regulatory agencies (including the Commission), and self-regulatory organizations (such as the exchange(s) on which the company's stock is listed for trading); conducted a thorough review of the extent, nature, and consequences of the transgressions; taken appropriate corrective and disciplinary action to prevent the misconduct's recurrence and to compensate those persons who were adversely affected by the misconduct; and adequately cooperated with the SEC, such as sharing all relevant information regarding the underlying misconduct with the Commission staff and compensating those persons harmed by the transgressions.[80]

Since the SEC's adoption of this framework over two decades ago, the Commission has focused on the extent of a target's self-policing, cooperation, and remediation when evaluating whether (and to what degree) to bring an enforcement action.[81] As a formal policy, the SEC has adopted incentives for cooperation by individuals and corporations, providing also for the use of cooperation agreements, deferred prosecution agreements, and non-prosecution agreements.[82] When conducting its assessment, the Commission seeks to vigorously enforce the federal securities laws to protect the integrity of the securities markets and the investing public while providing inducements for individuals and entities to cooperate in the Commission's investigative efforts as well as to undertake self-policing and corrective measures. Although the SEC may be criticized for being too lenient in certain cases, this policy arguably has enhanced the Commission's enforcement breadth: enabling the SEC to pursue a greater number of enforcement actions on a prompt basis with

---

Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), https://www.sec.gov/news/press/2010/2010-6.htm [https://perma.cc/MJK3-XMAL] (discussing value of cooperation by targets in SEC investigations).

80. *See supra* notes 78–79 and accompanying text.

81. *See Benefits of Cooperation With the Division of Enforcement*, SEC (Oct. 11, 2024), https://www.sec.gov/enforcement/enforcement-cooperation-program [https://perma.cc/A3HQ-YGZE]; *supra* sources cited notes 78–80.

82. The SEC's cooperation program is successful for a variety of cases for the entire enforcement spectrum:

> Cooperation Agreements—The [SEC's] Enforcement Division has entered many agreements under which it recommends to the Commission that a cooperator receive credit for cooperating in investigations or related enforcement actions if the cooperator provides substantial assistance such as full and truthful information and testimony. Deferred Prosecution Agreements—These are agreements under which the Commission agrees to defer an enforcement action against a cooperator if the individual or company agrees to cooperate fully and truthfully and comply with express prohibitions and undertakings during a period of deferred prosecution . . . . Non-Prosecution Agreements—These agreements are entered into in limited circumstances in which the Commission agrees not to pursue an enforcement action against a cooperator if the individual or company agrees to cooperate fully and truthfully and comply with express undertakings.

SEC, *supra* note 81; Press Release, SEC, SEC Charges Former Carter's Executive With Fraud and Insider Trading. (Dec. 20, 2010), https://www.sec.gov/news/press/2010/2010-252.htm (on file with the *Journal of Corporation Law*) (announcing non-prosecution agreement with Carter's, Inc. reflecting "the relatively isolated nature of the unlawful conduct, Carter's prompt and complete self-reporting of the misconduct to the SEC, its exemplary and extensive cooperation in the investigation, including undertaking a thorough and comprehensive internal investigation, and Carter's extensive and substantial remedial actions").

the allocation of fewer personnel resources while facilitating the implementation of improved corporate governance and disclosure practices by publicly-traded companies.[83]

3. SEC Administrative vs. Judicial Actions

The SEC may bring an enforcement action either in the federal courts or by instituting an administrative proceeding. In an administrative proceeding, the matter is prosecuted by the SEC staff before an administrative law judge, with the right to appeal an adverse decision to the Commission itself and thereafter to the U.S. Court of Appeals.[84] During the past several years, the SEC primarily has litigated in the administrative forum rather than in the federal courts, likely due to its rate of success being significantly higher in that forum.[85] Disgruntled litigants faced with an SEC enforcement action in an administrative forum have claimed that they are prejudiced, asserting that: the SEC has a "home court" advantage in this forum; compared to federal court cases, only limited discovery is available (for example, only a limited number of depositions are permitted); the rules of evidence are relaxed (including the prohibition against hearsay); and unlike federal court cases, there is no right to trial by jury.[86]

Due to this alleged disparity, defendants have successfully challenged aspects of the SEC's administrative enforcement authority on constitutional grounds. For example, in *Axon Enters., Inc. v. FTC*, the U.S. Supreme Court held that a defendant in an administrative enforcement case is entitled to institute a federal court action to challenge the

---

83. *See* SEC, *supra* note 81. The SEC has previously stated that enforcement cooperation:

> [C]ontribute[s] significantly to the success of the agency's mission. Information obtained from cooperators helps detect violations of the federal securities laws, increases the effectiveness and efficiency of SEC investigations, and provide[s] important evidence necessary to take enforcement actions. The [cooperation] program gives SEC investigators access to high-quality, firsthand evidence, resulting in stronger cases that can shut down fraudulent schemes earlier than otherwise would be possible.

Spotlight on Enforcement Cooperation Program, SEC (Sept. 20, 2016), https://web.archive.org/web/20220616232959/https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml [https://perma.cc/EC4D-BQWV]; *See also* Stephen J. Crimmins, *Cooperation Policy Tops Changes in SEC Enforcement Manual*, BNA INSIGHTS 133 (2010); Lance Cole, *The SEC's Corporate Cooperation Policy: A Duty to Correct or Update?*, 41 SEC. REG. L.J. 127 (2013); Karen E. Woody, *Corporate Crime and Cooperation*, 79 BUS. LAW. 65 (2023–24).

84. *See* Axon Enter. v. FTC, 598 U.S. 175, 180 (2023) ("As prescribed by statute, a party makes its claims first within the Commission itself, and then (if needed) in a federal court of appeals."); 17 C.F.R. § 202.5(b) (2025) (explaining that after an investigation the Commission may "take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the [federal] courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution").

85. *See* Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, WALL ST. J., Oct. 21, 2014, at A1; Christian J. Mixter, *The SEC's Administrative Law Enforcement Record*, 49 REV. SEC. & COMMODITIES REG. 69 (2016); Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 VILL. L. REV. 261 (2017).

