Speech

Remarks at Securities Enforcement Forum West 2022

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Good afternoon everyone.

Thank you to Bruce Carton for the invitation to speak today and to Professor Joe Grundfest for the very kind introduction.

As is customary, my remarks today express my views, and don't necessarily reflect those of the Commission, the Commissioners, or other members of staff.[1]

Ordinarily at an event like this one, I'd speak about all that ways in which we are working to protect investors, including our increased focus on the private fund space, the additional resources we've committed to our Crypto Assets and Cyber Unit, and other enforcement priorities. And I'd likely close by reassuring each of you in the defense bar that we're not doing away with the White Paper and Wells processes, but rather streamlining them. But I'd like to take a different approach today given some recent experiences and observations.

An animating principle for me in this role has been to increase public confidence in our markets and in government—to counter the declining trust in our institutions that we are experiencing.[2] There is a perception among large segments of the population that corporate wrongdoers are not being held accountable and that there are two sets of rules: one for the big and powerful and another for everyone else. While there are many reasons for these beliefs and trends, delayed accountability does not help.

That's why, since day one, I've been asking staff to look for ways in which to push the pace of our investigations. The public needs to know when they read a news story about corporate malfeasance that we will move quickly to investigate what happened and hold wrongdoers accountable, even in the most complex cases. You saw an example of that recently in our actions against Archegos Capital Management, its founder Bill Hwang, and others.[3]

But one thing I hear frequently from staff is how the conduct of defense counsel in some cases frustrates and delays our truth-seeking mission. For example, I recently learned about a document production in an investigation concerning an entity with billions in assets that it would be overly generous to refer to as a rolling production. Despite our best efforts, we've received a little over 200 documents over the course of the last six months, including a single page recently produced in response to requests for U.S. customer account and trading data. One page. Needless to say, that makes it difficult for us to assess whether there's been a violation of the securities laws.

None of this is new. About a decade ago, one of my predecessors—Rob Khuzami—gave a speech about questionable behavior by defense counsel in SEC investigations.[4] From slow-rolling document productions as I

just described—to representing multiple witnesses with adverse interests in the same matter—to kicking witnesses during testimony to get them to answer questions a certain way, Director Khuzami catalogued many ways in which defense counsel undermined the SEC's investigative process.

Unfortunately ten years on from that speech, we continue to see some of these behaviors, as well as newer forms of the same tactics. In other words, while defense counsel may have stopped kicking witnesses under the table, they've moved to more subtle behaviors.

To be clear, I fully appreciate and welcome zealous advocacy. After all, good defense lawyers help ensure that our enforcement decisions are fair and informed. But dilatory or obstructive conduct is not zealous advocacy. It is behavior that frustrates our processes, puts investors at risk, and contributes to that declining trust I described.

Delay, for example, may enable a fraudster to dissipate assets or place them beyond our reach. A needlessly lengthy accounting fraud investigation could mean that markets lack accurate information about a public company for an extended period. And advisory clients unaware of a potential conflict may keep money invested with a firm, when, given full information, they would choose another money manager.

Protracted investigations also impose costs on the individuals and firms involved. Most obviously, there are the reputational costs that an issuer might incur after disclosing an investigation but before its delayed resolution. Those reputational costs may, in turn, impose economic costs on shareholders. There are also, of course, the legal bills incurred as a result of unduly extended negotiations or needless disputes over routine investigatory issues.

And, finally, there are the psychological or emotional costs for witnesses involved in investigations. When counsel decide to dispute plainly reasonable requests, delay productions, prolong testimony, or otherwise frustrate our investigations, it can exacerbate all of these costs.

For these reasons and others, it's in our collective interest to ensure that our investigations move quickly and efficiently.

So what exactly are we seeing?

I'll start with document productions. Documents are the lifeblood of many investigations. They can provide investigative leads, help refresh witness recollections of distant events, and supply powerful, contemporaneous evidence of those same events. And compliance with document production obligations is one of defense counsel's most effective means of ensuring that we timely reach the underlying facts.

We understand that these productions can be both costly and time-intensive for counsel and their clients. That's why staff routinely negotiate with defense counsel on the scope of requests and production schedules, including by issuing more targeted requests, accepting rolling productions, and finding alternative ways to obtain the information we need. And we recognize that there are many potential causes for hitches in productions, so we don't automatically assume they're a result of gamesmanship.

That said, too often, we see defense counsel—sometimes even including Enforcement alums—engage in conduct that seems to have little purpose other than to delay our investigations. At times, this comes in the form of a simple blown production deadline, even one carefully negotiated with counsel, and at other times it comes in the form of a document dump of terabytes of irrelevant material or in a trickling production like the one I described earlier.

