## Speech

# Moving Forward Together – Enforcement for Everyone

**Commissioner Caroline A. Crenshaw**

**Washington D.C.**

**March 9, 2021**

I want to thank the Council of Institutional Investors for inviting me today. You are tireless advocates for investors and staunch proponents of good corporate governance. The agenda for this year's meeting covers a number of timely topics that are top of mind for me as well – from the impact of COVID-19 on members, to drivers behind the SPAC boom, to diversity and inclusion at U.S. companies. I'm pleased you are also talking about sustainable finance, proxy voting issues and ESG ratings. Further, I share CII's prioritization of clawbacks and transparency as to executive pay, stock trades and share buybacks. Today I have been asked to speak about what's next for the SEC. Before I do that, I will make the usual disclaimer that the views I express today are my own, and do not necessarily reflect those of staff, my fellow commissioners, or the agency.

In thinking about what I wanted to discuss today, of course I considered policy matters that I would like to see the Commission prioritize in the near term: Regulation Best Interest, the improvements needed in the proxy process, the need to finish implementing Dodd-Frank, and continuing updates to our market infrastructure. But I kept coming back to something even more foundational: our enforcement program. I want to talk about the central role enforcement plays in fulfilling our mission, how investors and markets benefit, and how a decision made 15 years ago has taken us off course. And I'll explain how changing tack now will yield better outcomes in all these areas.

Over the years, Commissioners on both sides of the political aisle have agreed that a strong enforcement program incentivizes compliance with the securities laws, and that enforcement helps to promote a market that inspires investor confidence, creating a level playing field for market participants. But Commissioners have had different views about when corporate penalties further those goals.[1] It is clear to me that the Commission has historically placed too much emphasis on factors beyond the actual misconduct when imposing corporate penalties – including whether the corporation's shareholders benefited from the misconduct, or whether they will be harmed by the assessment of a penalty. This approach is fundamentally flawed. This approach, more concerningly, could allow companies to profit from fraud as it unnecessarily limits the Commission's ability to craft appropriately tailored penalties that more effectively deter misconduct. If we are going to confront the novel issues today's markets present and deter ever more complicated and hard to detect frauds, we must revisit our approach.

This is a subject that I imagine matters to you as investors and market participants, because, unless there is a financial incentive to follow the rules, we know there is a temptation to break them. We know there is a temptation to spend money on operations at the expense of investing in compliance.[2] To help deal with those misaligned incentives, the Commission was given civil penalty authority,[3] allowing it to tailor remedies to misconduct and

effectively deter malfeasance to promote a fair market. Fairness yields better results for everyone. As CII members, you hold tremendous influence in the market and can help promote greater compliance with the securities laws, so I appreciate your time and attention today as I share my views.

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In order to protect investors and promote our capital markets, we need not only dedicated staff[4] and well-crafted regulations, but also for those regulations to be applied in a manner that promotes fairness. This, in turn, will promote growth and success. And it is not a platitude; the last 90 years or so present a long-running event study that proves it. To a large extent, our current regulatory system emerged in direct reaction to abuses that were revealed following the stock market crash of 1929.[5] The ’33 Act, and the legislation that followed, addressed weaknesses and failings of markets that had too long favored the rich and well-connected, who too often used their positions and advantages to treat retail investors as victims or marks, rather than owners.[6]

The enactment of prudent regulation changed that dynamic, as did the creation of an enforcement regime that has evolved over time to better address violations.[7] The stability of our regulatory system has allowed our markets to prosper.[8] Many studies have confirmed that companies that play by the rules do better in the long-term, but only if their competition plays by the same rules.[9] It is unfortunate, but not surprising when companies fail to honor rules if they see competitors reaping (short-term) benefits by skirting them or outright cheating. Aggressive but even-handed enforcement, without fear or favor, protects law-abiding corporate citizens. It also incentivizes everyone to behave fairly and focus on operations rather than on racing to the bottom.[10]

Against this backdrop, I have been, and will continue to be, focused on vigorous enforcement of our existing laws and regulations. As I’ll explain further, enforcement best advances our agency’s goals when it concentrates the costs of harm with the person or entity who committed the violation. For these reasons, ensuring that the violator pays the price is key to a successful enforcement regime and to promoting fair and efficient markets more broadly.

