Speech

Prosperity's Door

Commissioner Hester M. Peirce

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Thank you, Jim [Angel], for that kind introduction. It is a delight to be here with you tonight to talk about the future of financial markets regulation. I commend all of you for putting in the time to understand better both the fundamental underpinnings and practical realities of securities law and the role it plays in our rapidly changing markets. Tonight, I look forward to exploring with you what that role should be as we look to bring more and more people into these markets as investors, entrepreneurs, and financial professionals. Before I begin, I must offer my standard disclaimer, which is that the views that I represent are my own views and not necessarily those of the Commission or my fellow Commissioners.

Several weeks ago, economist Steven Horwitz passed away. Hearing the sad news of his death inspired me to read one of his speeches, which was itself inspiring and helps to lay the groundwork for what I want to talk about tonight. Professor Horwitz spoke of how human diversity is the key to human prosperity. He wrote:

> We are fortunate to live on a planet populated by 7.5 billion people, each of whom has his or her own unique genetic blends, learned skills, and particular preferences and goals. Each of us brings something distinct to the human conversation. The challenge is how to turn those differences into productive cooperation rather than destructive conflict in a world where most of the planet are strangers to one another. . . . The answer to this puzzle is exchange. Exchange enables us to overcome our differences by providing a way for us to interact *not just despite those differences but because of them*. . . . Contrary to what critics say, free markets do not shut the door on the most vulnerable among us. The door to prosperity is open to everyone.[1]

Horwitz is not alone in celebrating the way markets push open the door to prosperity. Since at least the 18th century, economists and philosophers have marveled at the power of free exchange to break down barriers between people by creating the incentives for them to look past their differences to a shared interest that can transform those differences from a source of mutual suspicion and resentment into a creativity that far exceeds the sum of those differences.[2]

Increasingly, though, we hear criticism that our economy and our financial markets do not in fact work for everybody, that they produce increasing inequality, exclude the disadvantaged, and discriminate in the provision of opportunities for employment and career advancement. Proposed solutions to these problems often appeal to people like you and me, regulators, regulatory experts, and lawyers who are paid to use our own ingenuity to design and implement technocratic solutions. The prospect of engaging in social engineering can be quite enticing to us, as it plays to our predilections and strengths. If, however, Professor Horwitz is correct—that people, left to their own devices, will come together in acts of mutual enrichment to exchange not only goods but ideas, capital, and labor—we should resist the allure and instead examine what our prior social engineering efforts have wrought. If we find that some individuals cannot access markets or cannot take advantage of opportunities that markets offer, our own solutions to past problems may be to blame.

Let us think tonight about how we might be able to open the door to prosperity wider for everyone through changes in how we regulate our securities markets. These markets have served the United States and the world well for centuries. We can spread the wealth and prosperity these markets create by ensuring that even more people participate in them as investors, users of capital, and financial professionals. During our time together tonight, I hope that instead of talking about the complex technocratic top-down approaches that appeal to our regulatory sensibilities, we can explore solutions that rely on regulators getting out of the way and allowing the market to do its work.

Our financial markets are among the greatest wealth-generating machines ever developed by any society. Countless Americans have invested in these markets to generate the returns that empower them to buy homes, to pay for their children's educations, to start businesses, and to prepare for retirement. Over the long term, our public markets have generated consistently strong returns that make it possible for our fellow citizens to pursue these and other dreams.

Why then do only about half of American households own equities directly and only about half of Americans own mutual funds or exchange-traded funds?[3] This under-participation in our markets may be a byproduct, in part, of poor financial education. Without this education, people may not understand how powerful securities markets can be in transforming their and their children's futures or simply may fear that markets are too complicated for them. This year, many retail investors are getting hands-on financial education. 2021 has seen unusually heavy retail participation in trading individual equities and options. The regulator's first reaction is concern over investor losses. That concern is legitimate, and there is certainly more that the Commission could be doing to help educate investors in our markets. At the same time, the experience this new generation of retail investors is gaining will establish a level of comfort around investing that many in their parents' generation do not have. New technologies in our financial markets—whether mobile apps, artificial intelligence, stablecoins, or even decentralized finance—can enable people of limited means to access cheap, convenient, high-quality financial services. Professor Angel was right when he said in a recent paper that "We are all better off if we manage to draw the gamers away from lottery tickets and into the market."[4] Protecting these investors is important, but part of doing that is recognizing that, whether we like it or not, they will access those markets in ways their grandparents could not even have imagined.

