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What Remedies Under New Admin's SEC Could Look Like

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The U.S. Securities and Exchange Commission will soon have a new chair and a new Republican majority. Former Commissioner Paul Atkins has been nominated to head the agency, and with the change in administration, issuers, registrants and other participants in the securities markets are eager to understand the enforcement agenda that the SEC will pursue.[1]

Much speculation has understandably focused on anticipating the Division of Enforcement's substantive priorities under new leadership: What will happen to the pending cases against crypto companies? Will the enforcement sweep involving text message records continue? Will the division continue to investigate — and sue — victims of cyberattacks?

But for those who find themselves in the Enforcement Division's sights, just as important as the substantive priorities of the new administration, if not more important, will be the approach that the commission adopts with respect to remedies where it deems enforcement action appropriate.[2]

The SEC has, for several years, aggressively pursued a range of remedies,[3] even while it has faced increasing headwinds in litigation. Many courts, including the U.S. Supreme Court, have expressed unease with the commission's expansive approach, which they view as excessively punitive rather than prophylactic.

In this article, we examine key remedies in the commission's arsenal and explain why the SEC is likely to substantially narrow the remedies it pursues over the next few years. Although it may take some time for the shifting views of the new commission majority to play out in enforcement matters, the SEC's mounting challenges in court and the expressed philosophical views of the incoming chair and fellow Republican commissioners are likely to lead the SEC to pursue a more limited approach to remedies in its enforcement actions.

Obey-the-Law Injunctions: A Renewed Focus on Collateral Consequences and Waivers

In virtually all enforcement actions, the SEC obtains — either through litigation or settlement — an obey-the-law injunction broadly prohibiting the defendant from violating specified provisions of the federal securities laws.[4] The entry of an injunction triggers a raft of automatic statutory disqualifications that prevent the defendant from engaging in certain capital-raising activities or otherwise restrict participation in the securities markets.

According to a 1981 paper by Thomas J. Andre Jr., the collateral consequences that stem from injunctions are "often serious and sometimes disastrous" for defendants.[5] They include disqualification from what scholar Urska Velikonja characterized in 2015 as "some of the most cost-effective options for raising external capital,"[6] including private offering exemptions under Regulations A, D and Crowdfunding, as well as well-known seasoned-issuer status.[7]

Injunctions can also result in disqualification from serving as a director, officer or employee of a registered investment company;[8] loss of statutory safe harbors for forward-looking statements;[9] suspension or revocation of registration;[10] bar from practicing before the agency;[11] and disqualification from membership or participation in a self-regulatory organization.[12]

Defendants can seek a waiver from these disqualifications.[13] As Velikonja observed, "The SEC possesses virtually complete discretion to grant or deny a waiver request."[14] Aside from a waiver, the authority that issues the order triggering the disqualification — i.e., a court — can advise the commission that a disqualification should not arise as a consequence of the order.[15]

Because the collateral consequences flowing from injunctions can be so severe, those consequences — and the likelihood of receiving a waiver — frequently influence settlement calculations for those subject to an SEC investigation.[16]

In many instances, the target of an enforcement action considering settlement terms is likely to be just as concerned — if not more concerned — with what it needs to do to secure a waiver as it is with assessing the likelihood of prevailing on the merits in litigation. Indeed, many settlements are driven by a concern that, if the target were to litigate and fail to win on all charges, the SEC might be less inclined to timely grant the waivers necessary for the target to carry on its business.

For these reasons, the injunctions the commission pursues in virtually every enforcement action are, as the Supreme Court recognized in its 1980 Aaron v. SEC decision, "a drastic remedy, not a mild prophylactic."[17] Indeed, some courts have declined to impose injunctions, even in situations where they are willing to impose significant monetary penalties, precisely because of the collateral consequences that would follow.[18]

But the broad injunctions underlying these disqualifications have faced mounting challenges in the courts in recent years. Both the U.S. Courts of Appeal for the Seventh and the Eleventh Circuits have rejected obey-the-law injunctions sought by the SEC on grounds that they lacked the specificity required under Rule 65(d) of the Federal Rules of Civil Procedure.[19] As U.S. Circuit Judge Frank Easterbrook put it in his 2022 decision in SEC v. Goulding for the Seventh Circuit, injunctions must "forbid[] with greater specificity what [the defendant] must not do."[20]

Injunctions in SEC enforcement actions are also vulnerable to challenge on grounds that they are overbroad. The commission often seeks injunctions prohibiting not only conduct falling within the charged provisions, but a wider swath of conduct, to dissuade recidivists from evading the injunction by clever maneuvering around its strict terms.[21]