86. *See* SEC v. Jarkesy, 603 U.S. 109, 143 (2024) (Gorsuch, J. concurring); STEINBERG & FERRARA, *supra* note 1, § 2:2 (2024–25 supp.); Ryan Jones, *The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507 (2015); Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1 (2015-2016).

Commission's constitutional authority to proceed with that case in the administrative forum.[87] Most recently, in *SEC v. Jarkesy*, the U.S. Supreme Court held that "the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud."[88] The Court's decision was limited to the constitutional impropriety of the SEC denying a defendant its Seventh Amendment right to a jury trial when the Commission seeks civil money penalties. Nonetheless, after *Jarkesy*, defendants will assert that other SEC administrative remedies, such as the imposition of a cease-and-desist order and the ordering of an officer and director bar, likewise are constitutionally impermissible. Indeed, the language of Chief Justice Roberts, writing for the Court, invites such challenges to be made, stating in the opinion's last paragraph: "A defendant facing a *fraud suit* has the right to be tried by a jury of his peers before a neutral adjudicator."[89] If this dicta eventuates to prohibit the SEC (as well as other administrative agencies) from pursuing their claims in-house that are deemed to be punitive, the consequence is that these proceedings will be tried in federal court.[90]

Nonetheless, irrespective of the Supreme Court's decision in *Jarkesy*, a defendant may voluntarily, knowingly, and intelligently waive a constitutional right.[91] Accordingly, although its negotiating leverage to procure meaningful sanctions may be reduced because of *Jarkesy*, the SEC likely will continue to bring settled cases in the administrative forum. After all, nearly all SEC enforcement actions are settled pursuant to the consent negotiation process, with both the Commission and defendants preferring the settled case to be brought administratively rather than in the federal courts.[92] This preference largely is due to that: a cease-and-desist order issued in an administrative proceeding is viewed as less severe than the ordering of a federal court injunction; the amount of media publicity may be less in an administrative proceeding; depending on the violations alleged in a consent order, the standards of culpability may be lower in an administrative proceeding than in a federal court proceeding (thereby presenting the impression that the defendants are less blameworthy); and the litigants avoid the possibility that a federal judge may question or object to

87. Axon Enter. v. FTC, 598 U.S. 175, 180 (2023). The case also involved the Federal Trade Commission (FTC).

88. *See* SEC v. Jarkesy, 603 U.S. 109, 120 (2024); *id.* at 125 (holding that "the civil penalties *in this case* are designed to punish and deter, not to compensate . . . . [and] [t]hat conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.") (emphasis added).

89. *Id.* at 139 (emphasis added). In his concurrence, Justice Gorsuch likewise made such an invitation, stating that, by the SEC instituting an administrative proceeding, Jarkesy was deprived "of the right to an independent judge and a jury . . . . [and] lost many of the procedural protections our courts supply in cases where a person's life, liberty, or property is at stake." *Id.* at 143 (Gorsuch, J. concurring).

90. As the dissent makes clear, the impact of the Court's decision is not limited to the SEC, asserting that, because of the Court's holding, "the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress." *Id.* at 200–01 (Sotomayor, J., dissenting).

91. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778 (2009) (addressing waiver of Sixth Amendment right to counsel).

92. *See* Vincent Ryan, *SEC Brought 91 Cases Against Companies in FY '23*, CFO (Dec. 13, 2023), https://www.cfo.com/news/sec-actions-2023-settlements-admissions-guilt—penalties-issuer-reporting-/702364/ [https://perma.cc/8S6U-7KQ6] (stating that 92% of the cases instituted by the SEC in FY 2023 were administrative actions).

the settlement terms.[93] Hence, settled SEC enforcement actions brought administratively should continue to be the favored forum. Moreover, even in litigated cases, some defendants may prefer the administrative forum, largely due to its frequently lower costs (e.g., less discovery and fewer depositions than in a federal court case, hence lower attorney fees) and the lower media attention that an administrative proceeding may have when compared to a case tried in federal district court.

The following discussion highlights key SEC remedies and sanctions in both the administrative and judicial forums. It bears mentioning that a number of these remedies and sanctions are available both administratively and judicially, such as ordering a defendant to disgorge ill-gotten gains, establishing a "Fair Fund" for aggrieved persons, and imposing an officer and director bar.

B. Remedies and Sanctions

This subsection addresses key SEC remedies and sanctions in both the administrative and judicial forums. The discussion begins with SEC enforcement actions brought in federal court followed by administrative proceedings instituted by the Commission.

1. SEC Relief in the Federal Courts

Before being granted expansive administrative authority by Congress in 1990 and 2010,[94] the SEC ordinarily brought its enforcement cases based on alleged false disclosure and misrepresentation against publicly traded companies in the federal courts. Today, if settled, these cases normally are brought in the administrative forum.[95] Nonetheless, in litigated matters, the SEC may resort to the federal courts to bring enforcement actions against subject companies and, on occasion, their directors and officers. Indeed, if money penalties are sought, the Commission after *Jarkesy* must bring the subject action in federal court.[96] The following discussion addresses several of the remedies and sanctions that the SEC may seek in the federal courts.

Historically, the SEC's principal judicial remedy is injunctive relief. Generally, the applicable standard in a court's determination whether to order an injunction is whether a reasonable likelihood exists that, if not enjoined, the defendant will again engage in the proscribed conduct.[97] Relevant factors to ascertain whether there is a reasonable likelihood

93. *See* SEC v. Citigroup Glob. Mkts., 752 F.3d 285 (2d Cir. 2014) (setting forth standards a district court must apply when determining whether to approve an SEC settlement); *See also* David Fredrickson, *What Happens to the SEC's Administrative Proceedings After* Jarkesy*?*, COVINGTON (Apr. 2024), https://www.cov.com/en/news-and-insights/insights/2024/04/what-happens-to-the-secs-administrative-proceedings-after-jarkesy [https://perma.cc/QT34-AEM3].

94. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

95. For example, 92% of SEC enforcement actions in 2023 were administrative proceedings. *See* Ryan, *supra* note 92. After *Jarkesy*, this preference for the administrative forum should continue. *See supra* notes 89–93 and accompanying text.

96. *See supra* notes 88–90 and accompanying text.

97. *See* Aaron v. SEC, 446 U.S. 680 (1980) (discussing standard for the ordering of an injunction in an SEC enforcement action). The statute of limitations for an SEC action for injunctive relief is ten years. § 21(b) of the Exchange Act, 15 U.S.C. § 78u(d)(8)(A)(ii) (2021).

of future violations include: "the degree of scienter involved, the sincerity of defendant's assurances against future violations, the isolated or recurrent nature of the infraction, defendant's recognition of the wrongful nature of his conduct, and the likelihood, because of defendant's professional occupation, that future violations might occur."[98] Additional pertinent factors are: whether the defendant in good faith relied on the advice of legal counsel,[99] the gravity of the misconduct,[100] the time that has elapsed between the violative conduct and the court's determination,[101] and the adverse impact upon the defendant if the injunction were ordered by the court.[102] The U.S. Supreme Court has made clear that the extent of a defendant's intentional misconduct is an important criterion in a court's determination whether to grant the SEC's request for injunctive relief.[103] Notably, however, depending on the underlying facts and circumstances, a court may order an injunction irrespective of the defendant's lack of scienter.[104]

In its actions requesting that an injunction be ordered, the SEC also seeks other equitable and monetary relief. These remedies and sanctions include: an order of disgorgement

98. SEC v. Universal Major Indus., Corp., 546 F.2d 1044, 1048 (2d Cir. 1976); *See also* SEC v. Calvo, 378 F.3d 1211 (11th Cir. 2004); SEC v. Cavanagh, 155 F.3d 129, 135–36 (2d Cir. 1998) (applying the quotation above).

99. *See* Howard v. SEC, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (discussing the good faith factor).

100. *See* SEC v. Manor Nursing Ctrs, Inc., 458 F.2d 1082, 1102 (2d Cir. 1972) (analyzing the "blatant nature" of the violations).

101. *See* SEC v. Monarch Fund, 608 F.2d 938, 943 (2d Cir. 1979) (discussing an injunction entered seven years after the violation).

102. *See* SEC v. Gentile, 939 F.3d 549, 559 (3d Cir. 2019) ("[T]he harsh effects of an SEC injunction demand that it not be imposed lightly or as a matter of course, that it be imposed only upon a meaningful showing of necessity, and when it is imposed that it be as short and narrow as reasonably possible.").

103. Aaron v. SEC, 446 U.S. 680, 701 (1980).

104. This point is confirmed by a recent federal appellate decision. *See* SEC v. Almagarby, 92 F.4th 1306, 1321 (11th Cir. 2024) (while acknowledging that a defendant's scienter is an important factor when a court determines whether to issue an injunction, "it is not a prerequisite to injunctive relief"). Note that a knowing violation of an SEC injunction carries the risk that a criminal contempt proceeding will ensue. *See, e.g.*, United States v. Custer Channel Wing Corp., 376 F.2d 675 (4th Cir. 1967) (upholding a conviction for criminal contempt after knowingly violating an injunction); *See generally* Marc I. Steinberg, *SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification, and Dissolution*, 66 CORNELL L. REV. 27 (1980) (examining the circumstances under which an SEC injunction may be modified or dissolved).

of the defendant's ill-gotten gains;[105] the levying of money penalties;[106] the creation of a "Fair Fund" for the benefit of injured investors and other adversely affected persons;[107] officer and director bars imposed against these individuals prohibiting them from serving in these roles for any publicly-held company due to their engaging in fraudulent conduct and being deemed unfit to serve in such capacities;[108] and the appointment of a receiver to oversee the subject company.[109] While the foregoing remedies and sanctions are not

105. *See* Liu v. SEC, 591 U.S. 71 (2020) (recognizing under certain conditions the propriety of disgorgement in SEC enforcement actions, provided that, among other considerations: the amount of disgorgement is to be based on the alleged wrongdoer's unjust enrichment, with the funds disgorged returned to victims of the misconduct and not to the U.S. Treasury (an exception may exist if the amount disgorged is paid by the U.S. Treasury to specified whistleblowers); and when ascertaining the amount to be disgorged by the alleged wrongdoer, that person's legitimate business expenses are to be deducted). Subsequent to this decision, Congress enacted a provision providing the SEC with express statutory authority to procure disgorgement. *See* National Defense Authorization Act Pub. L. No.116-283, § 6501, 134 Stat. 3388, 4625 (2021) *amending* Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d) (2021) (also providing for a ten-year statute of limitations for disgorgement ordered for scienter-based violations and a five-year statute of limitations for other violations). The extent to which this statute nullified aspects of the Supreme Court's decision in *Liu* is unresolved. *Compare* SEC v. Govil, 86 F.4th 89, 100 (2d Cir. 2023) (holding that the standards enunciated in *Liu* and those set forth in the statute are the same), *with* SEC v. Hallam, 42 F.4th 316, 338–41 (5th Cir. 2022) (stating that disgorgement pursuant to the statute is more expansive than that provided in *Liu*). *See generally* Andrew N. Vollmer, Liu *and the New SEC Disgorgement Statute*, 15 WM. & MARY BUS. L. REV. 307 (2024) (analyzing the text of the new disgorgement statute).

106. *See* Securities Exchange Act of 1934 § 21(d)(3), 15 U.S.C. § 78u(d)(3) (2021). Pursuant to statute, a three-tiered structure is used in a court's determination of the appropriate money penalty to be assessed. The gravity of the misconduct and the harm perpetrated or threatened by the unlawful conduct determine which tier applies to the case at bar. A five-year statute of limitations applies. *See* 28 U.S.C. § 2462 (2024).