This “price” that I mention—the amount corporations have to pay when they violate the securities laws,[11] has been a topic that the Commission and many commissioners have addressed over the years. In 2006, a unanimous, five-member Commission issued a statement discussing a multitude of factors that the Commission will consider when deciding whether to assess a penalty against a corporation.[12] In addition to stating that “corporate penalties are an essential part of an aggressive and comprehensive” enforcement program and contribute to the Commission’s ability to deter misconduct, the 2006 statement suggested that the Commission should be careful not to impose penalties that unduly burden shareholders. Since then, when assessing penalties, the Commission has looked at whether a corporation’s shareholders benefited from misconduct, or whether they will be harmed by the assessment of a penalty because the costs may be passed on to shareholders. This myopic approach is flawed and the reason why we need to make a change.

First, corporate penalties should be tied to the *egregiousness of the actual misconduct* – not just the benefit or impact on the shareholders. It is common sense and bedrock to our law enforcement regime that worse conduct comes with stiffer penalties. I agree with former Commissioner Luis Aguilar’s observation that focusing on how and whether the penalty will impact the wrongdoer and its shareholders takes the focus off the actual misconduct at issue.[13] Even the unanimous 2006 statement acknowledged that corporate penalties must be tailored to the *violation*.[14]

Second, the Commission should not treat the presence or absence of a shareholder or corporate benefit as a threshold issue to imposing a penalty. Let me explain. The rationale behind looking to whether a violation conferred an improper benefit on shareholders stems from the view that it is unfair to impose a penalty if shareholders will be harmed by that penalty, unless the shareholders also benefited from the violation.[15] While this rationale was the subject of many speeches following the release of the 2006 statement,[16] time has revealed its limitations. Corporate benefit calculations are quite simply incomplete. This is because the shareholder benefit stemming from a violation is not limited to the assets the company acquired as a result of its violation, nor is it just the inflated stock price shareholders enjoyed. Corporate benefits include economic and intangible benefits that the company obtained when the market was in the dark about the full extent of the violation.[17] How do we identify

and measure the benefits conferred by a good reputation, or determine the impact of dripping bad information out through multiple disclosures over time? How do we adequately measure the impact fraud has on the market? Does undisclosed fraud effectively reduce a company's capital costs?[18] And what if there is a stock buyback during the period the share price is inflated? Does that harm shareholders because the company is spending money to repurchase its stock, or does it actually further benefit them by potentially raising earnings per share (EPS)?[19] And one significant benefit we seem to have overlooked is the benefit all investors receive by encouraging companies to obey the law or face penalties.[20] If we are going to consider the benefit to shareholders, we need to consider all of the benefits. I disagree with the notion that a corporation should pay any less of a penalty simply because the total benefit it received from its misconduct is difficult to quantify with exact precision. If that were the case, corporations might actually profit from their fraud. That is a bad outcome and not what the securities laws were intended to achieve.

I want to say one additional thing about the shareholder harm concern. It is not clear to me that SEC penalties actually harm investors.[21] I am interested in seeing any and all data or studies on this point. If the penalties are sufficiently high to motivate the company to remediate problems, strengthen internal controls, clarify lines of responsibility, and prioritize individual accountability, those are all changes that likely lead to better future outcomes, and higher profits for shareholders. Moreover, rarely do investors realize harms or gains by things that happen on a particular day, especially if they hold the shares for a period that exceeds the duration of the event's impact. Finally, if we limit penalties to instances where shareholders benefited from the violation, then we're doing no more than disgorging the proceeds of corporate wrongdoing. Penalties are intended to incentivize compliance, and higher penalties can be effective in deterring violations that are particularly hard to detect.[22] There becomes less of an incentive for shareholders to invest in companies that choose to follow the law if there are no repercussions for investing in those that do not. And for policy reasons, I think such an approach is likely to jeopardize the integrity of our capital markets in the long-term. Simply put, a single-minded focus on having companies pay a calculated corporate benefit will not appropriately deter fraud or ensure fair and efficient markets. If our penalties were limited in such a way, the price of getting caught might not be high enough to deter misconduct.