Newly minted retail investors quickly discover that a huge swath of the market is off limits to them. Private markets, which are not subject to the disclosure mandates applicable to the public markets, are the gated domain of wealthy individuals and institutional investors. Under the Commission's accredited investor definition, an individual investor who wants to invest in companies making a private offering generally needs more than a million dollars in net worth, excluding her house, or an annual income above $200,000 (or above $300,000 for a couple). The Commission's view has been that wealthy individuals are likely to be more sophisticated about financial matters and are better able to bear the risk of loss from these investments.

The problem with this standard is pretty obvious. Even if you disagree with my view that the government should not be in the business of telling Americans how to spend or invest their hard-earned money, you likely agree that wealth or income is not always linked to financial sophistication or investing prowess. The accredited investor definition, however, would treat a third-year associate at a large law firm, after the most recent pay increases,[5] as having greater financial sophistication than a professor of business with years of teaching and research experience.[6] Investment opportunities open to a wealthy heir who has never worked a day in her life might be closed to a middle-class investor who has been managing her own investments for a couple of decades.

We recently tweaked the rules to enable investors to qualify as accredited investors based on defined measures of professional knowledge, experience or certifications in addition to the existing tests for income or net worth, but, to date, these changes have been limited to a few select financial professionals.[7] Moreover, the SEC has announced plans to explore updating the financial thresholds in the accredited investor definition so that presumably even fewer Americans will qualify.[8] The accredited investor rules are not the only barriers to the private markets for non-wealthy Americans. The Qualified Client and Qualified Purchaser rules under the Investment Advisers Act and Investment Company Act, respectively, play a similar gating role.[9]

Essentially, then, most Americans cannot participate in the private markets. Disparate treatment of individuals on an arbitrary basis—how rich you are—should strike us as unjust in any area of the law, but in this context it has particularly pernicious effects. The number of public companies has fallen dramatically over the last three decades.[10] Companies are waiting longer to go public,[11] so more and more of the growth and portfolio diversity are out of reach for retail investors. Individuals who do not meet the accredited investor standard are increasingly deprived of the opportunity to participate in these potentially significant early gains. Private market investments, of course, come with risk and do not necessarily generate higher returns than public market investments, but the opportunity to diversify one's portfolio broadly through public and private investments is certainly of value.[12] As others have noted, one might conclude that the Commission has essentially chosen to codify the old maxim that it "takes money to make money." Some suggest regulating private markets more heavily to reduce the incentive to stay private or eliminating

the ability to be private above a certain size, but this approach is the technocrat's solution. A simpler approach would be to unlock the existing gates to the private markets so that retail investors can get exposure to the private markets.

The private market gating rules' pernicious effects go far beyond the individual. A start-up in the Bay Area or in Manhattan may not find it particularly difficult to line up a significant pool of wealthy investors, but a start-up in Cleveland or Biloxi (where incomes are considerably lower) may not be able to locate investors who meet those same standards, which are uniformly applicable across different regions of the country with vastly different income and wealth levels.[13] Similarly, an entrepreneur raised in an affluent household who made the right connections at an Ivy League college may have friends and acquaintances who meet the thresholds. Those thresholds, however, effectively shut out the brilliant, young woman from a low-income background who had to go straight into the workforce to support a family but has a side hustle that could turn into something big if only she could solicit investments in her local community where her industriousness and talent are on display, but where few accredited investors live.

