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THE SEC AS AN ENTREPRENEURIAL ENFORCER

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ABSTRACT—The truth of disclosures by public companies is policed by both private plaintiffs and the Securities and Exchange Commission (SEC). The courts and many commentators have viewed the SEC as a more responsible enforcer than private litigants. Entrepreneurial enforcers with a profit motive have an incentive to advance questionable legal theories to expand the reach of Rule 10b-5, the primary federal prohibition of securities fraud. In contrast, the conventional view is that a public enforcer will bring straightforward cases against public companies. This Article argues that this perception is dated, and that the SEC has become more entrepreneurial in its enforcement relating to material misstatements by issuers. The agency now routinely avoids doctrinal limitations on the reach of Rule 10b-5 and brings cases that disagree with established precedent. One reason for this shift is the SEC's increasing emphasis on penalty collection. Another is that the SEC is advancing a more ambitious regulatory agenda. An entrepreneurial approach has increased the impact of SEC enforcement and addressed criticism that the agency is too passive. However, to maintain the legitimacy of its enforcement program, the SEC should take steps to increase the transparency of its enforcement decisions.

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INTRODUCTION

For decades, courts have exerted considerable effort in managing the problem of entrepreneurial litigation: suits brought by plaintiffs with incentive to assert novel legal theories that test the boundaries of the law. The most common entrepreneurial litigators are class action attorneys with significant monetary incentives to file lawsuits for damages against deep-pocketed defendants. Private plaintiffs often exploit the ambiguity of broadly worded legal provisions to assert aggressive theories that expand the reach of vague prohibitions. Unless a case is dismissed at an early stage, defendants face pressure to avoid litigation costs by settling the case. Courts have thus tried to narrow the scope of class action liability to reduce the expense of private litigation.

Concerns about entrepreneurial enforcement have been particularly salient in the context of securities fraud litigation. Public companies frequently defend against securities class actions alleging that they issued materially misleading information that inflated their stock price. Private plaintiffs typically rely on the broadly worded Rule 10b-5, which prohibits fraud in connection with securities transactions, to argue they were the victims of securities fraud.[1] Entrepreneurial class action attorneys are

[1] Section 10(b) of the Securities Exchange Act of 1934 permits the SEC to pass rules prohibiting "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. Rule 10b-5 reads in full:

attracted by the high damages a class of investors can claim for market losses.[2] The prospect of a 20% contingency fee incentivizes investment in lawsuits alleging theories that stretch the boundaries of securities fraud liability.[3] Skeptical courts have thus created various doctrines to narrow Rule 10b-5's reach and reduce the costs of entrepreneurial securities litigation.

Commentators, courts, and policymakers have a far more positive view of government enforcers. The Securities and Exchange Commission (SEC), the federal agency that regulates securities markets, also has the power to enforce Rule 10b-5 against public companies. Legal scholars have generally viewed the SEC as a more responsible enforcer than private plaintiffs and their lawyers.[4] Because the SEC and its staff do not personally profit from a successful enforcement action, the SEC has less incentive to aggressively file cases than private enforcers. Thus, the courts and Congress have granted the SEC more deference than private plaintiffs when it brings Rule 10b-5 cases. Nevertheless, for proponents of vigorous securities enforcement, the private sector has significant advantages over government enforcement. Critics assert that the SEC does not bring enough challenging cases, and that it settles too quickly and for too little when it does.[5]

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
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> (a) To employ any device, scheme, or artifice to defraud,
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> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2024).

2 The concept of "entrepreneurial litigation" has been most developed by Professor John C. Coffee Jr., who has described the "plaintiff's attorney in large class actions as less an agent than a risk-taking entrepreneur." JOHN C. COFFEE JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 5 (2015).

3 *See, e.g.*, Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2220 (2010) ("[P]rofit-driven private enforcers are more likely to bring borderline cases than public enforcers, thus increasing the risk of legal error and, in turn, overdeterrence.").

4 *See, e.g.*, Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 970 (1994) (noting that the SEC "consistently sought to avoid instituting an enforcement action if it did not in good faith believe that the action would likely prevail on the merits").

5 *See* James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 146–47 (2012).

This Article argues that the perception that the SEC is a passive enforcer is dated, at least in the context of public company securities fraud enforcement. The SEC has become more entrepreneurial in recent years, as evidenced by its growing willingness to bring ambitious cases that test the boundaries of the law. The SEC no longer limits itself to easy cases to be settled with a modest fine. It routinely brings difficult and innovative cases and insists on significant sanctions. It often avoids or disagrees with doctrinal limitations that the courts have used to narrow the reach of Rule 10b-5. Even if the SEC is not as entrepreneurial as private enforcers, it increasingly acts like a private plaintiff in testing the limits of Rule 10b-5.

This Article identifies two major explanations for the SEC's more entrepreneurial enforcement approach. The first is the incentive to collect penalties. The SEC began collecting substantial penalties against public companies only about twenty years ago. It now frequently emphasizes that it levies record penalties in its annual enforcement report. While the SEC and its staff do not keep the penalties it collects, the SEC can use its penalty collections to convey its competence and strength to the public. The second is that the SEC's entrepreneurial enforcement reflects its ambitious regulatory agenda. The SEC is expanding the reach of its regulation of public companies to cover a broader range of issues such as Environmental, Social, and Governance (ESG) risk. It has become more entrepreneurial in its enforcement because it is seeking opportunities to support its agenda and expand the reach of its authority.

By becoming more entrepreneurial, the SEC has addressed persistent criticism that it is too passive and overly deferential to private interests. The argument that SEC enforcement attorneys are captured by the private sector does not ring true today. The SEC's willingness to challenge restrictions on the scope of Rule 10b-5 can also check the tendency of courts to arbitrarily limit that rule to shield public companies against private litigation. In doing so, it can enhance the impact of such private enforcement.

Although the SEC's more entrepreneurial approach presents benefits, it also raises questions concerning the legitimacy of its enforcement program. If the SEC has an incentive to collect substantial settlements from corporate defendants, courts have less reason to defer to it relative to private enforcers. The SEC risks losing the trust of judges, who may treat its more ambitious claims with the skepticism traditionally directed toward private plaintiffs. Industry backlash could result in restrictions on the SEC's enforcement powers.

Thus, this Article concludes with some suggestions to ensure that SEC enforcement is more transparent and effective. First, the SEC should not levy substantial penalties for a material misstatement by a corporation without evidence of fraudulent intent or strong evidence of substantial investor harm. Second, the SEC should make it clear when it chooses to avoid or disagree with doctrines that limit the reach of Rule 10b-5. Finally, it should fully litigate cases rather than seek an early settlement when it brings cases based on innovative theories.

It is worth noting that this Article focuses on the subset of SEC enforcement directed at material misstatements by public companies. The SEC's enforcement division does much more than police the truth of corporate disclosure. It brings important cases against individual defendants, broker–dealers, and investment managers. However, the frequency of enforcement relating to public company misstatements permits comparison between SEC enforcement and private litigation. The courts have created an extensive doctrine to regulate that subset of cases. Some of this Article's analysis could apply to SEC enforcement more generally, but its ambition is limited to analyzing how the SEC has become more entrepreneurial in this particular context.

Part I of the Article explores the dominant perception that the SEC is a responsible public enforcer. Part II argues that the SEC has increasingly become more aggressive in its legal theories, in that it now both avoids and disagrees with doctrinal limitations on Rule 10b-5. Part III discusses the incentives motivating SEC enforcement, considering penalties and regulatory policy as reasons that the SEC has become more entrepreneurial. Part IV proposes some ways that the SEC could ensure the legitimacy of its enforcement efforts.