107. The money contained in a Fair Fund is derived from amounts disgorged and/or money penalties paid by defendants pursuant to an SEC enforcement action. With frequency, the Commission has used the Fair Funds provision to provide some measure of monetary recompense to aggrieved investors and other persons adversely affected by a defendant's misconduct. *See, e.g.*, Off. Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 76 (2d Cir. 2006) (stating that $750 million was distributed to company investors under the Fair Funds provision). *See generally* Urska Velikonja, *How Fair Funds Changed Public Compensation and Strengthened SEC Enforcement*, 78 BUS. LAW. 667 (2023) (describing how the SEC distributed $750 million under the Fair Fuds provision in WorldCom).

108. *See* Securities Exchange Act of 1934 § 21(d)(2), 15 U.S.C. § 78u(d)(2) (2021). For a decision handed down three decades ago that preceded enactment of this statute that upheld a court's authority to bar a violator from serving as an officer or director of any publicly-held company, see SEC v. Posner, 16 F.3d 520 (2d Cir. 1994). *See generally* Jayne W. Barnard, *SEC Debarment of Officers and Directors After Sarbanes-Oxley*, 59 BUS. LAW. 391 (2004) (explaining how the change was intended to reduce the burden of proof required of the Commission).

109. *See, e.g.*, SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) ("The federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures in actions brought by the SEC to enforce the federal securities laws . . . . [including the] imposition of a receivership in appropriate circumstances."). The propriety of a federal court awarding equitable relief in an SEC enforcement action has received congressional approbation. *See* Securities Exchange Act of 1934 § 21(d)(5), 15 U.S.C. § 78u(d)(5) (2021) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.").

exclusive,[110] they constitute the principal means of redress for the SEC in its judicial enforcement actions.[111]

2. SEC Relief in the Administrative Forum

Nearly all SEC enforcement actions that are settled today are brought administratively rather than in the federal courts.[112] Although the Commission has lost some of its negotiating leverage after *Jarkesy*, this situation likely will continue.[113] In these proceedings, the Commission procures much of the same relief that is available in federal court actions. For example, in SEC administrative proceedings, the SEC may seek disgorgement of ill-gotten gains, the imposition of money penalties (in settled proceedings), the establishment of a Fair Fund for injured investors and others adversely affected by a defendant's misconduct, and the imposition of officer and director bars.[114]

One key difference is that the SEC in an administrative enforcement proceeding has the authority to issue a cease-and-desist order.[115] This remedy is perceived as less onerous than an SEC injunction. This is because the cease-and-desist remedy is an administrative rather than a federal court ordered remedy; has a lesser culpability standard for its imposition than an injunction; and, unlike a federal court injunction, does not carry the risk of criminal contempt if its terms are violated.[116] Pursuant to its cease-and-desist authority, the Commission may seek to procure this remedy against any person based on a violation of the federal securities laws or of the SEC's rules or regulations adopted thereunder—including publicly-listed companies that allegedly engaged in false and deficient disclosure.[117]

To obtain a cease-and-desist order in a litigated proceeding, the SEC must prove that the defendant has violated, is about to violate, or is currently violating the federal securities laws or any SEC rule or regulation.[118] The Commission also can bring a cease-and-desist

110. For example, the SEC may procure other equitable relief, such as an asset freeze, appointment of a monitor, and appointment of independent consultants. *See* SEC v. Hickey, 322 F.3d 1123, 1131 (9th Cir. 2003), *modified on other grounds*, 355 F.3d 834 (9th Cir. 2003) (asset freeze may be issued based on court's authority to order such equitable relief); James R. Doty & J. Bradley Bennett, *Independent Consultants in SEC Enforcement Actions*, 43 REV. SEC. & COMMODITIES REG. 259 (2010); John Huber et al., *The Brave New World of SEC Monitorships*, 43 BNA SEC. REG. & L. REP. 1480 (2011).

111. For further discussion see STEINBERG & FERRARA, *supra* note 1.

112. Indeed, 92% of SEC enforcement actions in FY 2023 were brought as administrative proceedings. *See* Ryan, *supra* note 92.

113. *See supra* notes 88–93 and accompanying text.

114. *See* Securities Exchange Act of 1934 § 21C, 15 U.S.C. § 78u-3 (2021) (describing the SEC's authority to seek disgorgement).

115. *See* Securities Exchange Act of 1934 § 21C(a), 15 U.S.C. § 78u-3(a) (2021). Section 21C(c) also gives the SEC authority to issue temporary cease and desist orders when the Commission determines that the alleged misconduct "is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest." *Id.* § 78u-3(c)(1).

116. *See supra* note 93 and accompanying text. Note that, pursuant to its cease-and-desist authority, the SEC may require, as appropriate, "future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person." Securities Exchange Act of 1934 § 21C(a), 15 U.S.C. § 78u-3(a) (2021). *See infra* notes 117–26 and accompanying text.

117. *See* Securities Exchange Act of 1934 § 21C(a), 15 U.S.C. § 78u-3(a) (2021) (describing the authority of the Commission to bring a lawsuit).

118. *See id.* § 78u-3(c) (2021).

action against any person who was a "cause" of the violation, meaning that such person "knew or should have known" that his/her/its conduct would contribute to the violation.[119] Hence, with respect to the requisite culpability for those persons who allegedly are a "cause," negligent misconduct is sufficient provided that proof of the underlying violation (such as Section 17(a)(2) of the Securities Act) does not contain a scienter requirement. Although a single isolated violation may not be sufficient for the entry of a cease-and-desist order,[120] a lesser showing is required than what is required for the SEC to procure injunctive relief in federal court.[121]

By its terms, the cease-and-desist order also may require that the defendant disgorge all ill-gotten gains as well as conduct an accounting.[122] Moreover, the cease-and-desist action may order that the defendant engage in specified "undertakings."[123] Such undertakings may be ordered independently of the entry of a cease-and-desist order. Indeed, over four decades ago, the Commission settled an administrative proceeding against Occidental Petroleum Corporation for engaging in allegedly false disclosure and misrepresentation in its SEC filings.[124] Pursuant to the settlement, the company agreed to significant undertakings, including the appointment of a director to its board of directors who was satisfactory to the SEC who, among other functions, was responsible for preparing an environmental report. In the preparation of this report, the Order provided that: "The director will utilize Oxy's newly elected senior environmental official and an independent consulting firm, each of whom will be satisfactory to the Commission, to assist with the development of information for, and the preparation of the report . . . ."[125] A more recent example with respect to undertakings ordered the subject company that settled a cease-and-desist action to retain an independent compliance consultant charged with reviewing and evaluating the company's record-keeping, internal controls, and anti-corruption policies.[126] Hence, for approximately half a century, the SEC has ordered subject companies to undertake meaningful measures to correct the deficiencies at issue.