One might think that there would be a set of people who could help match wealthy investors with promising entrepreneurs like this hard-working young woman. While broker-dealers often play this role, full broker-dealer registration is impractical for someone occasionally introducing investors to small businesses trying to raise very small sums.[14] For that reason, for decades there has been a call for the SEC to create a tailored regulatory framework in which people could act as "finders" to match investors with small businesses. We proposed such a framework last fall and received comments on it,[15] but have not moved forward. I hope that, whether by exemptive order as proposed or by rule, we find a way to enable finders engaged in helping small entrepreneurs seeking to raise early dollars without a network of wealthy friends to operate without the full weight of broker-dealer regulation.

We can observe a similar dynamic when we turn to questions of access to employment opportunities in the financial industry. As Professor Horwitz notes, empowering people to "turn [their] differences into productive cooperation" is one of the things that makes the free market such a powerful engine in generating wealth and innovation. If he is right about this, all of us, whether in regulatory bodies or in regulated firms, have an interest in ensuring that the doors to employment and advancement in the financial industry are open to as many people as possible from every background. Opening these doors wide will require a frank assessment on our part of the barriers that we have erected over the years in the name of investor protection and other regulatory goals. We need to ask anew whether these barriers are well tailored to advance those goals while minimizing the significant costs of keeping individuals who pose little or no risk to investors out of the industry we regulate. People are questioning barriers to entry into other professions. Earlier this month, for example, President Biden raised questions about the effects of occupational licensing requirements that "lock[] some people out of jobs."[16] It is time that we ask the same questions for the financial industry.

The list of things that will keep an individual or a firm out of the securities industry is long. Take, for example, some of the reasons a person might find herself subject to a statutory disqualification under the Exchange Act that prevents her working as an associated person of a broker-dealer: These include being subject to a suspension or expulsion from an SRO, being subject to a regulatory order imposing a bar or suspension, having committed any felony or certain misdemeanors within the past ten years, and willfully making a false statement of material fact in a regulatory application.[17] Each of these, on its face, seems a wholly reasonable basis for disqualifying an individual from employment at a broker-dealer in roles that may involve, for example, making recommendations to customers or handling customer funds.

Look a little closer, though, and it becomes clear that even these apparently reasonable bases for disqualification, in practice, may create unreasonable barriers to employment opportunities while doing little or nothing to protect investors. For example, barring felons from working in the industry seems like an easy investor protection win—after all, a felony conviction is a pretty good indicator of moral turpitude or even moral depravity, right? Well, not so fast. In America today committing a felony is remarkably easy.[18] So easy, in fact, that a felony conviction may tell us very little about a person's moral character. As civil libertarian Harvey Silverglate notes in his book, *Three Felonies a Day*,

> it is only a slight exaggeration to say that the average busy professional in this country wakes up in the morning, goes to work, comes home, takes care of personal and family obligations, and then goes to sleep, unaware that he or she likely committed several federal crimes that day.[19]

Over the past several decades, our national and state legislatures have found it convenient, and politically popular, to impose increasingly severe punishments to deter a wide variety of conduct, including measures designed to fight the war on drugs and to incentivize compliance with an ever-growing regulatory state.[20] Many crimes now classified as felonies no longer even require the prosecutor to establish *mens rea*, which dramatically reduces the already questionable reliability of a felony conviction as evidence for a person's poor moral character. An Oklahoma woman

was charged with a felony for not returning "Sabrina the Teenage Witch," a movie she had rented from a video store.[21] Unbeknownst to her, that charge for felony embezzlement was on her record for twenty years.[22]

A distressing consequence of this overly punitive approach to classification and enforcement of crimes is the dramatic rise in the percentage of Americans who have felony convictions, from approximately 3 per cent of the population in 1980 to over 8 per cent of the population today.[23] The same research suggests that a majority of those with felony conviction have served no time in prison,[24] which itself raises questions whether collateral consequences that impose disabilities (such as being deprived of certain employment opportunities for a decade) that are more severe than the punishment imposed for the underlying offense can meet any reasonable standard of justice. Of course, each firm should have the opportunity to make appropriate hiring decisions based on its own business needs, but it is not the government's place to deprive individuals of the opportunity to show an employer that they deserve a second-chance at a career in financial services.[25]