So what should we do? In addition to gathering additional data that can better inform how we assess corporate penalties, we need to consider the impact of the other factors identified in the 2006 statement on penalties. This, includes the degree to which a corporation self-reported its conduct, cooperated with law enforcement investigations, and then self-remediated violations. Cooperation provides companies with a potential path toward reducing or, perhaps, entirely avoiding penalties because it promotes and protects investors' long-term interests.[23] Issuers should take note that the Commission takes cooperation and self-reporting seriously.[24]

I want to make clear, however, that cooperation credit is not afforded to companies that merely respond to Enforcement Division requests, or to those that offer to conduct a not-so-independent investigation led by corporate counsel.[25] Meaningful cooperation requires a commitment to proactively identifying and remediating wrongdoing, as well as holding accountable those individuals responsible for misconduct. It's about substantially shortening the staff's investigation and working with the staff toward an efficient resolution.

Additionally, because corporate benefits and shareholder harm are rather amorphous concepts, moving forward the Commission should focus on setting penalties that are based on the actual misconduct and reflect the extent of cooperation with the Division of Enforcement staff. We should consider the extent of harm to victims and, if we know it, the number of harmed investors. Penalties should be higher for violations that cause more harm, either on their own or in the aggregate when considering their frequency. Similarly, we should also impose higher penalties on violations that are more difficult for us to detect. There is a greater need to deter conduct that requires more Commission resources to uncover, investigate and address.[26] The pervasiveness or complicity within the organization is another relevant consideration. Corporate culture comes from the top, and there is a strong need to incentivize companies to foster a culture of compliance – not misconduct. If companies believe they can profit from violations and are unlikely to be caught, they are more likely to break the rules.[27] We can help solve this by giving at least equal, if not even greater weight to the other factors mentioned in the 2006 statement.[28] That is

how we will be most effective in deterring harmful misconduct[29] – and we should remember that deterrence was a primary reason the Commission was given penalty authority in the first place.[30]

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The SEC has a three part mission, and protecting a company's shareholders is part of that, but not at the expense of the larger market, particularly when there are other companies – and shareholders – who have committed to and invested in compliance. So in setting penalties, we can't look only at the impact the penalty will have on a particular group of investors who own shares in the specific violating entity. As the Commission noted 15 years ago, we must examine the impact more broadly.[31] We must think about the impact on all investors, and that will help ensure fair and efficient markets. Every enforcement decision we make effects multiple constituencies in myriad ways. Therefore, we must consider those impacts and seek the right balance.[32] We must correct this course.

Thank you for your time and attention today and I look forward to your questions.

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[1] *See, e.g.*, Elad L. Rosiman, Commissioner, Sec. & Exch. Comm'n, Remarks at SEC Speaks 2020 (Oct. 8, 2020); Hester M. Peirce, Commissioner, Sec. & Exch. Comm'n, Lies and Statistics: Remarks at the 26th Annual Securities Litigation and Regulatory Enforcement Seminar (Oct. 26, 2018); Daniel M. Gallagher, Commissioner, Sec. & Exch. Comm'n, Remarks at Columbia Law School Conference (Hot Topics: Leading Current Issues in Securities Regulation and Enforcement) (Nov. 15, 2013); Mary Jo White, Chair, Sec. & Exch. Comm'n, Deploying the Full Enforcement Arsenal (Sept. 26, 2013); Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, Reinvigorating the Enforcement Program to Restore Investor Confidence (Mar. 18, 2009); Mary L. Schapiro, Chair, Address to Practising Law Institute's "SEC Speaks in 2009" (Feb. 6, 2009); Annette L. Nazareth, Commissioner, Sec. & Exch. Comm'n, Remarks Before the SEC Speaks Conference (Mar. 3, 2006).

[2] *See* Matt Kelly, *How to Change Compliance's Cost Center Reputation*, Gain Integrity (Mar. 2, 2021) (noting that some "might perceive the compliance function as nothing more than a cost center to be contained" and lamenting that "[w]hen run poorly, or marginalized by a disinterested senior management team, the compliance function is little more than a cost center").

[3] Congress gave the Commission authority to seek civil penalties through the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. *See* Pub. L. No. 101-429, 104 Stat. 931; Matthew Scott Morris, *The Securities Enforcement Remedies and Penny Stock Reform Act of 1990: By Keeping up with the Joneses, the SEC's Enforcement Arsenal Is Modernized*, 7 Admin. L.J. Am. U. 151, 153 (1993) (noting that the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 "authorizes the federal courts and, in administrative proceedings against regulated entities, the Commission, to order the payment of monetary penalties for violations of the federal securities laws"). *See also* 15 U.S.C. §§ 77h-1(g), 78u-2(b), 80a-9(d), 80b-3(i) (providing instances of statutory authorization for the Commission to levy civil penalties).