So, for example, as to a defendant charged with violating Sections 17(a)(2) and 17(a)(3) of the Securities Act, the SEC sometimes seeks an injunction prohibiting the defendant from violating all three subsections of Section 17(a).[22]

This prophylactic approach is in tension with the principle that, as the Seventh Circuit explained in its 1944 decision in Bowles v. Montgomery Ward & Co., "ordinarily, courts cannot issue a general injunction against all possible breaches of the law, nor should an injunction be broader than the illegal acts or practices charged or proven."[23]

Some courts have criticized the approach,[24] warning that SEC injunctions should be as "short and narrow as reasonably possible" and ordered "only upon a meaningful showing of necessity," as the Third Circuit put it in SEC v. Gentile in 2019.[25] Others, like the U.S. District Court for the Western District of New York in its 2022 decision in SEC v. Grenda Group LLC, have made a point of approving injunctions that are "limited and proportional to the conduct at issue" and confined "to those sections of the Advisers Act that Defendants have already violated."[26]

The SEC also faces litigation risk when it reflexively pursues injunctions in every enforcement case. Under Title 15 of the U.S. Code, Section 78u(d)(1), the SEC may seek an injunction "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation [of the securities laws]."[27] For this reason, to obtain an injunction, the SEC must show a likelihood of future recurrence.[28]

As the U.S. Court of Appeals for the Second Circuit explained in its 1978 decision in SEC v. Commonwealth Chemical Securities Inc., the evidence must go "beyond the mere facts of past violations and demonstrate a realistic likelihood of recurrence."[29] Yet in many cases where the agency seeks an injunction, the likelihood of repetition is low: The defendant is a first-time offender, without any past or subsequent violations, or is no longer in the securities industry — leading some courts to balk at the SEC's requests.[30]

The likelihood of repetition may be especially low in cases charging fundamentally compliant corporations with one-off, unintentional disclosure violations. In such cases, the SEC may be hard-pressed to show that the corporation is likely to offend again.

In short, the SEC faces a number of risks in seeking broad obey-the-law injunctions.[31] Its historic practice is not entirely consistent with many of the limiting equitable principles enunciated in the case law.

While most courts have largely agreed to impose — and virtually all settling defendants to accept — obey-the-law injunctions, the SEC is nevertheless vulnerable to ongoing challenges in court, particularly given the scrutiny that it has received in aggressively pursuing other equitable remedies, such as disgorgement.

Given these risks and the significant collateral consequences that can stem from an injunction, a majority of the incoming commission may take a fresh look at the SEC's approach to this remedy. In particular, the SEC may be receptive to arguments that (1) the SEC should take a more surgical approach to injunctions, rather than reflexively seeking them in all actions; and (2) automatic imposition of collateral consequences — which aim to prevent bad actors from raising capital in the U.S. securities markets — make little sense for large financial institutions.

These entities, due to the size, breadth and complexity of their financial activities, will invariably and periodically engage in conduct contravening some provision of the securities laws. At the same time, continually subjecting them to the threat of disqualification and requiring them to repeatedly seek waivers may be unproductive and inefficient.[32]

In particular, we anticipate that enforcement targets may find themselves before a commission that is more willing to:

1. Simultaneously address an offer of settlement and a waiver request, an approach adopted during the first Trump administration, but abandoned during the most recent administration,[33] providing greater certainty to those confronting the prospect of a statutory disqualification and trying to resolve an enforcement action;

2. Consider bringing an action that involves monetary relief but not an injunction, where there is little evidence of likelihood of repetition;[34] and

3. Support proposed legislation and/or rule changes that would eliminate the automatic nature of statutory disqualifications and instead require that the commission make the determination to impose disqualifications, or that the SEC seek such imposition in federal court.[35]

Penalties: A Renewed Focus on Corporate Benefit

Over the last few years, the SEC has reaped record-breaking penalties. In fiscal year 2024, the SEC obtained orders for $2.1 billion in civil penalties, which the agency touted as "the second-highest amount on record," representing an increase from the $1.58 billion announced the prior year, following the record-setting $4.19 billion ordered in 2022.[36]

The commission's recent philosophy with respect to penalties has been straightforward: Higher penalties are needed to deter violations. As Commissioner Caroline Crenshaw put it in 2021, "[p]enalties are intended to incentivize compliance, and higher penalties can be effective in deterring violations that are particularly hard to detect."[37]