In any event, if a single item in one paragraph of the statutory disqualification provision is excluding so many Americans from pursuing their livelihoods in our financial markets, it may be time to begin rethinking whether the law strikes the right balance. Changing the definition of statutory disqualification would require an act of Congress, but the Commission could consider whether it would be appropriate to use its broad exemptive authority here to limit the scope of the bar to something that is better tailored to the investor protection concerns the requirement was intended to address.[26]

Some of the barriers to employment in the industry arise not from the statutory requirements themselves but from good-faith attempts to gather information that may be relevant to the investor protection objectives that the statutory disqualification definition is intended to advance. For example, FINRA's Form U4 and the Commission's Form ADV play central roles in the registration of individuals who seek to associate with broker-dealers or of investment advisers. Both forms are long, and both require a significant amount of detail about the applicant (including, in the case of Form ADV, the applicant's employees).

Much of this information is unquestionably relevant to determining whether an individual should be interacting with customers and handling their money. Some questions about criminal history, however, go beyond what the Exchange Act requires and may impose unjustifiable burdens on applicants. For example, both in the Criminal Disclosure section of Form U4 and in Item 11 of Form ADV, the applicant is required to report past felony or relevant misdemeanor convictions; in addition, the applicant must report if he has been *charged* with either type of offense. In the case of Form U4, these questions must be answered in the affirmative even if the conviction or charge occurred more than ten years ago.

The relevance of these questions from a regulatory perspective is doubtful. If a felony *conviction* is an unreliable guide to a person's character, how much less the fact that a person has been *charged* with a felony? Prosecutors have enormous discretion in determining whether to bring charges in any particular case,[27] and that discretion can be exercised with varying degrees of integrity and fairness, depending on the character and whim of the individual prosecutor. Most prosecutors are trying to do the right thing, but if a prosecutor cannot obtain a conviction on those charges, why should a person be required, as a condition of her employment, to continue reporting, potentially for her entire career, a charge that may have been brought because the prosecutor was in a particularly surly mood or did not much like the look of the person in custody? Is the investor served by adding another barrier to employment for an applicant once charged with a drug-related offense or an offense arising out of a youthful prank?[28]

FINRA is taking steps to explore ways that its rules may be closing the doors to people who could make a contribution to the financial industry. In a recent regulatory notice, FINRA sought public comment in connection with barriers to participation in the broker-dealer industry, including with respect to the possible effects of "collection and publication of registered representative background data."[29] Comments in response have identified several areas, including some that I have already described, where adjustments could open the doors to greater participation with little effect on investor protection.[30] For example, Professor Angel suggested that "[m]inor blemishes should not result in automatic rejection, especially for incidents prior to the age of 21" and "[n]on-violent felonies, such as old drug offenses, should not be grounds for automatic disqualification."[31] The Commission should engage in a similar review.

A quite different barrier to entry into the financial industry about which I have previously expressed concern is legal liability for compliance officers.[32] Compliance officers play a key role in helping financial firms apply a very complex set of rules to the unique intricacies of their own firms' business lines. If, as has sometimes happened in the SEC's, FINRA's, and other regulators' enforcement actions, when a firm violates the law, the regulatory consequences fall in whole or part on the compliance officer, committed and qualified people will be reluctant to take these jobs. An enforcement action can be professionally and personally devastating. The Commission and other regulators could help to alleviate concerns about facing liability for someone else's violations by establishing a compliance officer

liability framework. I was pleased to see that the New York City Bar Association proposed such a framework last month.[33] That proposal helps us to think systematically about when compliance officer liability would further and when it would hinder our regulatory objectives. If we were to embrace such a framework publicly, more people would be comfortable about entering the industry. Moreover, smaller firms would find it easier to obtain good compliance expertise and thus easier to enter and remain in the securities business.