---

119. *Id.* § 78u-3(a) (2021). Hence, depending on the facts and circumstances, a cease-and-desist-order may be issued when a person acts with negligence.

120. *See* WHX Corp. v. SEC, 362 F.3d 854, 861 (D.C. Cir. 2004) (ruling that the Commission erred in imposing a cease-and-desist order because WHX only committed a single violation).

121. *See* Geiger v. SEC 363 F.3d 481, 489 (D.C. Cir. 2004) (ruling that the civil penalties under the cease-and-desist order were proper under the circumstances). As stated in another decision: "The plain language of Section 21C, as well as the legislative history . . . undermine [defendant's] contention that the Commission erred in proceeding on the basis of a lower risk of future violation than is required for an injunction." KPMG, LLP v. SEC, 289 F.3d 109, 124 (D.C. Cir. 2002).

122. *See* Securities Exchange Act of 1934 § 21C(e), 15 U.S.C. § 78u-3(e) (2021). The order also can require that reasonable interest be paid by the defendant. *Id.*

123. *See* Securities Exchange Act of 1934 § 21C(a), 15 U.S.C. § 78u-3(a) (2021). The statute of limitations for an SEC cease-and-desist action is ten years. *See* Securities Exchange Act of 1934 § 21(d)(8)(B), 15 U.S.C. § 78u(d)(8)(B) (2021).

124. *In the Matter of* Occidental Petroleum Corp., Securities Exchange Act Release No. 16950, 20 SEC Docket 567 (July 2, 1980).

125. *Id.* I worked on the investigation of this matter when I was an SEC enforcement attorney in Washington DC. This enforcement proceeding is discussed by the author in MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 143–45 (2018), and is contained in the textbook MARC I. STEINBERG, SECURITIES REGULATION 982–88 (8th ed. 2022).

126. *In the Matter of* Stryker Corp., Securities Exchange Act Release No. 84308, 2018 WL 4678504 (Sept. 28, 2018); Press Release, SEC, SEC Charges Stryker a Second Time for FCPA Violations (Sept. 28, 2018), https://www.sec.gov/newsroom/press-releases/2018-222 [https://perma.cc/RW7U-D45G].

The next Section of this Article focuses on aspects of SEC enforcement policy that are problematic. The discussion identifies several of these concerns and proffers recommendations for improvement.

V. THE SEC ENFORCEMENT PROGRAM AND POLICIES—COMMENTS AND RECOMMENDATIONS

My 2021 Oxford University Press book *Rethinking Securities Law* has three dimensions: first, the book explains what the U.S. law currently is; second, it identifies many of the deficiencies of the U.S. securities regulation framework; and third, the book provides approximately 125 recommendations for improving the U.S. regimen.[127] The following discussion addresses a number of these shortcomings and identifies improvements that should be implemented.

A. No Requirement to Disclose All Material Information

Although not isolated to SEC enforcement, this failure impacts both the integrity of the disclosure framework and the efficacy of government enforcement. Unlike the European Union and other developed markets which mandate the prompt disclosure of all material information absent justifiable business reason,[128] the United States securities laws have no such requirement. Although the information that must be disclosed for publicly-listed companies is detailed and comprehensive,[129] this framework fails with frequency to capture important information that investors and the securities markets should receive.[130] As addressed earlier in this Article, this approach enables publicly-held companies to remain silent concerning certain material adverse financial conditions, even where there is no justifiable business reason for nondisclosure. The consequence is that the investing public and the securities markets are deprived of receiving material information that directly affects the subject corporation's financial condition and the trading price of its securities.[131] This situation also adversely impacts the integrity of the securities markets—namely, that while a company's stock price in an efficient market reflects all material public information, that price does not absorb undisclosed material information that has significant price impact.[132] Hence, undue delay in disclosing this information signifies that all too often the market prices of well-known global companies lack price accuracy.

---

127. STEINBERG, *supra* note 5.

128. *See* sources cited *supra* note 44 (discussing mandates for a company to publicly disclose all material information).

129. *See* discussion *supra* notes 6–32 and accompanying text.

130. As an example, the termination of a material contract by a company's customer is not required to be disclosed in such company's Form 8-K. *See* 17 C.F.R. § 249.308 (1992).

131. Note that the national securities exchanges, such as the New York Stock Exchange, require that, absent a justifiable business reason, all material information must be timely disclosed. *See* NYSE, LISTED COMPANY MANUAL §§ 202.01–.06 (2025), https://nyseguide.srorules.com/listed-company-manual/09013e2c85549e63 [https://perma.cc/7RST-E3BM]. However, these pronouncements, for the most part, are mere rhetoric as the exchanges rarely have levied discipline for noncompliance. Moreover, these rules do not provide investors with a private right of action for their violation. *See, e.g.*, Harris v. TD Ameritrade, Inc., 805 F.3d 664 (6th Cir. 2015).

132. *See* Basic Inc. v. Levinson, 485 U.S. 224, 241–42 (1988) (discussing the public availability of material information and the effect on stock price).