I. THE SEC AS A PUBLIC ENFORCER

For a time, the Supreme Court viewed private litigation as an important way to supplement the limited resources of government enforcers.[6] Private attorneys general could help ensure effective implementation of federal law by winning substantial monetary remedies that would deter future violations. Now, there is more skepticism toward the benefits of a system where entrepreneurial plaintiffs bring costly lawsuits against public companies for

[6] *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 376 (1991) (Kennedy, J., dissenting) (describing private securities litigation as an "essential tool" and "necessary supplement" to SEC enforcement (first quoting Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988); and then quoting Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985))); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (describing private actions as "a most effective weapon" in enforcing the securities laws that are a "necessary supplement to Commission action"). The Court has at times continued to acknowledge the positive role of private enforcers. *See, e.g.*, Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007) (observing that private actions are an "essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)").

profit. In the context of securities enforcement, the courts and Congress now look less favorably on private plaintiffs than the SEC, which they view as a measured enforcer that is more likely to bring meritorious cases.

A. A More Responsible Enforcer

The SEC is not a perfect enforcer, but it is almost uniformly viewed as more responsible than private enforcers. Private plaintiffs typically file well over a hundred securities class actions a year in federal court against public corporations, alleging they made material misstatements with fraudulent intent in violation of Rule 10b-5.[7] In contrast, the SEC usually brings only a handful of actions per year against public companies for issuing misleading information to investors.[8]

The nature of private securities litigation incentivizes risk-taking.[9] Because investor losses often reach eight or nine figures, private attorneys are willing to represent securities class action plaintiffs on a contingency fee basis. They can invest substantial amounts in investigating and developing the facts of a case. Complex securities litigation is costly, requiring review of voluminous documents and retention of expert witnesses. As a result, plaintiffs' attorneys face pressure to generate payments from defendants to recover their significant investments.

A private enforcer is also willing to push the boundaries of the law to pursue recovery. Class action attorneys typically only represent plaintiffs and thus have an incentive to consistently advocate for a broad reading of Rule 10b-5 and other liability provisions. They have little reason to concern themselves with the costs that expansive readings might impose on corporate

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7 James J. Park, *The Need for Sarbanes–Oxley*, 78 BUS. LAW. 633, 644 (2023) (reporting the number of securities class actions filed from 1996 to 2019).

8 In the category of Issuer Reporting and Auditing & Accounting, the SEC reported filing 18 civil actions and 68 administrative proceedings in 2023, 19 civil actions and 57 administrative proceedings in 2022, and 11 civil actions and 41 administrative proceedings in 2021. *See* U.S. SEC. & EXCH. COMM'N, ADDENDUM TO DIVISION OF ENFORCEMENT PRESS RELEASE FISCAL YEAR 2023, at 1 (2023), https://www.sec.gov/files/fy23-enforcement-statistics.pdf [https://perma.cc/Z4K8-HJH5]; U.S. SEC. & EXCH. COMM'N, ADDENDUM TO DIVISION OF ENFORCEMENT PRESS RELEASE FISCAL YEAR 2022, at 1 (2022), https://www.sec.gov/files/fy22-enforcement-statistics.pdf [https://perma.cc/J3QK-KYJ3]; U.S. SEC. & EXCH. COMM'N, ADDENDUM TO DIVISION OF ENFORCEMENT PRESS RELEASE FISCAL YEAR 2021, at 1 (2021), https://www.sec.gov/files/2021-238-addendum.pdf [https://perma.cc/96Z5-UDP2]. Many of the administrative proceedings in this category were cases against parties other than corporate issuers such as CPAs. In addition, the SEC initiates numerous investigations of public companies for securities law violations that do not result in an enforcement action.

9 *See, e.g.*, COFFEE, *supra* note 2, at 233 (observing that "entrepreneurial plaintiff's attorneys may be more innovative and willing to accept risk than attorneys within public bureaucracies").

defendants.[10] Even if the law is not completely favorable on an issue, an entrepreneurial enforcer is willing to take on the risk that their case will be dismissed on legal grounds.[11] Private plaintiffs might even file a case in spite of unfavorable precedent with the hope of persuading a judge to distinguish their case from prior decisions. Even if the legal basis for a case is weak, a defendant might settle the case to avoid the nuisance and costs of defending the lawsuit.[12]

Because the SEC is less entrepreneurial—at least relative to private plaintiffs—it has less of an incentive to bring questionable cases. The SEC is a regulatory enforcer in that its enforcement activities occur within the context of a broader regulatory mission.[13] The SEC is concerned with investor protection, but it is also tasked with promoting capital formation.[14] It is aware that excessive litigation costs can deter companies from going public in the United States. As a result, the SEC can be expected to be more selective in pursuing cases. Rather than file cases with questionable merit, the SEC is more likely to direct resources to cases that are indisputably strong on the law and the facts. Because it has the power to compel a corporate defendant to produce documents before it files a case, it can ensure that there is a strong factual basis for commencing litigation.

Scholars thus often view the SEC more favorably than they do private plaintiffs. For example, Professor Amanda Rose has proposed that the SEC be given the power to screen private securities class actions before they can be pursued in court.[15] With such review, the SEC could apply its regulatory expertise to identify those cases that are frivolous.[16] If the SEC was a monopolistic enforcer, it could more effectively exercise discretion to reduce the costs of securities enforcement.[17] It could independently examine the factual basis for a private claim in order to assess whether there is sufficient

[10] *See* Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 333 (1982) ("[T]he private cost of suit is less than the social cost, suggesting a tendency toward excessive litigation . . . .").

[11] *See, e.g.*, Charles M. Yablon, *A Dangerous Supplement? Longshot Claims and Private Securities Litigation*, 94 NW. U. L. REV. 567, 568 (2000) (arguing that some cases that are described as meritless are better understood as claims with low probability of success).

[12] *See* Grundfest, *supra* note 4, at 969–70.

[13] *See* Park, *supra* note 5, at 148.

[14] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424 (1996) (requiring the SEC to consider "efficiency, competition, and capital formation").

[15] *See* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1354 (2008).

[16] *See, e.g.*, *id.* at 1306 ("[W]e might rely on the Commission's exercise of its expert discretion to protect against overdeterrence.").

[17] *See, e.g.*, *id.* at 1348 ("Private Rule 10b-5 enforcement may . . . frustrate the Commission's ability to engage in discretionary nonenforcement . . . .").

evidence to move forward. It could also apply what might be a more conservative view of the scope of Rule 10b-5 in assessing whether a claim has sufficient legal basis. The hope of Rose's proposal is that by inserting a less entrepreneurial enforcer—the SEC—in the process, an inefficient, decentralized system of enforcers will be brought to order.[18]

Academics have at times cited confidence in the SEC's enforcement process as a reason to preclude suits by private enforcers. Professors Merritt Fox and Joshua Mitts argue that securities fraud litigation arising out of corporate crises should generally be brought by the SEC rather than private plaintiffs.[19] They argue that the social benefits of such suits are likely outweighed by their costs. They conclude that these cases "are better left to SEC enforcement action or criminal prosecution, where prosecutorial discretion, rather than entrepreneurial lawyering, picks which cases to pursue."[20]

Although many commentators laud the SEC's measured approach, the perception of the agency as a passive enforcer has also earned it criticism.[21] When the SEC fails to prevent a major securities fraud scandal, there are questions about why it did not act. At times, nimbler enforcers have highlighted the slow pace at which SEC investigations can move.[22] Additionally, critics assert that the SEC is captured by industry because the revolving door to the private sector reduces the incentive of its staff to aggressively enforce.[23]

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18 *See id.* at 1354–58.