[4] Since my confirmation, we have had three different agency heads: Chairman Clayton, acting Chairman Roisman, and acting Chair Lee. We anticipate that the Chair nominee will take the reins at some point soon. At a different organization, that amount of leadership change in such a short time might be destabilizing or distracting, but the SEC staff has and continues to perform its work admirably. If you knew the professionals who work at the SEC like I do, this ability to diligently focus on their work, rather than COVID or who sits in the Chair's office, would be entirely predictable. The individuals who serve our agency do their jobs well every day because they are dedicated to protecting investors and promoting the vitality of our markets, on which so much of our economy relies. And as our agency leadership changes lead to policy changes, I have every confidence that staff will continue to come to work every day to do what they always do – work hard to protect investors and our markets.

[5] The extent to which the unfair practices exposed post-crash had caused the stock market crash or the depression that followed is open to debate. But there is consensus that the creation of a new regulatory structure

was motivated in part by public outrage at abusive practices that harmed investors and revealed endemic unfairness in the functioning of the markets at the time. *See, e.g.*, Ronald J. Columbo, *Merit Regulation via the Suitability Rules*,12 J. Int'l Bus. & L. 1, 2-3 (2013) (discussing the stock market crash of 1929 and the impetus for the subsequently adopted federal securities laws); *Federal Securities Laws*, Sec. & Exch. Comm'n (May 4, 2017); *Securities Law History*, Cornell L. Sch.: Legal Info. Inst. (last visited Mar. 6, 2021).

[6] The Pecora commission conducted public hearings that exposed conduct that took place in the 1920's and had targeted retail investors as victims. This conduct included fraud and disclosure violations that led investors to buy overvalued stock or worthless bonds and today would likely violate the securities laws. *See* Gilbert King, *The Man Who Busted the 'Banksters,'* Smithsonian (Nov. 29, 2011). *See also* Andrew R. Simank, *Deliberately Defrauding Investors: The Scope of Liability*, 42 St. Mary's L. J. 253 (2010) (noting that the securities laws were developed with the intent to "prevent[] the circumstances that led to the 1929 stock market crash" and sought to protect investors from the previously prevalent "fraudulent practices").

[7] The Commission's impact on the economy has been to foster "transparency, consistency, and trust in the U.S. stock market." Kimberly Amadeo, *US Securities and Exchange Commission and How it Protects You*, Balance (Jan. 16, 2021). The Commission and its initiatives have evolved with time, and the Commission has taken additional steps to better achieve its investor-protection mission and ensure robust enforcement when violations occur. *See, e.g.*, Mary Jo White, Chair, Sec. & Exch. Comm'n, A New Model for SEC Enforcement: Producing Bold and Unrelenting Results (Nov. 18, 2016) (discussing "Enforcement's new approach to identifying wrongdoing, including harnessing the vast array of financial and marketplace data now available and taking maximum advantage of [the Commission's] game-changing whistleblower program" and addressing "the SEC's continuing emphasis on cases against individuals – the best form of deterrence against white collar wrongdoing"); Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, Looking Back at the SEC's Transformation (Dec. 24, 2015). In recent years, the Division of Enforcement has continued its "efforts to deter misconduct and punish securities law violators," which are "critical to protecting millions of investors and instilling confidence in the U.S. securities markets." Sec. & Exch. Comm'n, SEC Division of Enforcement 2020 Ann. Rep. 9 (2020). And, in 2021, the Commission has signaled that it will take a tough stance on enforcement. *See* Dylan Tokar, *SEC Signals a More Aggressive Stance Toward Wall Street*, Wall St. J. (Feb. 16, 2021).

[8] For an in-depth analysis on the U.S. capital markets and their participants. *See* SIFMA, 2020 Capital Market Fact Book (noting that "[c]lients benefiting from healthy capital markets include not just individual investors but also institutional investors, governments and corporations" and asserting that "[c]apital, raised through equity and debt, can be used to grow businesses, finance investments in new plant, equipment and technology and fund infrastructure projects," which "creates jobs and flows money into the economy," while also enabling "individuals and businesses [to] invest in securities to generate wealth").