Moreover, this policy facilitates the commission of illegal insider trading.[133] To remedy this situation, the U.S. securities laws should mandate that all publicly-traded enterprises must disclose within one business day, absent justifiable business reason, all material information after becoming aware of its materiality.[134] More specifically, the SEC should adopt the following disclosure mandate as an item in Regulation S-K, thereby applying to a subject company's filings with the Commission, including registration statements and periodic reports:

> In addition to the information required to be included in the subject filing, there shall also be provided in such filing or another filing any further material information, irrespective of whether such material information is or is not called for by any other item of this Regulation S-K. This information is to be provided within one business day after the issuer or registrant becomes aware of such information. Omission of such material information is permitted provided that the issuer or registrant can establish a justifiable business reason for such omission.[135]

B. SEC Allegations and Settlements—A Disconnect

With some frequency, when settling administrative enforcement actions, the SEC makes statements implying that fraudulent conduct was perpetrated yet the violations ordered only allege negligence. One such example is the *Under Armour* 2021 enforcement action. There, the Order stated: "Under Armour's [conduct] created an uncertainty or event that was *known to Under Armour's senior management* and was *reasonably expected* to have a *material effect* on the registrant's future revenues."[136] Yet, only non-scienter violations were found by the SEC, principally violation of Section 13(a) and specified rules thereunder.[137] Moreover, although the SEC's Order suggested that the company's senior management knowingly or negligently engaged in deficient disclosure, it declined to bring

---

133. By drastically reducing the window for permissible nondisclosure, incidents of illegal insider trading should be substantially reduced. *See* George R. Walker & Andrew F. Simpson, *Insider Conduct Regulation in New Zealand: Exploring the Enforcement Deficit*, 2013 N.Z. L. REV. 521, 542 (stating that "large abnormal gains to insiders came 'largely from transactions involving delayed disclosure' whereas 'transactions involving immediate disclosure earn[ed] insignificant returns . . . . [thereby suggesting] that well-crafted disclosure rules have a significant impact on the incidence of insider conduct.").

134. This one business day proposal basically follows that required by Regulation FD. Under Regulation FD, if the selective disclosure of material nonpublic information was not intentional, the subject corporation must "promptly" disclose this information to the securities markets and investors. As defined in Regulation FD, "promptly" means "as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange)." Rule 101(d) of Regulation FD, 17 C.F.R. § 243.101(d) (2000). *See supra* note 31 and accompanying text.

135. *See* STEINBERG, *supra* note 5, at 48. In an earlier era, at least by its rhetoric, the SEC agreed with this approach. *See, e.g.*, Timely Disclosure of Material Corporate Developments, Securities Act Release No. 5092, 1970 WL 10576, *1 (Oct. 15, 1970) ("Notwithstanding the fact that a company complies with its reporting requirements, it still has an obligation to make full and prompt announcements of material facts regarding the company's financial condition.").

136. *See In the Matter of* Under Armour, Inc., Exchange Act Release No. 91741, 2021 WL 1737508, *10 (May 3, 2021) (emphasis added).

137. *Id.* at *10–11; *see also supra* notes 61–65 and accompanying text.

an enforcement action against these individuals.[138] As addressed later in this section, the Commission's refusal to sue corporate officers and directors of large publicly-held corporations is prevalent.

The SEC's 2023 settled administrative enforcement action against Newell Brands and its former chief executive officer Michael Polk also merits discussion. Although the Commission's Order did not explicitly assert that the company and its CEO engaged in knowing violations, its language may be read to imply such misconduct, stating that: During the time of the alleged disclosure violations, Newell Brands

> [A]nnounced core sales growth rates that were misleading because Newell did not also disclose that its publicly disclosed core sales growth rate was higher as the result of actions taken by Newell that were *unrelated* to its actual underlying sales trends. *Internal communications* during this period recognized that Newell's sales were disappointing and had fallen short of management's goals.[139]

No violations involving fraudulent conduct were asserted. Rather, pursuant to the settlement, Newell and its CEO were alleged to have violated Section 17(a)(2) and 17(a)(3) of the Securities Act and Section 13(a) of the Exchange Act as well as certain other provisions that require only negligent conduct as the requisite culpability.[140] In a rare measure, the Commission named the former CEO Polk as a defendant, with the settlement ordering him to pay a civil money penalty of $110,000.[141] During the period in which this alleged misconduct occurred, Polk's annual total compensation was approximately $18 million.[142]

Even this minimal money penalty against a corporate director and officer was an aberration. Unless an officer or director of a large publicly-traded company engages in insider trading, stock manipulation, or other blatant misconduct involving egregious self-dealing, it is unusual for the SEC to institute an enforcement action against these individuals. The following discussion highlights this abstention.

---

138. Tellingly, Under Armour settled the securities class action fraud claims for $434 million. *See* Sabela Ojea & Inti Pacheco, *Under Armour to Settle Claims Over Past Financials With $434 Million Payment*, WALL ST. J. (June 21, 2024), https://www.wsj.com/business/retail/under-armour-to-pay-434-million-settle-shareholder-claims-over-past-financials-f4f944e0 (on file with the *Journal of Corporation Law*) (discussing federal authorities investigating Under Armour and the company's decision to settle with investors).

139. *In the Matter of* Newell Brands, Inc., Securities Exchange Act Release No. 98629, 2023 WL 6373141, *1 (Sept. 29, 2023) (emphasis added).

140. *Id.* at *8 (Indeed, the Order states: "A violation of these provisions does not require scienter and may rest on a finding of negligence."). For discussion of these provisions earlier in this Article, see *supra* notes 54–64 and accompanying text.

141. *Id.* at 11 ("Polk shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of $110,000 to the Securities and Exchange Commission.").

142. *See* NOTICE OF ANNUAL MEETING OF STOCKHOLDERS, NEWELL BRANDS 34–37 (2019) (setting forth Polk's 2018 total compensation as $18.1 million). Newell settled the securities class action claims for over $100 million which was the ninth largest securities-related settlement in 2023. *See* Jarett Sena, *Largest Securities-Related Class Action Settlements of 2023*, INSIGHTS (Jan. 18, 2024), https://insights.issgovernance.com/posts/the-largest-securities-related-class-action-settlements-of-2023/ [https://perma.cc/R56J-F3FB] (outlining the top ten securities class actions of 2023). The author served as an expert witness in this action on behalf of the plaintiff-investors.