19 Merritt B. Fox & Joshua Mitts, *Event-Driven Suits and the Rethinking of Securities Litigation*, 78 BUS. LAW. 1, 5 (2022).

20 *Id.*

21 *See, e.g.*, Mark Maremont & Deborah Solomon, *Missed Chances: Behind SEC's Failings: Caution, Tight Budget, '90s Exuberance*, WALL ST. J., Dec. 24, 2003, at A1; Joe Nocera, *Chasing Small Fry, S.E.C. Let Madoff Get Away*, N.Y. TIMES (June 26, 2009), https://www.nytimes.com/2009/06/27/business/27nocera.html [https://perma.cc/VJ9G-6HT6]. Scrutiny of SEC enforcement in the wake of the Financial Crisis of 2008 led to a significant reorganization of the SEC's enforcement division. *See* BOS. CONSULTING GRP., U.S. SECURITIES AND EXCHANGE COMMISSION ORGANIZATIONAL STUDY AND REFORM 42–43 (2011), https://www.sec.gov/files/967study.pdf [https://perma.cc/RF24-HPTS].

22 *See, e.g.*, Monica Langley, *As His Ambitions Expand, Spitzer Draws More Controversy*, WALL ST. J. (Dec. 11, 2003, 8:49 AM), https://www.wsj.com/articles/SB107109365079111900 [https://perma.cc/7WMX-FCQB] (noting impact of relatively small securities enforcement bureau of the New York Attorney General); *see also* U.S. SEC. & EXCH. COMM'N, OFF. OF THE INSPECTOR GEN., REP. NO. 467, PROGRAM IMPROVEMENT NEEDED WITHIN THE SEC'S DIVISION OF ENFORCEMENT 3 (Sept. 29, 2009), https://www.sec.gov/about/offices/oig/reports/audits/2009/467.pdf [http://perma.cc/D888-KLZ8] (noting issues relating to bureaucracy in the SEC enforcement division).

23 James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845, 851 & n.26 (2019) (citing Michael Lewis & David Einhorn, *The End of the Financial World as We Know It*, N.Y. TIMES (Jan. 3, 2009), https://www.nytimes.com/2009/01/04/opinion/04lewiseinhorn.html [https://perma.cc/DJ4R-ZY2G]).

An advantage of entrepreneurial litigation is that private enforcers have a greater incentive to fully develop cases. Professor John Coffee Jr. has argued that resource limitations incentivize the SEC to accept relatively small settlements for securities violations.[24] Because it cannot offer salaries on par with private firms, the SEC finds it difficult to assemble elite litigation teams.[25] Rather than turn over every stone in the hope of uncovering a stronger case, the SEC may simply be satisfied if the defendant quickly resolves a matter. In contrast, private plaintiffs often have more incentive to fully develop legal theories that support a higher settlement. If the SEC had the resources to fully investigate violations and frequently bring cases to trial, its enforcement program would be more effective. Coffee thus proposes that government enforcers such as the SEC retain private attorneys to investigate and pursue the most complex cases.[26] Public enforcers could "handle the mundane, run-of-the-mill action and also emergency injunctive cases, but leave the major, riskier, and slower-moving complex actions that generate real deterrence to the specially retained private firm."[27]

Not all commentators view the SEC as necessarily more measured than private enforcers. Professors Stephen Choi and Adam Pritchard have observed that the SEC can be influenced by behavioral biases that lead to overenforcement.[28] The SEC's cases may seem more meritorious than private litigation, but that may reflect the SEC's ability to more thoroughly investigate the facts before filing a case.[29] If private plaintiffs had equivalent power,[30] their cases could be stronger than they are in a world where

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[24] *See* JOHN C. COFFEE JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 102–03 (2020).

[25] *See, e.g.*, *id.* at 102 (observing that SEC attorneys "are paid at civil service salaries, which fall way below the annual compensation of 'star' litigation partners (who today may earn $5 million a year or more at some large defense firms)").

[26] *Id.* at 100–01.

[27] COFFEE, *supra* note 2, at 222; *see also* Tamar Frankel, *Let the Securities and Exchange Commission Outsource Enforcement By Litigation: A Proposal*, 11 J. BUS. & SEC. L. 111, 119–25 (2010) (proposing that SEC outsource more complex cases to private sector).

[28] *See, e.g.*, Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 21–40 (2003) (contending that SEC is subject to overconfidence and groupthink biases that can be checked through hierarchical internal review and judicial review).

[29] *See, e.g.*, Stephen J. Choi & A.C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIRICAL LEGAL STUD. 27, 28 (2016) (describing a "critical institutional detail: SEC enforcement actions are brought only after the SEC has done a substantial investigation, aided by the SEC's subpoena power, which yields cooperation from defendants even when not explicitly invoked").

[30] The power of private litigants to investigate the facts prior to filing a case has increased. One avenue has been the assertion of shareholder rights to a company's books and records. *See* DEL. CODE ANN. tit. 8, § 220 (2024).

plaintiffs rely primarily on discovery to develop the facts.[31] The SEC has also tended to exploit more favorable venues for litigation. After Congress gave it more power to file cases in its own administrative courts, the SEC increased its administrative filings.[32] Critics of this shift have argued that the SEC is abusing its authority so that it is more likely to prevail over defendants.[33]

B. The SEC's Broader Power to Address Material Misstatements

The perception that the SEC is a more responsible enforcer has influenced both courts and policymakers. Because of the belief that entrepreneurial enforcers often file meritless cases, the Supreme Court and Congress have restricted the reach of Rule 10b-5 over the years. In some instances, they have created limits that only apply to private securities class action filings. This Section describes how the SEC gained the authority to target a wider range of material misstatements than private plaintiffs.

1. Early Securities Fraud Enforcement Litigation

For more than half of the SEC's existence, it left the task of recovering monetary damages for securities fraud violations to private plaintiffs. It was not until 1990 that Congress granted the SEC the general power to impose penalties for securities law violations.[34] The SEC won the ability to order disgorgement in the early 1970s in an insider trading matter, *SEC v. Texas*

[31] *See, e.g.*, Choi & Pritchard, *supra* note 29, at 45–47 (finding that high-level officer resignations were lower in companies subject to SEC investigations relative to companies targeted by class actions, implying that class actions may do as well at targeting real examples of securities fraud).

[32] *See, e.g.*, Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REGUL. 1, 19–20 (2017) (documenting increase in SEC actions against nonfinancial public companies in administrative court); Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J.F. 124, 130 (2016) (documenting general increase in SEC settlement filings in administrative court).

[33] There is now an effort to limit or even eliminate the power of the SEC to bring enforcement cases before administrative judges. *See, e.g.*, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (requiring jury trial when SEC seeks civil monetary penalties for securities fraud); Lucia v. SEC, 585 U.S. 237, 251–52 (2018) (holding a defendant who had a hearing before an SEC administrative law judge who had not been properly appointed was entitled to a new hearing in front of a different judge); Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1162–63 (2016) (noting that first-level appeals are to the Commission, thus making Commissioners "act[] both as prosecutors and as judges" who "are afforded substantially more deference . . . than . . . federal district court judges"). For an argument in defense of the SEC's administrative proceedings, see generally David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155 (2016).

[34] Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990). The SEC had the power to order disgorgement, but it did not pursue such a remedy against public companies that committed securities fraud.

Gulf Sulphur Co.[35] However, it did not typically seek that remedy against public companies for issuing material misstatements.[36] In contrast, by the 1970s, private plaintiffs began using class actions to recover compensation on behalf of the significant number of investors injured by fraudulent misstatements.