Crenshaw emphasized "egregiousness of the actual misconduct," harm to victims and difficulty of detection of the violation, while deemphasizing the commission's historic focus on whether shareholders received a direct and material benefit from the offense that would justify a penalty to be borne by shareholders. Likewise, former Chair Gary Gensler asserted in a 2021 speech that penalties must "be carefully calibrated to have a specific and general deterrent effect."[38]

We expect a marked change in the SEC's approach to corporate penalties. A Proskauer Rose LLP study indicates that in over 200 cases, "Commissioners [Hester] Peirce and [Mark] Uyeda voted to approve the enforcement recommendation except as to the civil penalties imposed."[39]

Given the expressed views of the incoming chair and other Republican commissioners, we expect a much greater emphasis on corporate benefit, as outlined in the commission's 2006 statement on financial penalties, when Atkins was a commissioner.[40] As Atkins stated in 2006, "corporations exist for the benefit of stockholders," leading him "to oppose the imposition of financial penalties on corporations in instances, such as financial frauds, in which the stockowners have been harmed by the very misconduct at issue."[41]

In addition to a renewed focus on corporate benefit, one way in which the commission may rein in penalties is by applying greater rigor in calculating them. The statutory provisions governing the SEC's penalty authority are broad, permitting the agency to seek a specified penalty amount — based on the seriousness and impact of the offending conduct — for "each violation."[42]

The SEC has relied upon this language — and the fact that Congress did not define the term "violation" — to argue, variously, that each violative transaction, each alleged claim, each harmed investor, each deficient filing, or each month or year of violative conduct constitutes a violation.[43]

While courts have discretion to determine what constitutes a violation, provided that the statutory maximum is not exceeded,[44] litigants and commentators have complained that the methodologies employed are arbitrary.[45] As Atkins has observed, "too often [the SEC's] penalties seem to be justified on little more than that they 'feel right.'"[46]

The SEC may also be more receptive to providing enhanced transparency around the benefits of self-reporting and cooperation. Critics of the agency's penalty numbers have often focused on the lack of transparency in this area, including by calling for a formal framework.[47] And the U.S. Commodity Futures Trading Commission on Feb. 25 **put out** an enforcement advisory including just such a framework — a "mitigation credit matrix" — specifying presumptive percentage credits that a party may receive in the calculation of a penalty.[48]

The next SEC may thus be more amenable not only to renewed application of the corporate-benefit analysis, but also to arguments that due process requires greater clarity and consistency on the concrete benefits of self-reporting and cooperation, and in how "each violation" is defined in calculating an appropriate penalty.

Disgorgement: A Renewed Focus on Investor Harm

Disgorgement, which the SEC has aggressively pursued, has been the subject of perhaps the most controversy in the courts in recent years.

In 2020, in Liu v. SEC, the Supreme Court **held** that disgorgement is an equitable remedy that must be awarded for victims and cannot exceed a wrongdoer's net profits.[49] Less than a year later, Congress added a provision to Section 21(d) of the Securities Act permitting the SEC to seek disgorgement for unjust enrichment of a defendant, while remaining conspicuously silent as to whether disgorgement could only be awarded if it would be returned to victims.[50]

In the wake of these developments, courts have continued to grapple with the scope and nature of the SEC's disgorgement authority. In SEC v. Hallam, the U.S. Court of Appeals for the Fifth Circuit in 2022 **concluded** that disgorgement is a "legal" rather than "equitable" remedy, leaving open for another day questions of whether defendants might therefore be entitled to a jury trial on any disgorgement claim, whether the SEC might be required to trace assets to obtain disgorgement, and whether prejudgment interest might not be available.[51]

Adding to the confusion, in SEC v. Ahmed and SEC v. Govil, both decided in 2023, the Second Circuit expressly disagreed with the Fifth Circuit, concluding that the remedy is an equitable one.[52] More importantly, in Govil, the Second Circuit concluded that disgorgement requires a showing of pecuniary harm to a victim.[53]

Under these cases, the SEC cannot obtain disgorgement in cases that do not involve demonstrable pecuniary harm to victims, at least in the Second Circuit.[54] Disgorgement would thus seem to be unavailable in cases — as the SEC itself has conceded — alleging registration violations or violations involving investment advisers' conflicts of interest.[55]

And it is unclear whether disgorgement is available in cases involving violations where pecuniary harm to victims may be difficult to establish, such as insider trading. Nevertheless, the SEC has — post-Govil — continued to seek disgorgement within the Second Circuit in at least some cases involving precisely such violations.[56]