[9] For example, companies reap many benefits from regulatory compliance and risk integration. *See* Robert Biskup, *The Benefits of Integrating Governance, Risk and Compliance*, Wall St. J. Risk & Compliance J. (Mar. 6, 2014) (noting that better capital allocation, improved effectiveness, protected reputation, are some of the numerous advantages of regulatory compliance). Research has also shown that mandatory disclosure and securities regulation has a positive effect on the equity markets. *See, e.g.*, Frank B. Cross & Robert A. Prentice, *The Economic Value of Securities Regulation*, 28 Cardozo L. Rev. 333, 387 (2006) (finding "a positive effect for securities law on equity markets in models with high levels of statistical significance, and that the effect of securities [sic] is frequently an independently statistically significant one" and noting that "[a]s we better capture the full effect of securities law, the association becomes stronger, providing substantial evidence of the benefits of such laws").

[10] *See, e.g.*, Trung Nguyen, *The Effectiveness of White-Collar Enforcement: Evidence from the War on Terror*, 59 J. Acct. Res. 1, 4 (Mar. 2020) (finding that as certain FBI offices allocated more resources toward counterterrorism post-9/11 over financial fraud, there was "an increase in wire fraud, opportunistic insider trading, and fraud within financial institutions").

[11] Financial fraud has broader impacts that on the corporate entity itself. Recent work has shown an impact on financial markets and also on employees. *See* Urska Velikonja, *The Cost of Securities Fraud*, 54 Wm. & Mary L. Rev. 1887, 1892 (2013) ("If fraud is caught, fraudulent firms spend substantial resources on investigation, litigation, damages, and fines. Many file for bankruptcy that could have been avoided in the absence of fraud, or make costly adjustments that they often shift to employees, creditors, suppliers, customers, and the government as the insurer of last resort. Rivals face doubts about their own financial reporting, which increases their cost of capital and further depresses hiring in the industry. The ripple effects are felt throughout the economy and, once aggregated, exceed the harms to defrauded shareholders by a substantial margin."); *see also* Jung Ho Choi & Brandon Gipper, *Fraudulent Financial Reporting and the Consequences for Employees* (Stan. U. Graduate Sch. Bus., Research Paper No. 19-19, 2021) (finding that firms that consequences of fraudulent financial reporting include employee turnover and decreased employee wages at the fraud firm).

[12] *Statement of the Securities and Exchange Commission Concerning Financial Penalties*, Sec. & Exch. Comm'n (Jan. 4, 2006).

[13] *See* Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, A Stronger Enforcement Program to Enhance Investor Protection (Oct. 25, 2013); Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, Market Upheaval and Investor Harm Should Not be the New Normal (May 24, 2010); Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, Reinvigorating the Enforcement Program to Restore Investor Confidence (Mar. 18, 2009).

[14] *See Statement of the Securities and Exchange Commission Concerning Financial Penalties*, *supra* note 12.

[15] *See id.*

[16] *See, e.g.*, Elad L. Roisman, Commissioner, Sec. & Exch. Comm'n, Remarks at SEC Speaks 2020 (Oct. 8, 2020); Michael S. Piwowar, Commissioner, Sec. & Exch. Comm'n, Reflections of an Economist Commissioner at the Symposium for Federal Judges on the Economics of Corporate & Securities Law (Apr. 13, 2018).

[17] *See, e.g.*, Annette Nazareth, Commissioner, Sec. & Exch. Comm'n, Remarks Before the ABA National Institute on Securities Fraud (Sept. 28, 2006) ("A benefit can come in a variety of forms, including increased revenues or reduced expenses. The benefit need not be solely monetary or be capable of precise measurement. One example might be a company's use of its inflated stock price to make acquisitions.").