Let me close with a few words from another piece by Professor Horwitz, a blog post about the disease multiple myeloma, which eventually took his life. In that post written after being diagnosed, which occurred shortly after he had gotten married and started a new job, he explained his initial desire to allow anger at the situation to dominate him. Instead, however, he chose to think like an economist:

> The fact that I have multiple myeloma, for decision-making purposes, is importantly like a sunk cost. To be consumed by anger at my disease would be to fall for the fallacy that sunk costs matter. . . . The question is, as always for economists, how do I move forward given the place I find myself? . . [34]

Professor Horwitz's analysis may seem coldly objective in light of the terrible diagnosis he had just received, but his point is an important one in many contexts—even in securities regulation. When we see problems in our markets or the rules that govern them, we should set about figuring out how to move forward responsibly and deliberatively given the place we find ourselves. All of you who are here tonight are educating yourselves so that, wherever you are working, you can contribute to the sound regulation of this industry. Together we can work to ensure that our securities markets serve as a door to prosperity for all Americans.

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[1] Steven Horwitz, *Economics as the Study of Peaceful Human Cooperation and Progress,* The Library of Economics and Liberty (December 24, 2019), https://www.econlib.org/economics-as-the-study-of-peaceful-human-cooperation-and-progress/.

[2] Voltaire, Letters Concerning the English Nation (1734), *reprinted in* Philosophical Letters 25-26 (trans. Ernest Dilworth, 1961) ("Go into the Exchange in London, that place more venerable than many a court, and you will see representatives of all the nations assembled there for the profit of mankind. There the Jew, the Mahometan, and the Christian deal with one another as if they were of the same religion, and reserve the name of infidel for those who go bankrupt.").

[3] *Stock holdings by all families,* Federal Reserve (last visited July 21, 2021), https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Stock_Holdings;demographic:all;population:1;units:have (as of 2019, 52.6% of American households owned stocks); *2021 Investment Company Fact Book,* Investment Company Institute 2 (2021), https://www.ici.org/system/files/2021-05/2021_factbook.pdf (as of 2020, 47.4% of American households owned U.S.-registered funds).

[4] James J. Angel, *Gamestonk: What Happened and What to Do about It,* Georgetown McDonough School of Business Research Paper No. 3782195, 32 (March 1, 2021), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3795739_code35974.pdf?abstractid=3782195&mirid=1.

[5] *See* Caroline Spiezio, *Milbank again boosts associate pay, catching up to rivals,* Reuters (June 29, 2021), https://www.reuters.com/legal/legalindustry/milbank-again-boosts-associate-pay-catching-up-rivals-2021-06-29/.

[6] *See Occupational Employment and Wage Statistics,* U.S. Bureau of Labor Statistics (May 2020), https://www.bls.gov/oes/current/oes251011.htm (providing salary statistics for post-secondary teachers of business and indicating an annual mean wage of $113,110 for those teaching in colleges, universities, and professional schools).

[7] *See* Accredited Investor Definition, Release No. 33-10824 (Aug. 26, 2020), https://www.sec.gov/rules/final/2020/33-10824.pdf. The Commission explained that it may designate qualifying professional certifications, designations, and credentials by order in the future. *See id.* at 32-33 ("if an accredited educational institution, self-regulatory organization, or other industry body believes that it has a program of study or credential that fulfills the nonexclusive list of attributes enumerated in 501(a)(10), such institution or body may apply to the Commission for consideration as a qualifying professional certification or designation or credential under 501(a)(10). Similarly, members of the public may wish to propose to the Commission that a specific degree or program of study should be included in the accredited investor definition. Any such proposal does not need to be limited to a degree or program of study at a specific educational institution. Any such request for Commission consideration must address how a particular certification, designation, or credential satisfies the nonexclusive list of attributes set forth in the new rule, and may include additional information that the requestor believes the Commission may wish

consider."). Requests for Commission consideration, which must address how a particular certification, designation, or credential satisfies the nonexclusive list of attributes set forth in the new rule, may be submitted at investorcredentials@sec.gov.

[8] Exempt Offerings, RIN 3235-AM85 (Spring 2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM85.

[9] Investment Company Act § 2(a)(51)(A), 15 USC §80a-2(a)(51) (setting qualified purchaser threshold at $5 million in investments); 18 CFR § 275.205-3 (setting qualified client threshold at $2.1 million net worth or $1 million assets under management).