Given the significant open questions surrounding the SEC's disgorgement remedy, and the clear discomfort some courts have expressed with the agency's more expansive interpretations of its authority, the incoming commission may choose to adopt a more conservative approach here as well. Indeed, Commissioner Hester Peirce has repeatedly voted against a disgorgement remedy in actions involving violations where there is no pecuniary harm or where establishing that such harm was proximally caused by the violation would be highly challenging.[57]

Enforcement targets may find that the SEC is more receptive to arguments that disgorgement should only be sought (1) in cases where investor loss can clearly and quantifiably be shown, and (2) collected funds can readily be returned to those investors.

Conclusion

At this juncture in the SEC's history, the agency faces considerable scrutiny from the courts with respect to a range of remedies that it has pursued aggressively in recent years. Injunctions, penalties and disgorgement are the core remedies at the SEC's disposal, but the commission's often uncompromising approach has extended to other remedies that can be equally, if not more, significant for defendants, such as officer and director bars.[58]

While the SEC has, on balance, historically been successful in the courts, we do not expect the challenges raised by litigants to subside, nor do we expect the federal courts to be unreceptive to many of their arguments. At the same time, the expressed policy preferences of a majority of the incoming commission indicate that the agency will adopt a more finely calibrated approach to enforcement remedies, be more sensitive to litigation risk and more receptive to arguments regarding collateral consequences, proportionality and harm to investors.

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[1] See, e.g., Frederick L. Block et al., Current Developments in SEC Enforcement for Private Funds and a Look Ahead 2024–2025, Morgan Lewis (Feb. 2025), https://www.morganlewis.com/pubs/2025/02/current-developments-in-sec-enforcement-for-private-funds-and-a-look-ahead-2024-2025; Brian V. Breheny et al., A Significant Shift Away From ESG and Toward Crypto Is Expected at the SEC, Skadden (Jan. 14, 2025), https://www.skadden.com/insights/publications/2025/01/2025-insights-sections/a-focus-on-

cryptocurrencies/a-significant-shift-away-from-esg-and-toward-crypto; Richard Marshall et al., The SEC Lives On Under New Leadership — What to Expect, Katten (Dec. 17, 2024), https://katten.com/the-sec-lives-on-under-new-leadership-what-to-expect.

[2] Enforcement activity can be expected to continue under new Commission leadership, albeit with a different focus and set of priorities. See, e.g., Paul Atkins, Comm'r, SEC, Remarks Before FINRA's Market Regulation Annual Staff Meeting (May 16, 2008), https://www.sec.gov/news/speech/2008/spch051608psa.htm ("Where there are serious violations, enforcement action is necessary, but the goal should be to work with firms to build their internal compliance program."); Global Relay Intelligence & Practice, Transcript: Hester Peirce podcast December 2024 (Dec. 5, 2024), https://www.grip.globalrelay.com/transcript-hester-peirce-podcast-2024/ ("Enforcement is a tool that we have that we use when you have a firm that has not done the right thing, and has not tried to do the right thing. We're primarily a regulatory agency. And so we use other tools first, and then we turn to enforcement when the other tools aren't working.").

[3] Kokesh v. SEC, 581 U.S. 455, 458–59 (2017) (recognizing the expansion of the SEC's remedies toolbox, from initially being limited to injunctions barring future violations of the federal securities laws to the modern "full panoply of enforcement tools" including monetary civil penalties, injunctive relief, and disgorgement).

[4] In settled administrative proceedings, a cease-and-desist order has the same function.

[5] Thomas J. Andre Jr., The Collateral Consequences of SEC Injunctive Relief: Mild Prophylactic or Perpetual Hazard, 1981 U. Ill. L. Rev. 625, 670 (1981).

[6] Urska Velikonja, Waiving Disqualification: When do Securities Violators Receive a Reprieve?, 103 Calif. L. Rev. 1081, 1090 (2015).

[7] See, e.g., 17 C.F.R. §§ 230.252(c)–(f), 230.506(d)(2) (2024).

[8] 15 U.S.C. § 80a-9(a)(2)–(3) (2023).

[9] 15 U.S.C. §§77z-2(b)(1)(A), 78u-5(b)(1)(A) (2023).

