

Remarks at SEC Speaks 2024

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Thank you, Gurbir.

I'd like to begin with the disclaimer that my remarks today are in my official capacity as Deputy Director of the SEC's Division of Enforcement, and do not necessarily reflect the views of the Commission, the Commissioners, or other members of the staff.

I want to echo Gurbir by thanking PLI for providing free access to the online stream of this program. It is important that those who are interested in the work of the SEC have an opportunity to hear from us. In the spirit of addressing a wider audience, we have deliberately tried to include practical tips and best practices in this panel discussion and in the Enforcement workshop later this afternoon.

Before I introduce the panel, I want to briefly highlight some of the Division's work during the last fiscal year (FY).

- In FY 2023, the Commission filed 784 total ENF actions, representing a 3% increase over the prior FY. [1] These included 501 original, or "stand-alone," ENF actions, which was an 8% increase over the prior FY.
- In addition, we filed 162 "follow-on" administrative proceedings seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders; and we filed 121 actions against issuers who were allegedly delinquent in making required SEC filings.
- The SEC obtained orders for just under \$5 billion in financial remedies, the second highest amount in SEC history after the record-setting financial remedies ordered in fiscal 2022. The financial remedies comprised nearly \$3.37 billion in disgorgement and prejudgment interest, and nearly \$1.6 billion in civil penalties.
- In addition, the SEC obtained orders barring 133 individuals from serving as officers and directors of public companies, the highest number of officer and director bars obtained in a decade.
- FY 2023 was also a record-breaking year for the Whistleblower Program. The SEC issued whistleblower awards totaling nearly \$600 million, the most ever awarded in one year, including a record-breaking \$279 million awarded to one whistleblower.
- Reflecting the success of that program, we received more than 18,000 whistleblower tips in FY 2023, the most ever, and roughly 50% more than the prior record set in FY 2022.
- Finally, we distributed \$930 million to harmed investors, marking the second consecutive year with more than \$900 million in distributions.

Of course, these numbers don't tell the full story of the important work we did in FY 2023, or of the work we are engaged in now. I wouldn't be able to cover that over these two days, much less in the hour we have for this

panel.

But I am going to briefly address two ongoing Enforcement initiatives that have received a fair amount of attention: the recordkeeping initiative and the amended marketing rule initiative. Specifically, I'll address our approach to penalties in these matters.

Since December 2021, the Commission has charged nearly 60 firms – investment advisers, broker-dealers, and credit ratings agencies – with recordkeeping violations, resulting in combined penalties of just over \$1.7 billion.^[2] This initiative has received a great deal of attention, much of it focused on penalties, which were as high as \$125 million for some of the firms, while, on the lower end of the spectrum, one firm paid a \$2.5 million penalty.

Perhaps as a result of that wide range in penalties, there has been a critique from the defense bar that we're picking numbers at random; that they're not informed by individualized determinations. I'm here to disabuse you all of that perception: stated simply, we do make an individualized assessment of each firm. I'll share some of the factors we focus on:

- We consider the size of the firm to ensure that the penalties are adequate to serve as a deterrent against future violations. A penalty that may be adequate with one firm may not be adequate with another. That means we look at the firm's revenues from the regulated parts of its business. We also look at the number of registered professionals at the firm.
- We consider the scope of the violations. How many individuals communicated off-channel? How many off-channel communications were there? But since we're generally dealing with samples, not with the total numbers, there is not a strict correlation between these numbers and the penalty. Consideration of other factors may also result in a relatively larger or smaller recommended penalty.
- We take into consideration a firm's efforts to comply with its recordkeeping obligations and to prevent off-channel communications, focusing, for example, on timely adoption of meaningful technological or other solutions.
- We consider precedent. The SEC has now issued 40 settled orders in these matters since December 2021. These precedents are a guide but are not determinative. They are part of an individualized determination; not a substitute for it.
- We also consider whether a firm self-reported. This is, in fact, the most significant factor in terms of moving the needle on penalties. From our prior actions, you can see how much we have credited those firms which have chosen to self-report, including the \$2.5 million penalty I mentioned.^[3]
- Finally, we consider cooperation. Firms that do not self-report can still receive credit based on their cooperation with ENF staff during our investigation. We'll address what cooperation looks like during the panel discussion to follow.

Those are some of the factors we consider when assessing what penalty to recommend in each action. While none of these is dispositive, I want to reiterate that self-reporting is the factor most likely to significantly lower the penalty we recommend.

Our initiative to enforce compliance with the amended marketing rule involved penalties ranging from \$175,000 to \$50,000.^[4]

This initiative, too, has made a big impact on the industry. Which is what we intended, as the amended rule contains important investor protection measures that we want to ensure that firms comply with.

Here, too, we conduct an individualized assessment of each firm when determining what penalty to recommend. The factors we look at include:

- A firm's reported regulatory assets under management;
- The nature of the regulatory history of the firm, including the nature of any prior enforcement actions;
- Whether the firm promptly remediated the noncompliant marketing materials;
- The need to send strong messages of accountability and deterrence; and

- As with the recordkeeping cases and, frankly, all our cases, we consider whether a firm self-reported and cooperated with our investigation.

I hope those factors I have laid out are helpful in the event that your firm or your client is confronting these issues. In fact, those factors are almost certainly going to be relevant in any SEC investigation you may be dealing with.

I'll turn now to my colleagues here for their presentations, which will include recent judicial developments in our space and helpful practice tips.

[1] See Press Release, SEC, "SEC Announces Enforcement Results for Fiscal Year 2023" (Nov. 14, 2023), available at www.sec.gov/news/press-release/2023-234.

[2] See Press Release, SEC, "Sixteen Firms to Pay More Than \$81 Million Combined to Settle Charges for Widespread Recordkeeping Failures" (Feb. 9, 2024), available at www.sec.gov/news/press-release/2024-18; Press Release, SEC, "SEC Charges Two Credit Rating Agencies, DBRS and KBRA, with Longstanding Recordkeeping Failures" (Sept. 29, 2023), available at <https://www.sec.gov/news/press-release/2023-211>; Press Release, SEC, "SEC Charges 10 Firms with Widespread Recordkeeping Failures" (Sept. 29, 2023), available at www.sec.gov/news/press-release/2023-212; Press Release, SEC, "SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failures" (Aug. 8, 2023), available at www.sec.gov/news/press-release/2023-149; Press Release, SEC, "SEC Charges HSBC and Scotia Capital with Widespread Recordkeeping Failures" (May 11, 2023), available at www.sec.gov/news/press-release/2023-91; Press Release, SEC, "SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures" (Sept. 27, 2022), available at <https://www.sec.gov/news/press-release/2022-174>; Press Release, SEC, "JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay \$125 Million Penalty to Resolve SEC Charges" (Dec. 17, 2021), available at <https://www.sec.gov/news/press-release/2021-262>.

[3] See Press Release, SEC, "SEC Charges 10 Firms with Widespread Recordkeeping Failures" (Sept. 29, 2023) (referencing \$2.5 million civil penalty against Perella Weinberg), available at www.sec.gov/news/press-release/2023-212; see also Press Release, SEC, "SEC Charges HSBC and Scotia Capital with Widespread Recordkeeping Failures" (May 11, 2023), available at www.sec.gov/news/press-release/2023-91.

[4] See Press Release, SEC, "SEC Sweep into Marketing Rule Violations Results in Charges Against Nine Investment Advisers" (Sept. 11, 2023), available at www.sec.gov/news/press-release/2023-173.