[10] *See, e.g.,* Jay Ritter, University of Florida, *The Number of Listed Firms in the U.S. 1980-2020,* By Quarter, IPO Data, https://site.warrington.ufl.edu/ritter/files/number-operating-companies-listed-on-major-us-exchanges.pdf.

[11] Stephen H. Dover, *FOMO? Investors Fear Missing Out As Companies Stay Private For Longer,* Franklin Templeton, https://www.franklintempleton.lu/investor/article?contentPath=html/ftthinks/ftinstitutional/cio-views/fomo-investors-fear-missing-out-as-companies-stay-private-for-longer.html (noting that the median age of technology companies at the time of their IPOs increased from 7.9 years in 2006 to 10.9 years in 2019).

[12] A recent presentation to the SEC's Asset Management Advisory Committee offers a helpful assessment of the consequences of limiting retail investor access to the private markets. Interim Report of Subcommittee on Private Investments, SEC Asset Management Advisory Committee (July 7, 2021), https://www.sec.gov/files/spotlight/amac/amac-private-investment-sub-committee-prelim-report-070721.pdf.

[13] *See What Percentage of American Households Make Over 200k,* World Population Review (last visited July 21, 2021), https://worldpopulationreview.com/state-rankings/what-percentage-of-american-households-make-over-200k (stating that only 3% of Mississippi households and 5% of Ohio households make over $200,000, while 11% of New York households and 12% of California households do so).

[14] *See, e.g.,* David R. Burton, *Let Entrepreneurs Raise Capital Using Finders and Private Placement Brokers,* The Heritage Foundation Backgrounder No. 3328 (July 10, 2018), https://www.heritage.org/sites/default/files/2018-07/BG3328.pdf (explaining that "[a] 'finder' is a person who is paid to assist small businesses to find capital by making introductions to investors, either as an ancillary activity to some other business, as a Main Street business colleague or acquaintance, or as a friend or family member of the business owner" and calling for a safe harbor for finders); Gregory Yadley, *Notable by their Absence: Finders and other Financial Intermediaries in Small Business Capital Formation,* JD Supra (June 26, 2015), https://www.jdsupra.com/legalnews/notable-by-their-absence-finders-and-52234/ ("Fully licensed broker-dealers are similarly not inclined to assist in micro and small offerings. The risks involved in undertaking a small transaction are often similar to those of a large one, without a commensurate upside.").

[15] *See* Notice of Proposed Exemptive Order Granting Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders, Release No. 34-90112 (October 7, 2020), https://www.sec.gov/rules/exorders/2020/34-90112.pdf.

[16] Executive Order on Promoting Competition in the American Economy, White House Briefing Room (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[17] 15 U.S.C. § 78c(a)(39).

[18] Commissioner Hester M. Peirce, *Statement of Dissent from the Commission's Order Approving the Financial Industry Regulatory Authority's Proposed Rule Change, as Modified by Amendment No. 1, to Address Brokers with a Significant History of Misconduct* (December 14, 2020), https://www.sec.gov/news/public-statement/peirce-dissent-finra-proposed-rule-brokers-misconduct.

[19] Harvey Silverglate, Three Felonies a Day: How the Feds Target the Innocent, 498 (Kindle ed. 2009). *See also* Gary Fields and John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall Street Journal (July 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920 ("'There is no one in the United States over the age of 18 who cannot be indicted for some federal crime,' said John Baker, a retired Louisiana State University law professor who has also tried counting the number of new federal crimes created in recent years. 'That is not an exaggeration.'").

[20] *See* Alan Flurry, *Study estimates U.S. population with felony convictions,* UGA Today (October 1, 2017), https://news.uga.edu/total-us-population-with-felony-convictions/.

[21] https://kfor.com/news/local/former-oklahoma-resident-had-unknown-charge-of-felony-embezzlement-for-not-returning-vhs-tape-rental-21-years-ago/

[22] *Id*.

[23] *See* Sarah K. S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United* States, *1948–2010,* 54 Demography 1795, 1808 (2017).

[24] *Id.* at 1805.