[10] See, e.g., 15 U.S.C. § 78o(b)(4)(C), (b)(6) (2023) (broker-dealer); § 80b-3(e)(4), (f) (2023) (investment adviser); § 78o-4(c)(2), (c)(3) (2023) (municipal securities dealer or municipal advisor); § 78o-7(d)(1)(A) (2023) (nationally-recognized statistical rating organization); § 78o-10(l)(2)(C), (3)(C) (2023) (security-based swap dealer or major security-based swap participant).

[11] 17 C.F.R. § 201.102(e)(3)(i) (2023).

[12] 15 U.S.C. § 78c(a)(39) (2023). Cease-and-desist orders also result in the loss of statutory safe harbors for forward-looking statements and the loss of well-known seasoned issuer status for securities offerings. See 15 U.S.C. §78u-5(b)(1)(A) (2023); 15 U.S.C. § 77z-2(b)(1)(A) (2023); 17 C.F.R. § 230.405 (2024).

[13] See, e.g., 17 C.F.R. § 230.405 (2024) ("An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer."). Waiver requests are typically evaluated by the staff of the

Divisions of Corporation Finance or Investment Management, not the Division of Enforcement. See 17 C.F.R. §§200.30-1(b)(1), (c), 200.30-5(a)(7), (8) (2024).

[14] Velikonja, supra note 7, at 1094.

[15] See, e.g., 17 C.F.R. § 230.506(d)(2)(iii) (2024).

[16] Hester M. Peirce & Elad L. Roisman, Comm'rs, SEC, Statement of Commissioners Hester M. Peirce and Elad L. Roisman on Contingent Settlement Offers (Feb. 12, 2021), https://www.sec.gov/newsroom/speeches-statements/peirce-roisman-statement-contingent-settlement-offers-021221 (acknowledging that an entity's settlement decision "often is influenced by its concerns regarding the potential collateral consequences of entering into the settlement").

[17] Aaron v. SEC, 446 U.S. 680, 703 (1980) (Burger, C.J., concurring).

[18] See, e.g., SEC v. Westport Cap. Mkts., LLC, 547 F. Supp. 3d 157, 168 (D. Conn. 2021); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99 (2d Cir. 1978); SEC v. Scott, 565 F. Supp. 1513, 1537 (S.D.N.Y. 1983) ("It appears to the Court that the grave collateral consequences of an injunction under these circumstances would result in punishing Dirks instead of merely deterring him.") (cleaned up).

[19] Fed. R. Civ. P. 65(d)(1)(C) (requiring that injunctions "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required"); SEC v. Goble, 682 F.3d 934, 951 (11th Cir. 2012) (injunction failed to provide "guidance on how [a defendant can] conform his conduct to the terms of the injunction"); SEC v. Goulding, 40 F.4th 558, 563 (7th Cir. 2022).

[20] Goulding, 40 F.4th at 563; see also SEC v. Smyth, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005).

[21] David M. Weiss, Reexamining the SEC's Use of Obey-the-Law Injunctions, 7 U.C. Davis Bus. L.J. 6 (2006).

[22] See Final Judgment, SEC v. Lindell, No. 1:22-CV-08368 (S.D.N.Y. Apr. 12, 2024) (imposing permanent injunction prohibiting defendant (charged only with negligence-based violations of Sections 17(a)(2) and (3)) from violating all three subsections of Section 17(a)).

[23] Bowles v. Montgomery Ward & Co., 143 F.2d 38, 42 (7th Cir. 1944). Notably, in Bowles, the court recognized that the facts (i.e., failure of the defendant to make "any effort to comply" with the Emergency Price Control Act during World War II) justified flexible application of the court's equitable authority to impose a broad injunction.

[24] SEC v. Am. Bd. of Trade, 751 F.2d 529, 535 (2d Cir. 1984) (largely vacating injunction "of the extraordinary breadth of that here issued, which, in addition to the violations of the registration provisions of the 1933 Act and the ICA and the antifraud provisions of the 1933 and 1934 Acts with which defendants were charged, included every section of the three statutes, and, indeed, for good measure, of any other federal securities laws, however unrelated to the acts charged").

[25] SEC v. Gentile, 939 F.3d 549, 559 (3d Cir. 2019).

[26] SEC v. Grenda Grp., LLC, 621 F. Supp. 3d 406, 411 (W.D.N.Y. 2022).

[27] 15 U.S.C. § 78u(d)(1).

[28] See, e.g., Goble, 682 F.3d at 948; SEC v. Gann, 565 F.3d 932 (5th Cir. 2009); SEC v. Fehn, 97 F.3d 1276 (9th Cir. 1996); Gentile, 939 F.3d at 556 ("This principle is a corollary to the most basic rule of preventive injunctive relief—that the plaintiff must show a cognizable risk of future harm.").