For example, the SEC did not seek to recover damages in its Rule 10b-5 case against the railroad Penn Central, which filed for bankruptcy in 1970 in one of the largest corporate scandals of the second half of the twentieth century.[37] The SEC wrote an extensive report on its investigation, outlining several transactions that materially misstated the company's financial condition.[38] It also filed a federal action alleging Rule 10b-5 violations.[39] However, that lawsuit only requested permanent injunctive relief against the company to prevent it from making material misstatements or omissions.[40] Rather than seeking recovery from the corporate entity,[41] the SEC sought disgorgement from a number of individual Penn Central officers for insider trading.[42]

In contrast, a private class action based on similar allegations as the SEC's action asserted a Rule 10b-5 claim for monetary damages.[43] Plaintiffs sued various Penn Central entities, its auditor, and various officers alleging that "various reports, statements, documents and press releases were intended to and did inflate the market price of Penn Central Co. stock and affect plaintiffs and the investing public in their decisions to purchase, sell

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35 446 F.2d 1301, 1307–08 (2d Cir. 1971).

36 It primarily sought disgorgement in insider trading cases to require that the defendant return illicit gains from trading. Harvey L. Pitt & Karen L. Shapiro, S*ecurities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REGUL. 149, 224–25 (1990). It is worth noting that in the *Texas Gulf Sulphur* matter, private plaintiffs also won damages for insider trading. *See* Mitchell v. Tex. Gulf Sulphur Co., 446 F.2d 90, 103, 107 (10th Cir. 1971).

37 For a more extensive discussion of the Penn Central securities fraud, see JAMES J. PARK, THE VALUATION TREADMILL: HOW SECURITIES FRAUD THREATENS THE INTEGRITY OF PUBLIC COMPANIES 33 (2022).

38 SEC. & EXCH. COMM'N, THE FINANCIAL COLLAPSE OF THE PENN CENTRAL COMPANY: STAFF REPORT OF THE SECURITIES AND EXCHANGE COMMISSION TO THE SPECIAL COMMITTEE ON INVESTIGATIONS 180–81 (Aug. 1972).

39 *See* Complaint at 5, 8–12, SEC v. Penn Cent. Co., 1974 WL 391 (E.D. Pa. May 2, 1974); *see also* Kenneth H. Bacon, *Penn Central Co. and Ex-Officers Are Charged with Fraud by SEC*, WALL ST. J., May 3, 1974, at 3. The complaint also described claims against the company's auditor and some of its officers and directors. *See Penn Cent. Co.*, 1974 WL 391, at *2–3.

40 *Penn Cent. Co.*, 1974 WL 391, at *12–13.

41 Penn Central had filed for bankruptcy, making recovery from the corporate entity more difficult. PARK, *supra* note 37, at 34.

42 *Penn Cent. Co.*, 1974 WL 391, at *13.

43 *See In re* Penn Cent. Sec. Litig., 347 F. Supp. 1327, 1332–34 (E.D. Pa. 1972).

and hold Penn Central Co. stock."[44] That case resulted in a $10.6 million settlement, which supplemented the injunctive relief sought by the SEC.[45]

The Supreme Court's early view that private litigation was a necessary supplement to SEC enforcement was shaped by the SEC's limited ability to enforce Rule 10b-5.[46] Entrepreneurial enforcers were tasked with filing cases that would generate monetary recoveries to compensate investors and deter securities fraud violations.[47] Although private cases brought under theories consistent with SEC complaints were fairly uncontroversial, as private attorneys began to innovate, there was a growing concern that private litigation was becoming much more than a useful supplement to SEC enforcement.

2. *The Option to Avoid Establishing Fraudulent Intent*

The Supreme Court evidenced a favorable view of the SEC as early as 1980. The Court significantly expanded the SEC's enforcement power relative to private plaintiffs in cases involving materially misleading statements. It did so by interpreting parts of section 17 of the Securities Act of 1933, which empowers the SEC to sanction misstatements relating to the "offer or sale" of securities, as only requiring a showing of negligence by the defendant.[48] In *Aaron v. SEC*, the Court held that: (1) subsection 17(a)(1)

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[44] *Id*. at 1331–32.

[45] *In re* Penn Cent. Sec. Litig., 416 F. Supp. 907, 912 (E.D. Pa. 1976), *rev'd*, 560 F.2d 1138 (3d Cir. 1977).

[46] There were some notorious securities fraud cases during the 1970s that were primarily addressed through criminal prosecutions. *See, e.g.*, LEE J. SEIDLER, FREDERICK ANDREWS & MARC J. EPSTEIN, THE EQUITY FUNDING PAPERS: THE ANATOMY OF A FRAUD 302 (1977) (noting conviction of Equity Funding's former chairman and president); Arnold Lubasch, *Year in Jail Given for Stock Fraud*, N.Y. TIMES, Sept. 19, 1973, at 65 (noting the one-year sentence of the former board chairman of Four Seasons Nursing Centers of America in a stock-fraud case); *Two Auditors in National Student Case, Company's Founder Receive Jail Terms*, WALL ST. J., Dec. 30, 1974, at 11 (reporting convictions in the National Student Marketing Corp. fraud). In some of those cases, the SEC did not a file a complaint. Private litigation resulted in recoveries for investors. *See, e.g.*, *In re* Equity Funding Corp. of Am. Sec. Litig., 438 F. Supp. 1303, 1319 (1977) (noting $60 million recovery for Equity Funding investors).

[47] *See* John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 220–26, 222 n.15 (1983). Such enforcement was not uncontroversial. Some questioned whether such private enforcement did no more than free ride on the earlier investigative efforts of the SEC. *See, e.g.*, *id.* (describing "free riding" and its pros and cons).

[48] Section 17(a) provides:

> It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
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> (1) to employ any device, scheme, or artifice to defraud, or

requires a showing of fraudulent intent because it specifically prohibits "any device, scheme, or artifice to defraud," but (2) the language of subsections 17(a)(2) and (3) do not limit their scope to fraudulent activity.[49]

Lower courts later held that only the SEC has the power to sue under section 17 of the Securities Act.[50] Without this limitation, private plaintiffs could avoid restrictions on Rule 10b-5 by filing under subsections 17(a)(2) and (3) instead.[51] *Aaron* thus granted the SEC the unique power to enforce provisions that only required it to establish that a corporate defendant was negligent in issuing a material misstatement relating to the "offer or sale" of a security.

Just five years before *Aaron v. SEC*, the Supreme Court had interpreted an SEC rule with virtually identical language to section 17 as including a scienter requirement. In *Ernst & Ernst v. Hochfelder*, the Court held that a violation of Rule 10b-5 cannot be satisfied with only a showing of

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> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
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> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Securities Act of 1933, Pub. L. No. 73-22, § 17(a), 48 Stat. 74, 84–85 (codified as amended at 15 U.S.C. § 77q).

49 446 U.S. 680, 696–97 (1980).

50 *See, e.g.*, Maldonado v. Dominguez, 137 F.3d 1, 7 (1st Cir. 1998) (discussing circuit decisions uniformly denying implied right); Schlifke v. Seafirst Corp., 866 F.2d 935, 943 (7th Cir. 1989) ("A decisive majority of recent authorities have refused to imply a right of action under section 17(a)."). Some courts prior to *Aaron* held there was a private right of action under section 17(a) on the assumption that the provision only covered fraudulent misstatements. *See, e.g.*, Stephenson v. Calpine Conifers II, Ltd., 652 F.2d 808, 815 (9th Cir. 1981); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1979); *see also* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 867 (2d Cir. 1968) (noting that a private right of action under section 17 was premised on the "proviso that fraud, as distinct from mere negligence, must be alleged").