C. *Declining to Bring Enforcement Actions Against Directors and Officers of Large Publicly-Held Corporations*

In its enforcement actions, the SEC commonly obtains orders of disgorgement of ill-gotten gains and the levying of money penalties.[143] Indeed, in a number of cases, publicly-held companies have paid money penalties of tens of millions and even billions of dollars.[144] Critics, including some SEC Commissioners, contend that imposing such money penalties on publicly-held companies harms shareholders who thereby suffer diminution in the value of their stock due to the misconduct perpetrated.[145] The response is that amounts disgorged along with money penalties levied frequently are deployed for use as "Fair Funds" whereby injured persons are compensated. For example, in fiscal year 2023, the SEC distributed $930 million to harmed investors.[146] So long as the amounts disgorged and paid in money penalties are distributed to those persons who were harmed by the misconduct, this approach makes good policy. Otherwise, payment of these sums by publicly-held companies to the U.S. Treasury may inflict further injury on shareholders who were adversely affected by the alleged violations.[147]

While the SEC has been successful in procuring these large monetary amounts from publicly-held companies, it ordinarily has declined to take enforcement action against those corporate insiders who may well have been responsible for the transgressions. Indeed, in the aftermath of the financial crisis, the SEC instituted a total of *one* enforcement proceeding against a corporate executive officer.[148] This abstention largely continues today.

---

143. *See* Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2023, (Nov. 14, 2023), https://www.sec.gov/newsroom/press-releases/2023-234 [https://perma.cc/CB4B-T7WA] (stating that financial remedies in FY 2023 "comprised $3.369 billion in disgorgement and prejudgment interest and $1.580 billion in civil penalties"). As discussed earlier in this Article, with respect to enforcement actions that are not settled, the Supreme Court's decision in *Jarkesy* signifies that the SEC can procure money penalties only in the federal courts (and not in administrative proceedings). *See* discussion *supra* notes 88–92 and accompanying text.

144. *See, e.g.*, Press Release, DOJ, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading [https://perma.cc/4BB6-LD6K]; Press Release, DOJ, Goldman Sachs Agrees to Pay More than $5 Billion in Connection with Its Sale of Residential Mortgage-Backed Securities (Apr. 11, 2016), https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed [https://perma.cc/2P24-VM97]; *In the Matter of* JP Morgan-Chase Bank, N.A., Securities Exchange Act Release No. 76694, 113 SEC Docket 26 (Dec. 18, 2015) (settlement with payment of $307 million); *In the Matter of* Deutsche Bank AG, Securities Exchange Act Release No. 75040, 111 SEC Docket 3482 (May 26, 2015) (settlement with payment of $55 million).

145. *See, e.g.*, Paul S. Adkins, Comm'r, SEC, Remarks Before the Atlanta Chapter of the National Association of Corporate Directors (Feb. 23, 2005), https://www.sec.gov/news/speech/spch022305psa.htm [https://perma.cc/M2Q4-4VP5] ("Corporations fined for disclosure-based transgressions use shareholder money to pay for behavior of which the shareholders were the victims.").

146. Press Release, *supra* note 143. The Fair Funds provision was passed as part of the Sarbanes-Oxley Act of 2002. *See* Sarbanes-Oxley Act of 2002 § 308, 15 U.S.C. § 7246 (2010).

147. *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 334 (2015) (in a study of fair funds conducted, finding that the Commission distributed more than 75% of all collected money penalties under the Fair Funds provision).

148. *See* Final Judgment as to Defendant Angelo Mozilo, SEC v. Mozilo, No. 09–3994, 2010 WL 3656068 (C.D. Cal. Sept. 16, 2010); Press Release, SEC, Former Countrywide CEO Angelo Mozilo to Pay SEC's Largest-Ever Financial Penalty Against a Public Company's Senior Executive (Oct. 15, 2010), https://www.sec.gov/news/press/2010/2010-197.htm [https://perma.cc/JQ6C-SLE2] (SEC action against former

It is incumbent upon the SEC to deploy the resources in its repertoire. Although the Commission frequently has called on corporate directors and officers to conduct themselves in a law-compliant manner,[149] it declines to pursue these individuals with sufficient vigor.[150] This point is illustrated by the SEC's refusal to use the control person provision in its enforcement actions against large publicly-traded companies for allegedly engaging in false disclosure and misrepresentation.[151] As discussed earlier in this Article,[152] the control person statute—Section 20(a) of the Securities Exchange Act—provides that:

> [E]very person who . . . controls any person liable under any provision of this [Act] . . . shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."[153]

Pursuant to this statute, the SEC is given express authority to bring enforcement actions against such control persons as chief executive officers and chairs of boards of directors when the corporations for which they serve violate the federal securities laws by engaging in false disclosure and misrepresentation.[154] For reasons unknown, the SEC refuses to

---

CEO of Countrywide Financial Corporation whereby, pursuant to settlement, he agreed to a permanent director and officer bar, disgorgement of $45 million, and a money penalty of $22.5 million).

149. *See, e.g.*, Mary Jo White, Chair, SEC, Speech at the Council of Institutional Investors Conference: Deploying the Full Enforcement Arsenal (Sept. 26, 2013), https://www.sec.gov/newsroom/speeches-statements/spch092613mjw [https://perma.cc/S93Q-FDC6] ("Another core principle of any strong enforcement program is to pursue responsible individuals wherever possible. That is something our enforcement division has always done and will continue to do.").

150. A justification for the SEC's abstention is that it is normally an insurmountable challenge to prove fraud by directors and C-suite executives. *See* Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL. REV. 265 (2014) (addressing difficulties with respect to the SEC suing directors and executive officers). Assuming the merit of this contention, it is not germane to the Commission's refusal to invoke the control person provision. Occasionally, the SEC brings enforcement actions against corporate executives of NYSE-listed companies for securities fraud. *See, e.g.*, SEC v. Daniel C. Ustian, Litigation Release No. 24753, 2020 WL 998851 (Mar. 2, 2020) (settlement whereby former chief executive officer of Navistar International Corporation consented, without admitting or denying, to SEC's allegations that he committed, among other violations, securities fraud in statements made to the investing public).