[29] Commonwealth Chem. Sec., 574 F.2d at 100.

[30] See, e.g., SEC v. Walczak, No. 20-cv-76-wmc, 2024 WL 4800026, at *10–11 (W.D. Wis. Nov. 15, 2024) (rejecting the SEC's request for a permanent injunction because Walczak was "a first-time offender, whose violations lacked scienter" and where the monetary penalty and disgorgement were considered a sufficient deterrent for future misconduct); SEC v. Sargent, Nos. 23-1669, 23-1812, 2025 WL 484971 (1st Cir. 2025) (vacating and remanding with respect to entry of injunction where district court made no findings regarding likelihood of recidivism and where defendant had not been convicted of a crime, did not commit an offense involving scienter, and was not a repeat offender); SEC v. Spartan Sec. Grp., Ltd., 620 F. Supp. 3d 1207, 1217 (M.D. Fla. 2022) (declining to issue injunction where the entity was "basically defunct with little to no chance of ever resuming operations"); Westport Cap. Mkts., 547 F. Supp. 3d at 166 (denying SEC's motion for injunctive relief where the SEC did not introduce evidence that the defendants had engaged in any subsequent violations of the securities laws); Commonwealth Chem. Sec., 574 F.2d at 100–01 (finding no basis to enjoin two defendants where there was no likelihood of repetition of the conduct at issue given they were minor participants and had no prior or subsequent violations).

[31] A number of federal appellate courts have also recently criticized the SEC's historic reliance upon more relaxed standards when seeking preliminary injunctions or other emergency equitable relief. See, e.g., SEC v. Chappell, 107 F.4th 114, 130 (3d Cir. 2024) (rejecting SEC's argument that it need not satisfy traditional four-factor test in seeking preliminary injunction, including showing irreparable harm, and declining to impose "lower burden" on SEC in seeking asset freeze); SEC v. Fife, 311 F.3d 1, 8–9 (1st Cir. 2002) (declining to follow Second Circuit's approach in not requiring the SEC to make a showing of irreparable harm when seeking preliminary injunction, but finding harm had adequately been shown); see also Starbucks Corp. v. McKinney, 602 U.S. 339, 340 (2024) (rejecting argument that lower standard applied for injunctions sought by the National Labor Relations Board and reiterating that, "absent a clear command from Congress, then, courts must adhere to the traditional four-factor test").

[32] Matt Levine, Matt Levine's Money Stuff: Florida Banned Some Banks, Bloomberg (Oct. 30, 2024), https://www.bloomberg.com/opinion/articles/2024-10-30/florida-banned-some-banks ("If you are a big bank, somebody somewhere in your organization is pretty much always doing something that looks a bit like securities fraud, and periodically the SEC will add it all up and send you an invoice for a big fine. And because of the fraud, you are technically disqualified from many of these relaxed disclosure rules, which is very inconvenient for you (and your customers) as a giant bank that does tons of securities issuance."); Matt Levine, This SEC Rule Makes No Sense for Big Banks, Bloomberg (Feb. 4, 2018), https://www.bloomberg.com/view/articles/2018-02-04/this-sec-rule-makes-no-sense-for-big-banks (noting that the bad-actor disqualification rules "make no real sense for big banks").

[33] See Jay Clayton, Chairman, SEC, Statement Regarding Offers of Settlement (July 3, 2019), https://www.sec.gov/newsroom/speeches-statements/clayton-statement-regarding-offers-settlement ("collateral consequences can range from immaterial to extremely significant" and settling entities should be able to consider settlement offers that simultaneously address the underlying enforcement action and any related collateral disqualifications); Allison Herren Lee, Acting Chair, SEC,

Statement of Acting Chair Allison Herren Lee on Contingent Settlement Offers (Feb. 11, 2021), https://www.sec.gov/newsroom/speeches-statements/lee-statement-contingent-settlement-offers-021121.

[34] Almost all SEC enforcement actions are filed under Exchange Act Section 21(d)(1), which provides the SEC with authority to file an action in federal district court seeking an injunction. Some remedies (i.e., an officer and director bar) are only available in connection with an injunctive action. But Section 21(d)(3) separately authorizes the Commission to file a federal court action when seeking a civil penalty and/or disgorgement—meaning that in the appropriate case, the Commission has authority to bring an action purely for monetary relief, without also seeking an injunction.