51 *See, e.g.*, Puchall v. Houghton (*In re* Wash. Pub. Power Supply Sys. Sec. Litig.), 823 F.2d 1349, 1352 (9th Cir. 1987) (en banc) (observing that permitting a private right of action under section 17(a) "would have the practical effect of eliminating any need to show scienter or, for that matter, to proceed under section 10(b)"); *see also* Finkel v. Stratton Corp., 962 F.2d 169, 175 (2d Cir. 1992) (explaining that "*Aaron* broke the link between rule 10b-5 and § 17(a)" so that the appellate court could "no longer justify the private right of action under § 17(a) on the ground that rule 10b-5 provides the same cause of action anyway"); Newcome v. Esrey, 862 F.2d 1099, 1107 (4th Cir. 1988) ("[P]ermitting private actions to be brought under section 17(a) would allow plaintiffs to escape the limitations Congress specifically intended to apply to actions based on negligence."); Landry v. All Am. Assurance Co., 688 F.2d 381, 387 (5th Cir. 1982) (noting that after *Aaron*, "§ 17(a) suddenly becomes an attractive, viable alternative to actions previously brought under Rule 10b-5, at least as to those based upon negligence"). In addition, at the time of the passage of section 17(a), the assumption was that the statute would be enforced through governmental enforcers. *See, e.g.*, Mark A. Ryan, *What Did Congress Really Want?: An Implied Private Right of Action Under Section 17(a) of the 1933 Securities Act*, 63 IND. L.J. 623, 637 (1988). For an argument that private securities enforcement should be generally governed by a negligence standard, see MARC I. STEINBERG, RETHINKING SECURITIES LAW 195–97 (2021).

negligence. Rule 10b-5 is somewhat broader than section 17 because it applies not only to misstatements relating to the "sale" of securities but also to the "purchase" of securities.[52] However, Rule 10b-5's language is otherwise identical to section 17. One other difference between Rule 10b-5 and section 17 is that Rule 10b-5 is an administrative rule rather than a statute. The SEC passed Rule 10b-5 pursuant to its authority under section 10(b) of the Securities Exchange Act, which authorizes the SEC to pass rules prohibiting use of a "manipulative or deceptive device" in connection with the "purchase or sale" of a security.[53] Because the rule's authorizing statute requires some level of intent beyond negligence, the Court reasoned that the rule itself must also be limited to conduct motivated by scienter.[54]

The Supreme Court's two rulings in *Ernst & Ernst* and *Aaron* were not motivated by the text of the relevant statutes alone. They also considered the potential impact of entrepreneurial litigation. *Ernst & Ernst* was filed by private plaintiffs who alleged they were defrauded by a brokerage firm.[55] They sought damages from the auditor of the brokerage firm on the theory that it had "aided and abetted" the fraud by not conducting proper audits of the firm. Towards the end of the decision, the Court questioned the validity of the private plaintiffs' claim.[56] It observed that the plaintiffs were "not foreseeable users of the financial statements" prepared by the auditor. It noted that an expansive standard could result in liability to "thousands" of investors and that such liability would create "serious policy questions not yet addressed by Congress."[57]

In contrast, the SEC was not seeking damages from the defendant in *Aaron v. SEC*. It only sought an injunction against an employee of a broker–dealer for failing to supervise employees of the firm who made misleading statements in soliciting orders for a stock.[58] In addition to arguing that section 17 only requires negligence, the SEC argued that Rule 10b-5's scienter requirement should not apply when it was seeking an injunction.[59] The Court rejected this argument, possibly because it was uncomfortable reading Rule 10b-5 as requiring scienter for private plaintiffs but not the SEC. Instead, it

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[52] 425 U.S. 185 (1976).

[53] Securities Exchange Act of 1934, 15 U.S.C. § 78j.

[54] *Ernst & Ernst*, 425 U.S. at 201–03.

[55] *Id.* at 188–90.

[56] *Id.* at 214 n.33.

[57] *Id.* The year before, the Court had acknowledged "that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975).

[58] Aaron v. SEC, 446 U.S. 680, 684 (1980).

[59] *Id.* at 689–95.

read virtually identical provisions in section 17 as giving the SEC broader power.[60] As noted, before 1990, the SEC did not have the general ability to seek penalties for securities law violations. The policy question of substantial monetary liability was thus not as prevalent in SEC enforcement cases as it was in private litigation.

3. *The Private Securities Litigation Reform Act*

The number of securities class action filings increased substantially over the 1980s.[61] As the computer industry boomed, a significant number of technology companies such as Apple Computer sold stock to the public. These shares were often quite volatile and fluctuated depending on whether a company was able to innovate and develop new products. When a company reported bad news and its stock price fell, investors, assisted by entrepreneurial attorneys, filed lawsuits alleging securities fraud. These complaints were often speculative and argued for an expansive reading of the definition of securities fraud.[62]

In response, Congress passed a law that heightened the burden of private plaintiffs to establish scienter at an early stage of the case. The Private Securities Litigation Reform Act of 1995 (PSLRA) recognized that even with a fairly high substantive standard of liability, defendants could still spend significant amounts in defending questionable claims.[63] Indeed, the requirement of establishing scienter gave plaintiffs grounds to ask for expansive discovery that they could use to prove fraudulent intent. The PSLRA thus required plaintiffs to plead with particularity the facts that would be the basis for establishing scienter to survive a motion to dismiss.[64] Additionally, the statute required the court to stay discovery until it decided that motion.[65]

These PSLRA restrictions only apply to private plaintiffs, not the SEC. When the SEC files a case in federal court, screening at the motion to dismiss stage is less necessary because the SEC has the power to issue investigative subpoenas without bringing a lawsuit. Moreover, the SEC did not file significant numbers of actions against public companies during the 1980s

[60] *Id.* at 695–700.

[61] *See, e.g.*, S. REP. NO. 104-98, at 38 (1995) (describing the "rising tide of frivolous securities litigation").

[62] *See* H.R. REP. NO. 104-369, at 43 (1995) (describing the chilling effect of abusive securities litigation on disclosure of future projections by corporations).

[63] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

[64] 15 U.S.C. § 78u-4(b)(2).

[65] *Id.* § 78u-4(b)(3)(B).

and the years leading up to the passage of the PSLRA.[66] There was thus no reason for Congress to restrict the SEC's ability to enforce Rule 10b-5.

Indeed, the PSLRA specifically provided that a Supreme Court decision eliminating aiding and abetting liability in Rule 10b-5 cases did not prohibit the SEC from bringing cases under that theory.[67] In 1994, the Supreme Court held in *Central Bank of Denver v. First Interstate Bank of Denver* that a private plaintiff cannot bring an aiding and abetting claim under Rule 10b-5.[68] Such claims were common prior to that decision, and they permitted plaintiffs to target a wider range of defendants than the primary violator of the securities laws.[69] In coming to its decision, the Court reiterated its earlier reasoning at the end of the *Ernst & Ernst* decision.[70] Because investors do not rely upon any statement by a secondary actor, they cannot be deceived by the secondary actor. The Court also raised the concern that private Rule 10b-5 litigation would require "secondary actors to expend large sums even for pretrial defense and the negotiation of settlements."[71] It noted broader policy concerns that excessive litigation would mean that "newer and smaller companies may find it difficult to obtain advice from professionals."[72]

Over a decade after deciding *Central Bank*, the Supreme Court more explicitly expressed its view that the SEC is a more responsible enforcer than private plaintiffs. In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, the Court rejected a "scheme liability" theory that would have made a secondary actor that facilitated accounting fraud by a corporation potentially liable under Rule 10b-5.[73] In doing so, the Court emphasized the reliance theory discussed in *Ernst & Ernst* and *Central Bank*. Because investors would be unaware of the secondary actor, they would not have relied on that secondary actor in making investment decisions. The Court also re-emphasized concern about entrepreneurial litigation. It noted "that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent

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66 *See, e.g.*, Grundfest, *supra* note 4, at 974–75, 974 n.41 (noting limited involvement of SEC in securities enforcement during the 1980s); *cf.* Pitt & Shapiro, *supra* note 36, at 157 (describing insider trading as the major focus of SEC enforcement during the 1980s).