[25] J.W. Verret, *End the ban on felon participation in the securities markets,* The Hill (June 17, 2021), https://thehill.com/opinion/criminal-justice/558984-end-the-ban-on-felon-participation-in-the-securities-markets ("Some of the best stories are about people who have made mistakes, served time in prison and then find the strength to change their lives and start new careers upon re-entering society. . . . Unfortunately, this story is impossible for many careers in the financial services industry because of prohibitions in federal securities and banking law and in rules administered under those laws."); Nick Sibilia, *Barred from Working*, Institute for Justice 4 (August 2020), https://ij.org/wp-content/uploads/2020/08/Barred-from-Working-August-2020-Update.pdf ("For too long, collateral consequences have imposed a 'civil death' on ex-offenders. Protecting their right to earn an honest living would go far in granting them a second chance at life.").

[26] Some states have enacted legislation limiting employers' ability to require job applicants to disclose criminal background information in initial job applications, but these laws generally include carve-outs for financial firms required to collect this information under federal law. *See New Mexico Adopts Ban-The-Box, Expungement Laws,* JD Supra (April 23, 2019), https://www.jdsupra.com/legalnews/new-mexico-adopts-ban-the-box-81468/ *Illinois Places Significant Restrictions on Employers' Use of Criminal Conviction History and Imposes EEO Reporting Requirement,* EGB Law (April 1, 2021), https://www.ebglaw.com/news/illinois-places-significant-restrictions-on-employers-use-of-criminal-conviction-history-and-imposes-eeo-reporting-requirement/; *Background Screening in the Financial Services Industry*, Big Report (May 3, 2017), https://www.bigreport.com/resource-center/background-screening/background-screening-in-the-financial-services-industry/ (describing the limitations to these laws due to federal requirements more generally).

[27] *See* Angela J. Davis, *The Power and Discretion of the American Prosecutor,* Droit Cultures 55-66 (2005) https://journals.openedition.org/droitcultures/1580.

[28] Other parts of these forms may raise similar concerns. *See*, *e.g.*, FINRA Form U4, Question 14M, https://www.finra.org/sites/default/files/form-u4.pdf ("Do you have any unsatisfied judgment or liens against you?").

[29] FINRA Seeks Comment on Supporting Diversity and Inclusion in the Broker-Dealer Industry, Regulatory Notice 21-17 (April 29, 2021), https://www.finra.org/sites/default/files/2021-04/Regulatory-Notice-21-17.pdf.

[30] John Manganaro, *FINRA Project Examines How Regulators Can Support Diversity,* Plan Adviser (June 30, 2021), https://www.planadviser.com/finra-project-examines-regulators-can-support-diversity/ (citing commenter recommendations that FINRA consider online licensing exams, enrollment through community colleges, and more liberal expungement rules).

[31] James J. Angel, Comment Letter on FINRA Regulatory Notice 21-17 (May 18, 2021), https://www.finra.org/sites/default/files/NoticeComment/Georgetown%20University%20%5BJames%20J.%20Angel%5D_21-17%20-%20Comments%20by%20Professor%20James%20J%20Angel%20CFP%20CFA%20on%20FINRA%2021-17.pdf.

[32] *See* Commissioner Hester M. Peirce, Costumes, Candy and Compliance: Remarks at the National Membership Conference of the National Society of Compliance Professionals (October 30, 2018), https://www.sec.gov/news/speech/speech-peirce-103018; Commissioner Hester M. Peirce, When the Nail Fails – Remarks before the National Society of Compliance Professionals (October 19, 2019), https://www.sec.gov/news/speech/peirce-nscp-2020-10-19.

[33] Framework for Chief Compliance Officer Liability in the Financial Sector, New York City Bar (June 2, 2021), https://s3.amazonaws.com/documents.nycbar.org/files/NYC_Bar_CCO_Framework.pdf.

[34] Steven Horwitz, *Costs, Cancer, and Making Better Choices,* The Library of Economics and Liberty (January 7, 2019), https://www.econlib.org/library/Columns/y2019/Horwitzcosts.html.