[35] Defendants in federal court actions may currently ask the court to grant a waiver from statutory "bad actor" disqualification. 17 C.F.R. §230.506(d)(2)(iii) (2024). And courts have shown themselves capable of adjudicating these requests. SEC v. Ripple Labs, Inc., 20 Civ. 10832, 2024 WL 3730403, at *4 (S.D.N.Y. Aug. 7, 2024) (denying waiver request); SEC v. Lemelson, 619 F. Supp. 3d 246, 250 (D. Mass 2022) (same). See also Hester M. Peirce, Comm'r, SEC, Prosperity's Door (July 21, 2021), https://www.sec.gov/newsroom/speeches-statements/peirce-prosperity-door-072121 (noting that "[c]hanging the definition of statutory disqualification would require an act of Congress"); Matt Levine, SEC Doesn't Take Automatic Punishment Too Literally, Bloomberg (Feb. 5, 2015), https://www.bloomberg.com/opinion/articles/2015-02-05/sec-doesn-t-take-its-automatic-punishments-too-literally ("It would probably be better just to get rid of the automatic bars, no? They're not really serving a deterrent function. And if the SEC thinks that the consequences to a specific firm for specific misconduct should be a disqualification from doing private placements, then it can make that a specific part of its punishment. But if it doesn't think that, it really shouldn't go through the rigmarole of making the disqualification automatic and then semi-automatically waiving it.").

[36] Press Release, SEC Announces Enforcement Results for Fiscal Year 2024 (Nov. 22, 2024), https://www.sec.gov/newsroom/press-releases/2024-186; Press Release, SEC Announces Enforcement Results for Fiscal Year 2023 (Nov. 14, 2023), https://www.sec.gov/newsroom/press-releases/2023-234; Press Release, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), https://www.sec.gov/newsroom/press-releases/2022-206.

[37] Caroline A. Crenshaw, Comm'r, SEC, Moving Forward Together – Enforcement for Everyone (Mar. 9, 2021), https://www.sec.gov/newsroom/speeches-statements/crenshaw-moving-forward-together.

[38] Gary Gensler, Chairman, SEC, Prepared Remarks at the Securities Enforcement Forum (Nov. 4, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-securities-enforcement-forum-20211104.

[39] See Proskauer, Eight Enforcement Trends That Likely Will End Under a Trump SEC (Dec. 20, 2024), https://www.proskauer.com/insights/get-pdf/28348.

[40] SEC, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), https://www.sec.gov/news/press/2006-4.htm.

[41] Paul S. Atkins, Comm'r, SEC, Remarks Before the International Corporate Governance Network 11th Annual Conference (July 6, 2006), https://www.sec.gov/news/speech/2006/spch070606psa.htm.

[42] 15 U.S.C. § 78u(d)(3). The statute also permits the SEC to obtain penalties equal to the defendant's

"pecuniary gain."

[43] SEC v. GTF Enters., Inc., No. 10-CV-4258 (RA), 2015 WL 728159, at *3–4 (S.D.N.Y. Feb. 19, 2015); SEC v. Murphy, 50 F.4th 832, 848–49 (9th Cir. 2022), cert. denied, 144 S. Ct. 344 (2023).

[44] See SEC v. Punch TV Studios Inc., 2024 WL 4451747, at *6 (C.D. Cal. Aug. 21, 2024).

[45] See Petition for Writ of Certiorari, Murphy v. SEC, No. 22-1241, 2023 WL 4276670 (June 23, 2023) (contending that the SEC's arbitrarily calculated penalties exceeded statutory caps set by Congress and are excessive under the Eighth Amendment); David Rosenfeld, Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis, 22 U. Pa. J. Bus. L. 135, 179 (2019) ("Although the Commission routinely touts the amount of penalties in press releases, it never explains how it arrived at the particular number and, to make matters worse, the statutory framework provides no real guidance, often leading to seemingly inconsistent results, and overall a penalty regime that, for the most part, lacks any discernable pattern or order.").

[46] Paul S. Atkins, Comm'r, SEC, Remarks to the 'SEC Speaks in 2008' Program of the Practising Law Institute (Feb. 8, 2008), https://www.sec.gov/news/speech/2008/spch020808psa.htm.

[47] See, e.g., Cleary Enforcement Watch, SEC FY 2024 Enforcement Results: Record Dollars But Many Fewer Cases (Nov. 26, 2024), https://clearyenforcement.watch.com/2024/11/sec-fy-2024-enforcement-results-record-dollars-but-many-fewer-cases.