67 *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 104, 109 Stat. 737 (addressing "Authority of Commission to Prosecute Aiding and Abetting").

68 511 U.S. 164, 191 (1994).

69 For example, auditors were often sued for aiding and abetting securities fraud. *See* James J. Park, *Auditor Settlements of Securities Class Actions*, 14 J. EMPIRICAL LEGAL STUD. 169, 170–71 (2017).

70 *Central Bank*, 511 U.S. at 173–74.

71 *Id.* at 189.

72 *Id.*

73 552 U.S. 148, 153 (2008).

companies."[74] The Court also added a new argument for limiting the costs of litigation: the possibility that companies will be deterred from offering securities in the United States. It expressed a concern about increasing "the cost of being a publicly traded company under our law," which could "shift securities offerings away from domestic capital markets."[75]

The fact that the class action giving rise to *Stoneridge* was filed in the first place illustrates that private plaintiffs have the incentive to take risks in advancing a questionable theory. It is difficult to distinguish the scheme liability theory advanced against third parties from the aiding and abetting theory advanced in *Central Bank*. Participating in a broader scheme seems essentially the same as aiding and abetting a securities law violation. The plaintiffs arguably repackaged a claim against a secondary actor to evade a prior limitation on Rule 10b-5 that was not only set forth by the Supreme Court but implicitly ratified by Congress, which permitted the limitation to remain for private litigants while relaxing it for the SEC.

The Court in *Stoneridge* downplayed concerns of deterring fraudulent schemes by noting that even if it restricted private plaintiffs from suing secondary actors, the SEC retained the power to enforce Rule 10b-5 against such facilitators of securities fraud. It observed that "[s]ince September 30, 2002, SEC enforcement actions have collected over $10 billion in disgorgement and penalties, much of it for distribution to injured investors."[76] The Court implied that with a measured but active government enforcer, there was less need for private plaintiffs to enforce Rule 10b-5. Even as the SEC became more active in collecting penalties, the Court assumed that such efforts were consistent with meritorious actions.

4. *The Extraterritorial Reach of Rule 10b-5*

The Supreme Court continued voicing concerns about private securities litigation in *Morrison v. National Australia Bank Ltd.*, where it considered the extraterritorial reach of Rule 10b-5.[77] In limiting Rule 10b-5 suits against publicly traded companies to transactions on U.S. stock exchanges, the Court noted that reading Rule 10b-5 to have broad extraterritorial effect would interfere with the sovereignty of foreign states to implement their own securities regulation.[78] It noted the possibility that entrepreneurial attorneys

[74] *Id.* at 163.
[75] *Id.* at 164.
[76] *Id.* at 166.
[77] 561 U.S. 247, 285–86 (2010).
[78] *Id.* at 269–70.

had made the United States "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[79]

The Supreme Court's decision in *Morrison* might also have restricted the ability of the SEC to police foreign securities fraud. If Rule 10b-5 does not reach beyond U.S. stock exchanges in private class actions because of comity concerns, then the same logic could apply to the SEC's extraterritorial enforcement. Instead, Congress soon responded by including a provision in the Dodd–Frank Act that made it clear that the SEC has jurisdiction over foreign securities transactions in certain circumstances.[80] In doing so, it reinforced the view that the SEC is unlikely to abuse its enforcement power by bringing frivolous cases.

* * *

The Supreme Court now views entrepreneurial private litigation unfavorably relative to SEC enforcement. Initially, there was less concern about the SEC because it did not have authority to impose monetary penalties. Yet even after Congress granted the SEC general penalty power, the Supreme Court viewed that as a reason to conclude that private litigation was superfluous because of the SEC's vigor in collecting penalties.

Congress has preserved the SEC's enforcement authority even as the Court has narrowed Rule 10b-5, but it has not completely exempted the SEC from judicial limitations on the substantive scope of Rule 10b-5. For example, while the SEC need not meet the PSLRA's pleading requirements, the agency still must establish that a defendant acted with scienter for it to be liable under Rule 10b-5. Some circuits have defined scienter narrowly. Most notably, the Ninth Circuit requires a showing of deliberate recklessness or conscious misbehavior to establish fraudulent intent.[81] Described more fully below, the federal courts have developed a variety of doctrines in the context of private securities litigation that further limit the scope of liability for material misrepresentations.

II. PUSHING RULE 10B-5'S LIMITS

As courts have increasingly narrowed the scope of SEC Rule 10b-5 in adjudicating securities class actions, the SEC has had to navigate a more challenging set of hurdles to punish securities fraud. It has done so in two ways. First, it brings cases that avoid Rule 10b-5's scienter requirement. Second, it expresses disagreement with adverse doctrine by taking positions

79 *Id.* at 270.

80 Dodd–Frank Act, Pub. L. No. 111-203, § 929P(b)(2), 124 Stat. 1862, 1865 (2010) (codified as amended at 15 U.S.C. § 78aa(b)).

81 *In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 988 (9th Cir. 1999).

that are in tension with doctrinal limitations. The use of both tactics in major cases against public companies over the last decade evidences the SEC's shift to more entrepreneurial enforcement with respect to public company misstatements.

A. Avoidance

The first way the SEC can navigate doctrinal limits on Rule 10b-5 is by bringing cases based on laws that are less demanding in their requirements. The SEC can avoid establishing scienter in a complex securities fraud case by limiting its case to violations of provisions that do not require such a showing, such as subsections 17(a)(2) and (3) of the Securities Act.[82] The SEC has realized the Supreme Court's fear that entrepreneurial plaintiffs would avoid the requirements of Rule 10b-5 by filing under the parts of section 17 that do not require a showing of fraudulent intent. It routinely extracts substantial penalties in cases based on violations of subsections 17(a)(2) and (3). It may negotiate like an entrepreneurial plaintiff. By bargaining away a Rule 10b-5 claim, the SEC can achieve faster settlements with defendants that would prefer to pay a higher penalty rather than agree to a settlement that alleges fraudulent intent. Recent actions against Boeing, General Electric, and Citigroup illustrate the SEC's avoidance strategy.

1. Boeing

The SEC may have utilized an avoidance strategy in a case arising out of a major corporate crisis involving Boeing. The SEC relied solely on subsections 17(a)(2) and (3) in an administrative proceeding settled in 2022 with the aircraft manufacturer (which paid a $200 million penalty) and its CEO (who paid a $1 million penalty).[83] The case arose out of statements issued by Boeing in November 2018 and April 2019 after the crashes of two of its 737 MAX airplanes. The SEC emphasized the failure of the defendants to "exercise reasonable care" in ensuring the accuracy of these statements, but it also alleged facts suggesting that Boeing and its CEO deliberately issued false statements.[84] An intentional misstatement generally would satisfy the scienter element. A question thus arises as to why the SEC did not

[82] The SEC reportedly became more willing to bring charges for negligence after the 2008 financial crisis, primarily to increase the ability to win settlements from individual defendants. *See* Jean Eaglesham, *At SEC, Strategy Changes Course*, WALL ST. J. (last updated Sept. 30, 2011), https://www.wsj.com/articles/SB10001424052970203405504576601251693560910 [https://perma.cc/5HGP-TZ45].