[18] Studies have also found that the costs of capital tend to increase after the allegations of wrongdoing are made public. *See* Deborah Murphy & Samuel Tibbs, *Internal Controls and the Cost of Fraud: An Empirical Investigation*, 3 J. of Corp. Treasury Mgmt. 127, 130-31 (finding evidence that firms' cost of capital increases after allegations of wrongdoing); Velikonja *supra* note 11, at 1922 (noting that fraud and financial misreporting increases firms' cost of capital); *see also* Lucian Arye Bebchuk & Oren Bar-Gill, *Misreporting Corporate Performance* 4-5 (Harv. Law Sch., John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 400, 2002) ("Another important cost arises from distorting the allocative role of capital markets. When some low value firms can misreport and thereby pool themselves with high-value firms, the financing and investment decisions of both types of firms will be distorted. In the pooling equilibrium caused by misreporting, high-value firms will be cross-subsidizing those low-value firms whose managers will misreport. Because of this compelled cross-subsidization, high-value firms might forgo some efficient projects to avoid the need to raise capital, whereas some low-value firms that misreport might raise equity even when they do not have efficient projects. As a result, there will be under-investment by firms that do not misreport and over-investment by firms that do.").

[19] *Compare* Albert Manconi et al., *Are Buybacks Good for Long-Term Shareholder Value? Evidence from Buybacks Around the World*, 54 J. of Fin. and Quantitative Analysis 1899, 1900-92 (2019) (describing the literature that supports the finding that U.S. buybacks are associated with stock price increase at the time of the buyback and also with positive long-term excess returns and that this is supported in a review of non-US buybacks), *with* William Lazonick, *The Financialization of the U.S. Corporation: What Has Been Lost and How It Can Be Regained*, 36 Seattle U. L. Rev. 857, 859 (2013) (noting that trillions of dollars are spent on share buybacks and that "corporate executives who make these decisions are themselves prime beneficiaries of this focus on rising stock prices as a the measure of corporate performance"), *and* Thomas Franck, *Elizabeth Warren Rips Stock Buybacks*

*as 'Nothing But Paper Manipulation*, CNBC (Mar. 3, 2021) ("Sen. Elizabeth Warren . . . lambasted share buybacks as market manipulation made to inflate executive pay, calling them a poor use of excess corporate profits.").

[20] *See supra* note 9 and accompanying text (discussing the financial benefits of corporate regulatory compliance). And, investors deem compliance important too. *See How Strong Compliance Can Produce Positive Reputation*, Dow Jones (Nov. 2017) ("Investors often evaluate companies similarly to how the public does. 'If an investor sees a company conveying the message that they're doing things ethically and legally, that signals that it's a company worth investing in.'").

[21] *See, e.g.*, John Pereira et al., *Enforcement Actions, Market Movement and Depositors' Reaction: Evidence from the US Banking System*, 55 J. of Fin. Servs. Res. 143, 154 (2016) (finding that "[m]arket reaction to C&D [cease & desist orders] (Panel B) is negative and statistically significant across almost all the event windows analysed, indicating that equity markets react negatively following C&D announcement except on the day of the announcement" and noting that "[m]arket reaction to CMP [civil monetary penalty] (Panel C) is significant only for the 2-day, 3-day and 5-day event windows"). Also, monetary penalties serve as a deterrent to fraud. *See Statement of the Securities and Exchange Commission Concerning Financial Penalties*, *supra* note 12 ("We proceed from the fundamental principle that corporate penalties are an essential part of an aggressive and comprehensive program to enforce the federal securities laws, and that the availability of a corporate penalty, as one of a range of remedies, contributes to the Commission's ability to achieve an appropriate level of deterrence through its decision in a particular case."). Further, if there is not effective deterrence the costs of fraud to shareholders can be numerous and high. *See* Velikonja, *supra* note 11, at 1892 (noting that once caught fraudulent firms spend substantial resources on investigations, litigations, bankruptcy proceedings, shifts to employees, creditors, suppliers, customers).

[22] *See* S. Rep. No. 101-337 (1990) (providing the Senate Committee on Banking, Housing, and Urban Affairs Report noting that the Securities Law Enforcement Remedies Act of 1990 "addresses the disturbing levels of financial fraud, stock manipulation and other illegal activity in the U.S. markets by authorizing new civil money penalties to deter unlawful conduct by increasing the financial consequences of securities law violations"); *Statement of the Securities and Exchange Commission Concerning Financial Penalties*, *supra* note 12.

[23] *See* Rebecca Files, Gerald S. Martin & Stephanie J. Rasmussen, *The Monetary Benefit of Cooperation in Regulatory Enforcement Actions for Financial Misrepresentation* 1 (2012) (finding that "there are significant monetary benefits for firms that cooperate with regulators in the enforcement process" and noting that "regulators systematically offer leniency to cooperating firms when determining monetary penalties and the monetary benefits of cooperation appear to outweigh the increased probability of the firm being charged"). *See also supra* note 9 and accompanying text (discussing the financial benefits of corporate regulatory compliance).