[48] CFTC Releases Enforcement Advisory on Self-Reporting, Cooperation, and Remediation (Feb. 25, 2025), https://www.cftc.gov/PressRoom/PressReleases/9054-25.

[49] Liu v. SEC, 591 U.S. 71 (2020).

[50] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/6395.

[51] SEC v. Hallam, 42 F.4th 316, 343 (5th Cir. 2022).

[52] SEC v. Ahmed, 72 F.4th 379, 395 n.7 (2d Cir. 2023), cert. denied, 144 S. Ct. 2658 (2024); SEC v. Govil, 86 F.4th 89 (2d Cir. 2023).

[53] Govil, 86 F.4th at 98.

[54] The First Circuit has declined to follow Govil. See SEC v. Navellier, 108 F.4th 19 (1st Cir. 2024). And district courts outside the Second Circuit have distinguished the cases pending before them rather than dismissing disgorgement claims based on Govil.

[55] Pet. for Reh'g at 19-20, ECF No. 72, SEC v. Govil, 22-1658 (2d Cir. Dec. 15, 2023).

[56] SEC v. Ripple Labs, Inc., 20 Civ. 10832 (AT), 2024 WL 3730403, at *7 (S.D.N.Y. Aug. 7, 2024) (rejecting SEC's request for disgorgement in Section 5 registration action "[b]ecause binding Circuit precedent precludes disgorgement"). But see SEC v. Concord Mgmt. LLC, No. 7:23-CV-8253 (AEK) (S.D.N.Y. Apr. 5, 2024) (stipulating to withdrawal of disgorgement claim in case alleging registration violation, ECF No. 30, following court inquiry regarding lack of victims, ECF No. 22 at 10–11). The SEC

also argued that it could obtain disgorgement in an insider trading case post-Govil before the action was settled. See Opp. Br. at 4–5, ECF No. 402, SEC v. Yin, No. 1:17-CV-972 (JPO) (S.D.N.Y. Feb. 26, 2024) (arguing that Govil does not preclude disgorgement).

[57] See, e.g., BMO Cap. Mkts. Corp., Exchange Act Release No. 102160, 2025 WL 89640 (Jan. 13, 2025) (failure to supervise); William R. Ruffalo, Exchange Act Release No. 102247, 2025 WL 269083 (Jan. 17, 2025) (insider trading); SAP SE, Exchange Act Release No. 99308, 2024 WL 147790 (Jan. 10, 2024) (Foreign Corrupt Practices Act); Kershner Trading Americas, LLC, Exchange Act Release No. 100172, 2024 WL 2289157 (May 20, 2024) (Rule 105 of Regulation M); see SEC, Commission Votes, available at https://www.sec.gov/about/commission-votes.

[58] For example, the SEC has pursued permanent officer and director bars in virtually every situation possible under the governing statute, 15 U.S.C. § 78u(d)(2). And for years, courts have with some regularity rejected the Commission's requests, instead limiting such bars to a shorter duration or declining to enter them altogether. SEC v. Panuwat, 3:21-CV-6322, 2024 WL 4602708, at *17–28 (N.D. Cal. Sept. 9, 2024) (declining to enter any officer and director bar, finding low likelihood of recidivism); SEC v. E-Smart Techs., Inc., 139 F. Supp. 3d 170 (D.D.C. 2015)) (imposing a ten-year bar for one defendant and a five-year bar for another, despite the SEC's request for a lifetime ban, where the defendants were not repeat offenders); SEC v. Findley, 718 F. Supp. 3d 125 (D. Conn. 2024) (imposing a four-year bar rather than a permanent bar, noting that the CEO was not a repeat offender and his conduct was less egregious than that of parties who had been subject to permanent bars). At least one Commissioner has frequently voted against authorizing officer-and-director bars in cases involving defendants who were not officers or directors, portending a potential reconsideration of the SEC's approach here as well in certain cases. See, e.g., Stephen Forlano, Exchange Act Release No. 100979, 2024 WL 4131304, at *1 (Sept. 9, 2024) (respondent was not an officer or director, but rather, a retired general dentist); Tian "Tony" Tian, Exchange Act Release No. 99410, 2024 WL 244961, at *1 (Jan. 22, 2024) (respondent was a consultant for the investment firm); Xia Hong, Exchange Act Release No. 98401, 2023 WL 6036830 (Sept. 14, 2023) (respondent was a senior product director who worked on due diligence).