When we see counsel repeatedly encountering unexplained issues that delay productions across different clients and matters, it undermines both our process and trust between counsel and investigative staff.

While this is different than the public trust I've spoken about so far, it's critical to rebuilding that public trust. That's because one of the most valuable qualities an effective defense lawyer can have is credibility with the staff. We've all experienced this firsthand—that close call when it's counsel's credibility that carries the day and drives a fair and timely resolution.

Trust between staff and counsel—and staff and witnesses for that matter—is also important in the context of investigative testimony. As I'm sure you instruct your clients, a witness's primary responsibility is to truthfully answer staff's questions. And the staff, in turn, are responsible for asking precise questions designed to elicit relevant information.

When a witness misunderstands a question, the potential confusion that results can disserve all involved.

Counsel can—and sometimes do—alleviate these potential issues by, for example, preparing witnesses in advance, asking clarifying questions, or directing the witness to provide information that counsel believes will assist the staff's understanding.

Unfortunately, sometimes counsel create or amplify misunderstandings or sow distrust between the witness and the staff. When experienced counsel, who are well aware that the Federal Rules of Evidence do not apply in our investigative testimony, repeatedly interrupt testimony to lodge hearsay or other inapplicable objections, trust can be eroded.

When counsel repeatedly speak over the witness or attempt to answer questions, trust can be eroded.

When counsel overtly coach the witness on how or whether to answer a question, trust can be eroded.

And when such tactics needlessly prolong a testimony session, preventing the staff from addressing all of the factual items at issue, it serves neither the staff nor the witness, who may simply be called to testify again.

Just as trust is, on the macro level, foundational to the rule of law, on a micro level, the legal system is built on trust between lawyers and their clients. And that trust can be compromised when attorneys, who may be potential fact witnesses in an investigation, appear as counsel. These representations typically end with lawyers ultimately conflicting themselves out of a matter at the 11th hour—often in the Wells Process—and putting their clients in difficult situations.

While I'm certain firms ask themselves at the outset of an engagement: *can* we represent the company in such circumstances? The more relevant question and the one that we, as lawyers, always need to ask ourselves is: *should* we take on the representation?[5]

A lot of the problematic conduct we see from lawyers stems from a misguided emphasis on the "can" rather than the "should."

Relatedly, it's also troubling when counsel assert the attorney-client privilege in situations where its application appears clearly unwarranted, and the assertion itself appears to be more a form of aggressive lawyering, or gamesmanship, than a good-faith effort to protect the sanctity of the attorney-client relationship.

The privilege is a bedrock element of our legal system and we have tremendous respect for it and other analogous protections like the work-product doctrine. It's in our collective interest that clients seek counsel and make informed, well-guided business decisions, and that those conversations and deliberations are candid and protected.

But when we see questionable privilege claims, we'll justifiably probe. If, after discussions with counsel, we still believe that a claim of privilege over potentially responsive documents is not supported, we may file a subpoena enforcement action and let a judge review the materials to determine whether emails with a lawyer randomly cc'ed without more, or notes of meetings where a lawyer just happened to be present in which no legal advice is requested or provided, are really privileged. While clients and their counsel will make their own decisions about subpoena compliance, they should all appreciate the potential monetary and reputational costs they can incur as a result of subpoena enforcement litigation.

The behaviors I've discussed aren't inherently part of effective advocacy, and they don't necessarily serve clients' interests. In some cases, by engaging in these tactics, defense counsel may even forfeit their clients' opportunity to obtain cooperation credit.

This brings me to the way forward.

Beyond the benefits I've discussed to the markets and investors as a whole when defense counsel and their clients proactively cooperate with our matters in ways that save staff resources and streamline investigative steps, good behavior by lawyers can yield tangible benefits for clients.

As we've seen in a number of recent cases, when clients take steps to self-report potential violations, or to proactively cooperate with our investigations and remediate violations, the Commission is often willing to credit that cooperation, including through reduced penalties, or even no penalties at all.[6]

Now, I'm often asked to further explain what I mean by cooperation. To me, cooperation is more than the absence of obstruction[7]; it's an affirmative behavior.

If you're delaying our investigation by slow-walking document productions, trying to put off witness testimony for an excessive time, or being obstructive during testimony, you're not cooperating, no matter what your client's 8-K may say.

There's no exhaustive checklist of what constitutes cooperation, though as described in the *Seaboard* report, behaviors such as self-reporting and remediation fall within the cooperation rubric.

But here are some more examples of good cooperation: when your clients are involved in an investigation, you can make documents or witnesses available to us on an expedited basis, highlighting "hot" documents or providing translations of key documents where applicable.