[24] The Commission has considered cooperation in agreeing to accept multiple recent settlements. For example, the Commission took into account BMW's significant cooperation in the staff's investigation despite COVID-19 disruptions. *See* Press Release, Sec. & Exch. Comm'n, SEC Charges BMW for Disclosing Inaccurate and Misleading Retail Sales Information to Bond Investors (Sept. 24, 2020). In the press release for the recent Gulfport case, the Director of Enforcement stated that "Gulfport's timely remediation and cooperation in our investigation were key factors in the Commission's decision not to impose a penalty against the company." Press Release, Sec. & Exch. Comm'n, SEC Charges Gas Exploration and Production Company and Former CEO with Failing to Disclose Executive Perks (Feb. 24, 2021).

[25] The Commission's website provides additional information about the Division of Enforcement's Cooperation Program and the Commission's approach to evaluating cooperation in investigations and actions. There are four basic considerations for the Commission when determining whether to afford cooperation credit: 1) did the corporation self-police with an effective compliance program; 2) did the corporation self-report after the company became aware of the violation, and if so, what was the amount of detail in that report; 3) did the company undertake remedial efforts, including holding individual wrongdoers accountable; and 4) the extent of cooperation with law enforcement, including the SEC, and the degree to which the company proactively shared information

with us. *See Spotlight on Enforcement Cooperation Program*, Sec. & Exch. Comm'n (last modified Sept. 20, 2016).

[26] Commission staff and former commissioners have noted over the years that there are certain types of misconduct that are more difficult for the Commission to detect than others. For example, cherry-picking schemes involving fraudulent trade allocations, mismarking schemes involving falsely reported prices, and certain types of accounting frauds can be especially difficult to detect. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Announces Cherry-Picking Charges Against Investment Manager (Jun. 29, 2015); Press Release, Sec. & Exch. Comm'n, SEC Charges Four Brokers With Defrauding Customers in $18.7 Million Scheme (Oct. 5, 2012); Press Release, Sec. & Exch. Comm'n, SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud (Apr. 17, 2006); *see also* Jay Clayton, Chairman, Statement at Open Meeting on Amendments to the Commission's Whistleblower Program Rules (Jun. 28, 2018) (observing that the "Commission's whistleblower program has contributed significantly to our ability to detect wrongdoing and better protect investors and the marketplace, particularly where fraud is well-hidden or difficult to detect").

[27] Gary Becker's seminal paper, *Crime and Punishment: An Economic Approach*, is credited for introducing "[t]he economic analysis of deterrence . . . in the modern literature. [His] analysis suggests that when rational utility-maximizers decide whether to violate the law, they take into account not the nominal penalties (i.e., the sanctions set forth in the statute), but the expected ones. The difference between the two arises because enforcement of law is imperfect and some offenses go unpunished. Thus, the expected penalty equals the nominal penalty discounted by the probability that the penalty will be imposed, or probability of punishment: EP = NP x PP where EP is the expected penalty, NP is the nominal penalty, and PP is the probability of punishment." Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 Colum. L. Rev. 569, 576 (2006) (citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76J. Pol. Econ. 169 (1968)).

[28] *See Statement of the Securities and Exchange Commission Concerning Financial Penalties*, *supra* note 12.

[29] *See, e.g.*, Diane Del Guercio, Elizabeth R. Odders-White & Mark J. Ready, *The Deterrent Effect of the Securities and Exchange Commission's Enforcement Intensity on Illegal Insider Trading: Evidence from Run-up before New Events*, 60 J. L. & Econ. 269, 304 (finding that SEC's increased enforcement activity in insider trading cases had a deterrent effect on insider behavior).

[30] *See* S. Rep. No. 101-337 (1990) (providing the Senate Committee on Banking, Housing, and Urban Affairs Report outlining the rationale and purpose behind the Securities Law Enforcement Remedies Act of 1990).

[31] *See Statement of the Securities and Exchange Commission Concerning Financial Penalties*, *supra* note 12.

[32] I think that one potential way to strike the right balance is by establishing fair funds to distribute penalties to victims of violations, which will include shareholders.