[83] *See In re* Boeing Co., Securities Act Release No. 11105, 2022 WL 4445459 (Sept. 22, 2022); *In re* Dennis A. Muilenburg, Securities Act Release No. 11106, 2022 WL 4445460 (Sept. 22, 2022).

[84] *In re Boeing Co.*, 2022 WL 4445459, at *1.

include 10b-5 claims in the settlement to signal its belief that Boeing acted with scienter through its CEO.

Boeing's first allegedly misleading statement was its assertion in a press release after the first 737 MAX crash that the model was "as safe as any airplane that has ever flown the skies."[85] The press release was allegedly misleading because it did not discuss a problem with the 737 MAX's flight control system. When Boeing issued the statement, it knew there was an "airplane safety issue" that required redesigning the system's software.[86] Boeing's CEO, upon reviewing the press release, "suggested removing discussion of the planned [flight control] software redesign from the Draft Press Release."[87] After the press release was issued, an official from the National Transportation Safety Board informed the company that the statement was misleading, but Boeing did not retract the statement.[88]

The second statement highlighted by the SEC involved similar reassurances that failed to acknowledge concerns about the 737 MAX's safety. In an earnings call and press conference after the second crash of a 737 MAX in April 2019, Boeing's CEO represented that its "certification process" for the airplane was consistent with prior "design and certification processes that consistently produce safe airplanes."[89] The CEO did not mention that a Boeing employee had "lied to regulators (unknowingly)" about the system, despite being informed of the statement and noting that it was "concerning."[90]

One view of the SEC's failure to insist upon a Rule 10b-5 claim in settling with Boeing is that the agency was too cautious and avoided pursuing a more difficult case. The agency could have taken a risk and litigated against Boeing and its CEO. Instead, it appeared satisfied with the payment of a sizeable penalty for the corporation and a modest penalty for the company's CEO, who was arguably responsible for the misleading nature of the company's statements.

A more positive view of the Boeing matter is that the SEC appreciated that while there was evidence of scienter, there were countervailing facts which led it to genuinely believe that the motivation did not clearly rise to the level of a scheme to deceive investors, but instead reflected the difficulty of navigating a corporate crisis. In responding to what the company believed was unfair press coverage, the CEO decided to reveal only a minimal amount

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[85] *Id.* at *8.
[86] *Id.*
[87] *Id.* at *7.
[88] *Id.* at *8.
[89] *Id.* at *10–11.
[90] *Id.* at *11.

of information.[91] The intent was arguably not to deceive investors but to convey the company's genuine belief that the planes were safe. The decision to not include a Rule 10b-5 claim could have reflected the SEC's conclusion that Boeing and its CEO may not have acted with fraudulent intent.[92]

The Boeing settlement sent a mixed message to the public. On the one hand, the $200 million settlement and charge against the CEO highlighted the seriousness of Boeing's material misrepresentations. Also, the various factual allegations described by the complaint suggested that the defendants knowingly issued misleading information. On the other hand, there was no allegation of a Rule 10b-5 violation and thus Boeing can argue that it did not act with fraudulent intent.

The SEC's case was one of many private and public actions filed against Boeing. Because the company had already settled criminal charges, perhaps the SEC did not see the need to also pursue a more serious theory of Rule 10b-5 liability. Indeed, there is a question as to what the SEC added by filing parallel proceedings with the Department of Justice, which ordered Boeing to pay $2.5 billion in compensation and penalties.[93] The SEC might argue that it was concerned about harm to investors from the misleading statements, but such harm was hardly catastrophic.[94] The SEC's willingness to carve out a role for itself in cases such as *Boeing* evidences its entrepreneurial spirit.

The SEC's ability to proceed without clearly showing scienter allowed it to communicate its views by filing a notable case. First, it emphasized the duty for companies to at least act with "reasonable care" when issuing statements about the safety of a product, even during a corporate crisis. Such statements could affect the ability of investors to assess the impact of the crisis on the company's securities. Second, it is notable that the SEC's administrative order cited the fact that Boeing sold $1.5 billion in bonds after its first alleged misstatement and $9 billion in bonds after its second.[95] In

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91 *Id.* at *8–9.

92 Notably, a court declined to dismiss a Rule 10b-5 securities class action against Boeing and its CEO alleging that statements about the company's dealings with the Federal Aviation Administration were materially misleading and made with scienter. *See In re* Boeing Co. Aircraft Sec. Litig., No 19-cv-02394, 2022 WL 3595058 (N.D. Ill. Aug. 23, 2022).

93 *See* Press Release, U.S. Dep't of Just., Boeing Charged with 737 MAX Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion [https://perma.cc/NB7N-82L9]. The SEC often works with other agencies in investigating securities fraud. *See, e.g.*, Verity Winship, *Enforcement Networks*, 37 YALE J. ON REGUL. 274, 285–92 (2020) (mapping SEC enforcement network).

94 The SEC cited price reactions in Boeing stock of 4.8% and 6.8% relating to the two misleading statements. *See In re Boeing Co.*, 2022 WL 4445459, at *9, *13.

95 *Id.* at *10, *12.

doing so, the agency may have been highlighting the interests of risk-averse bondholders in receiving accurate disclosure about corporate risk.[96]

2. *General Electric*

The SEC may also utilize its avoidance strategy in situations where there is unfavorable judicial precedent standing in the way of a securities fraud claim. A few years before *Boeing*, the SEC entered into a $200 million settlement with the conglomerate General Electric (GE) based on an administrative order which also lacked allegations of scienter.[97] The investigation related to disclosures that allegedly obscured the risk of significant losses reported by GE in 2017 that resulted in the loss of more than half of its market value.[98] The crisis shattered GE's reputation as a company with exceptional management that delivered consistent results for investors.

Unlike many of its major cases alleging that financial reporting was misleading, the SEC did not claim that GE failed to follow Generally Accepted Accounting Principles (GAAP) to hide its poor performance from investors. Instead, it described several practices intended to manipulate non-GAAP measures of performance that were of interest to the market.[99] For example, the company increased its sale of receivables (payments it would collect in the future), to generate more cash immediately.[100] GE also changed estimates concerning its costs and expected losses on health insurance policies to increase its profitability.[101]

Such practices are often described as real earnings management because, unlike decisions to fabricate revenue, they involve real transactions.[102] While the transactions were generally recorded in the proper period, they were often inefficient in that managers would not have chosen to go forward with the transactions absent the desire to create a misleading impression of the company's financial performance. Courts have been reluctant to find that real earnings management violates Rule 10b-5 because

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96 For a discussion of the role of securities litigation in protecting bond investors, see James J. Park, *Bondholders and Securities Class Actions*, 99 MINN. L. REV. 585 (2014).

97 *In re* Gen. Elec. Co., Securities Act Release No. 10899, Exchange Act Release No. 90620, 2020 WL 7265278 (Dec. 9, 2020).

98 *Id.* at *8.

99 *Id.* at *3–4.

100 *Id.* at *12.

101 *Id.* at *5.