You can flag documents that you know we're interested in, even if they might arguably, under a certain reading, fall outside the scope of a subpoena.

You can make presentations to the staff during an investigation that are not simply advocacy pieces, but that meaningfully illuminate events.

And, where your client may have violated the law, you can counsel them to own that violation and work in good faith to remedy it.

In short, you can take steps that enable us to efficiently conduct our investigations, protect investors, and rebuild trust in our markets and the law.

I've talked at length about defense counsel, so let me take a moment to talk a bit about how we in Enforcement conduct ourselves. As long as I'm Director, I expect Enforcement staff to continue to practice, as it historically has, what I've preached today.

In short, we will not play games during our investigations, negotiations, or litigations.

We don't play games with Wells notices. If we tell you we plan to recommend charges, it means that we are prepared to litigate any resulting action, pending careful consideration of any Wells submission.

We don't play games like threatening potential charges to gain leverage in negotiations or at trial if we don't in good faith believe that the evidence supports recommending those charges. Enforcement actions are far too serious to be used this way.

We don't play games with admissions. If we say, during settlement negotiations, that we demand admissions, we mean it and are prepared to litigate the case if the Commission authorizes an action. Admissions are not a bargaining chip.

And this is true more broadly: we don't play games with our settlement demands. This doesn't mean that our opening offer is our final offer, but it does mean that our offer is the product of rigorous thought about the appropriate outcome. It's calibrated to the case and the conduct. And while there may be some flexibility in certain aspects of it – and yes, on occasion, we may get our initial ask wrong, you should not assume that everything is subject to negotiation.

The enforcement process is not a bazaar. It is a serious undertaking, and we all need to treat it with the respect it deserves.

In recent remarks, Commissioner Allison Herren Lee spoke about how the legal profession stands "apart from other businesses principally because advocating for fidelity to the law is, at its core, a form of public service." [8] I couldn't agree more. And because the practice of law is fundamentally an expression of the importance of the rule of law, trust in the legal profession is an essential element of civil society. If the public does not believe that officers of the court take seriously our obligation to uphold not just the letter of the law, but its spirit, our society is the weaker for it. This is another reason why I wanted to talk with you today about how we can work together to re-build public trust in our markets and, in the process, in our profession.

And for those who want to work with us more closely in this shared endeavor, we are hiring for a variety of positions, including right here in the Bay Area. I encourage you to consider joining what I've come to learn in my short tenure is among the finest group of public servants anywhere.

Thank you to our hosts at the Securities Enforcement Forum. It's been wonderful to be with you all in person this afternoon.

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

[2] *See, e.g.*, Gurbir S. Grewal, Remarks at SEC Speaks 2021 (Oct. 13, 2021), *available at* https://www.sec.gov/news/speech/grewal-sec-speaks-101321; Gurbir S. Grewal, Remarks at PLI Broker/Dealer Regulation and Enforcement 2021 (Oct. 6, 2021), *available at* https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621.

[3] *See* Press Release 2022-70, SEC Charges Archegos and its Founder with Massive Market Manipulation Scheme (April 27, 2022), *available at* https://www.sec.gov/news/press-release/2022-70.

[4] *See* Robert S. Khuzami, Remarks to Criminal Law Group of the UJA-Federation of New York (June 1, 2011), *available at* https://www.sec.gov/news/speech/2011/spch060111rk.htm.

[5] This question is equally relevant for in-house counsel, if not more so. *See* Giovanni P. Prezioso, Remarks before the Spring Meeting of the Association of General Counsel (April 28, 2005), *available at* *https://www.sec.gov/news/speech/spch042805gpp.htm*.

[6] *See, e.g.*, Press Release 2022-14, Remediation Helps Tech Company Avoid Penalties (Jan. 28, 2022), *available at* https://www.sec.gov/news/press-release/2022-14; Press Release 2021-244, SEC Charges Oilfield Services Company and Former CEO With Failing to Disclose Executive Perks and Stock Pledges (Nov. 22, 2021), *available at* https://www.sec.gov/news/press-release/2021-244.

[7] *See* Gurbir S. Grewal, Remarks at PLI Broker/Dealer Regulation and Enforcement 2021 (Oct. 6, 2021), *available at* https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621.

[8] *See* Alison Herren Lee, SEC Commissioner, *Send Lawyers, Guns and Money: (Over-) Zealous Representation by Corporate Lawyers*, Remarks at PLI's Corporate Governance – A Master Class 2022 (March 4, 2022), *available at* https://www.sec.gov/news/speech/lee-remarks-pli-corporate-governance-030422.