151. Securities Exchange Act of 1934, 15 U.S.C. §78t(a) (2021). Another example is that the SEC has not frequently brought enforcement actions against chief executive officers and chief financial officers for making deficient disclosures with respect to their certifications regarding their companies' financial disclosures and internal controls. *See* Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241(2010); 17 C.F.R. § 240.13a-14 (2024); sources cited, *supra* note 71. This lack of enforcement is particularly evident with respect to the lack of enforcement actions for allegedly deficient certifications by CEOs and CFOs of S&P 500 companies. For one such enforcement action brought against the former CFO of Dell, Inc. for alleged violation of Rule 13a-14, among other provisions, see *In the Matter of* Schneider, Exchange Act Release No. 63600, 109 SEC Docket 1644 (Dec. 22, 2010) (settlement whereby defendant neither admitted nor denied the SEC's allegations).

152. *See supra* notes 66–71 and accompanying text.

153. 15 U.S.C. § 78t(a) (2021).

154. On a few occasions during the past ten years, the SEC has invoked the control person provision against senior executive officers. *See, e.g.*, SEC v. Ustian, 229 F. Supp. 3d 739, 777 (N.D. Ill. 2017) (denying former chief executive officer's motion to dismiss control person claim); SEC v. ITT Educ. Servs., Inc., SEC Litigation Release No. 00758, 2018 WL 3008632 (June 15, 2018) (in a settled enforcement action, alleging § 20(a) control person liability against the company's former chief executive officer and chief financial officer).

invoke this provision that is used with regularity in private actions alleging federal securities law violations.[155]

As addressed earlier in this Article, the control person statute is a remedy that may be easily deployed in SEC enforcement actions.[156] When invoking this statute, the Commission need only show that the chief executive officer or chair of the board of directors had the requisite power to control the conduct of the primary violator who engaged in the misconduct.[157] The burden then shifts to the subject defendant to prove that they acted in good faith and did not, directly or indirectly, induce the primary violation.[158]

The SEC's refusal to bring suit against directors and executive officers when merited is unacceptable and provides a persuasive basis to conclude that the Commission's enforcement program is tainted by this favoritism. It is therefore incumbent upon the SEC as a core mission to deploy the resources that have been provided. As a law enforcement agency, the Commission in appropriate cases should duly exercise its statutory authority, utilizing a reasoned and fair process against high-level corporate officers as well as certain directors (such as the chair of the audit company in the event of alleged fraud in the accuracy of the company's financial statements). By implementing its statutory authority in an equitable and transparent manner, it is likely that greater discipline and enhanced ethical practices would be instilled in the boardroom and C-suite, thereby achieving enhanced law compliance and more sound corporate governance conduct.[159]

D. Relatively Robust Enforcement with Key Deficiencies

As evidenced by the foregoing discussion, although the U.S. securities laws may be viewed as relatively robust with respect to SEC enforcement of false disclosures and misrepresentation engaged in by publicly-held companies, inadequacies exist. The SEC's approach of more bark than bite, the imposition at times of severe corporate money penalties without the existence of a Fair Funds presence, and its refusal to bring appropriate enforcement actions against directors and executive officers of large, publicly-held companies are the most striking deficiencies.

VI. Conclusion

This Article has focused on SEC enforcement with respect to false disclosure and misrepresentation by publicly-traded companies. Disclosure deficiencies in this context

---

155. *See, e.g.*, *supra* note 67 and accompanying text.

156. *See supra* notes 66–71 and accompanying text.

157. *See* Harrison v. Dean Witter Reynolds, Inc., 974 F.2d 873, 881 (7th Cir. 1992) (stating that "[w]e have looked to whether the alleged control-person actually participated in . . . exercised control over, the operations of the person in general and . . . to whether the alleged control-person possessed the power or ability to control the specific transaction or activity upon which the primary violation was predicated, whether or not that power was exercised").

158. *See, e.g.*, *In re* Stone & Webster, Inc. Sec. Litig., 414 F.3d 187, 194 (1st Cir. 2005). Note, however, that some courts opt for a far more lenient standard in favor of control persons, requiring that the plaintiff prove that the controlling person was a "culpable participant" whereby the controlled person's conduct was deliberate and done intentionally to further the fraud. *See* SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1472–73 (2d Cir. 1996); *see also* sources cited *supra* note 68.

159. This position has been advanced in several of the author's other works. *See, e.g.*, Steinberg, *supra* note 5, at 288–92; Steinberg & Roberts, *supra* note 67.

ordinarily occur by a subject corporation in its SEC filings, press releases, and verbal statements made by company spokespersons. As discussed earlier, while the Commission's enforcement approach regarding alleged misconduct engaged in by publicly-held enterprises may be viewed as having some meaningful rigor, the same generally cannot be said with respect to directors and executive officers of large, publicly-held companies. Indeed, the SEC declines to utilize key statutory resources that the federal securities laws expressly provide to the Commission. This abstention is unacceptable, reflecting poorly on the Commission's vigor with respect to its obligation to appropriately and fairly enforce the securities laws against all violators, irrespective of their size and influence.

Nonetheless, as compared to many other developed markets, the SEC enforcement program should be admired for many reasons. These reasons include: the relatively straightforward statutory and regulatory mandates that have been adopted; the presence of competent SEC personnel who generally have adequate resources to perform their functions; the cultural acceptance in the United States of bringing enforcement actions when warranted against large, publicly-held corporations; the acumen of implementing a consent settlement negotiation process enabling the SEC to effectively and efficiently utilize its enforcement reach; and the availability of an impressive array of remedies and sanctions at the Commission's disposal to use as it deems appropriate. Thus, although the SEC's enforcement program is not flawless and some massive frauds have gone undetected, its overall performance plays an important role in seeking to maintain the integrity and transparency of the U.S. securities markets.