102 *See, e.g.*, Beatriz García Osma, Jacobo Gomez-Conde & Ernesto Lopez-Valeiras, *Management Control Systems and Real Earnings Management: Effects on Firm Performance*, MGMT. ACCT. RSCH., June 2022, at 1, 1 (2022) (defining real earnings management as "real actions taken to manage earnings that alter the timing and structure of investment, operating, and financing transactions").

of the difficulty of distinguishing transactions that are made with fraudulent intent from those that are made in good faith.[103]

Because the SEC need not allege scienter to prevail, the SEC has broader ability to proceed in real earnings management cases than private plaintiffs. In the *GE* case, it alleged a number of facts implying that there was fraudulent intent with respect to the company's practices. It asserted that GE's managers sold receivables to boost cash flow despite knowing that the strategy was "not sustainable."[104] The SEC also claimed that the company reduced cost estimates in its insurance business despite knowing that the risk of losses in its insurance portfolio had grown.[105] As it did in the *Boeing* case, the SEC highlighted that GE sold bonds during the relevant period, implying that the higher risk of loss would have been of particular interest to bond investors.[106]

Even with these facts, the SEC may not have alleged scienter against GE because the company's use of real earnings management was longstanding and widely known.[107] As Professor Claire Hill has argued, investors are aware that certain amounts of earnings management occurs in public companies.[108] So long as a company is open about these tactics, the smoothing effect of such management should not substantially distort its market valuation. Moreover, it might have been unfair to say that such practices were motivated by fraudulent intent when the SEC did not file a case concerning similar practices by GE over the years. Given the operational complexity of a conglomerate like GE, it would have been difficult to make the case that the decisions reflected a deceptive scheme rather than a lack of care.

Despite the difficulty of identifying the line between permissible and impermissible earnings management, smoothing can clearly be part of a deceptive scheme. Public companies have an incentive to create the

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103 *See, e.g.*, Greebel v. FTP Software, Inc., 194 F.3d 185, 202–03 (1st Cir. 1999) (noting that earnings management practices only provide a "weak" inference of scienter); *In re* Ashworth, Inc. Sec. Litig., No. 99CV0121-L, 2000 WL 33176041, at *7 (S.D. Cal. July 18, 2000) (finding that acceleration of sales was weak evidence of scienter "[b]ecause there may be a number of legitimate reasons for attempting to achieve sales earlier").

104 *See In re Gen. Elec. Co.*, 2020 WL 7265278, at *6.

105 *Id.* at *8, *10–11.

106 *Id.* at *14; *cf. supra* notes 95–96 and accompanying text (discussing the SEC's administrative order for Boeing).

107 Its practices made the front-page story of the Wall Street Journal in 1994. *See* Randall Smith, Steven Lipin & Amal Kumar Naj, *How General Electric Damps Fluctuations in Its Annual Earnings: It Offsets One-Time Gains with Write-Offs, Times Asset Purchases and Sales*, WALL ST. J., Nov. 3, 1994, at A1.

108 *See* Claire A. Hill, *Why Financial Appearances Might Matter: An Explanation for "Dirty Pooling" and Some Other Types of Financial Cosmetics*, 22 DEL. J. CORP. L. 141, 142 (1997).

impression that their results are less volatile so they can attract risk-averse investors.[109] If corporate managers know their tactics are unsustainable and are substantially likely to result in the reporting of significant losses, there is a case that they acted with scienter. There is an argument that the SEC presented such facts in its complaint against GE. By not charging GE with scienter, the SEC may have missed an opportunity to illustrate how real earnings management can be motivated by fraudulent intent.

3. *Citigroup*

Finally, it is notable that one of the few major cases brought by the SEC against a large financial institution for material misstatements after the 2008 financial crisis did not assert claims under Rule 10b-5. In 2010, the financial conglomerate Citigroup agreed to pay $75 million to settle a case alleging violations of subsection 17(a)(2) of the Securities Act and section 13(a) of the Exchange Act for issuing misleading statements about its exposure to subprime risk.[110] Its CFO and its head of investor relations at the time the statements were released both settled charges of violating section 13(a) of the Exchange Act.[111] Like subsection 17(a)(2), section 13 does not require a showing of scienter.[112] Unlike subsection 17(a)(2), a section 13 violation

[109] *See, e.g.*, Makor Issues & Rts. Ltd. v. Tellabs Inc., 513 F.3d 702, 710 (7th Cir. 2008) (describing impact of misleading investors about volatility).

[110] Press Release, SEC, SEC Charges Citigroup and Two Executives for Misleading Investors About Exposure to Subprime Mortgage Assets (July 29, 2010), https://www.sec.gov/news/press/2010/2010-136.htm [https://perma.cc/4JQ9-EKGE]. Section 13(a) of the Securities Exchange Act reads in relevant part:

> Every issuer of a security registered pursuant to section 78*l* of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—
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> (1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78*l* of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.
>
> (2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

15 U.S.C. § 78m(a).

[111] The CFO paid a penalty of $100,000 and the head of investor relations paid a penalty of $80,000. Press Release, *supra* note 110. It is worth noting that the SEC does not always bring less serious theories of liability against individual defendants. *See, e.g.*, Complaint at 13–14, SEC v. Evoqua Water Tech. Corp. & Imran Parekh, No. 1:23-cv-00105 (D.R.I. Mar. 13, 2023) (charging company with violations of subsections 17(a)(2) and (3) while charging individual defendant with violations of Rule 10b-5 and section 17(a)).

[112] *See, e.g.*, SEC v. McNulty, 137 F.3d 732, 740–41 (2d Cir. 1998) (noting that "scienter is not an element of civil claims under [section 13(b)]").

does not require establishing that a misstatement was material to investors.[113] The SEC's case against Citigroup was one of the first to draw significant attention for its absence of scienter claims.

Towards the start of the 2007 subprime-mortgage market collapse, Citigroup issued statements in investor calls implying that its total subprime exposure was $13 billion.[114] In fact, the bank had exposure of over $50 billion in subprime risk, partly because of obligations to repurchase subprime-related securities it had previously sold to investors.[115] After the company issued the $13 billion figure, a Citigroup executive raised concerns that the statement was misleading because it did not include the full $50 billion in risk.[116] Citigroup ultimately concluded that it did not need to discuss the additional risk because it had not been raised in earlier statements and because it believed the risk of loss with respect to the additional obligations was low.[117]

Given its knowledge of the additional subprime exposure and failure to correct earlier misleading statements, Citigroup arguably acted with an intent to deceive investors. Even if the statement accurately described the reduction of the company's exposure to a certain type of subprime risk, it was still misleading because it failed to inform investors about the company's total subprime exposure—a substantially higher amount. Citigroup should have clarified that its initial statement was not complete and disclosed the additional risk to investors.

On the other hand, Citigroup could argue that it acted in good faith with respect to a complex disclosure. Its statement that a certain type of risk had been reduced to $13 billion was literally true on its face. It was a mistake to not include other subprime risks in the initial disclosure and a worse mistake to not discuss those risks in later disclosure, but the company could arguably justify its decisions because it believed that the mistake was not material, and a correction would only confuse investors.

After Citigroup settled the matter with the SEC, a *Wall Street Journal* article noted that the complaint was ambiguous on the question of whether the company had acted with fraudulent intent.[118] The SEC had not alleged fraudulent intent, but the substantial penalty paid by Citigroup implied that

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[113] *See* Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 34-15570, 16 SEC Docket 1143, at *6 (Feb. 15, 1979).

[114] Complaint at 1, SEC v. Citigroup Inc., No. 1:10-cv-01277 (D.D.C. July 29, 2010).

[115] *Id.*

[116] *Id.* at 15.

[117] *Id.*

[118] Randall Smith, *Parsing the Settlement at Citi: To Bolster Lawsuits, Stockholders and Bondholders Ask: Was Fraud Involved?*, WALL ST. J., Aug. 2, 2010, at C3.

its conduct was deceptive. Because of the SEC's ability to avoid the showing of fraudulent intent required by Rule 10b-5, it was not required to resolve the question of whether Citigroup committed fraud. The SEC's ability to avoid Rule 10b-5 resulted in a mixed message to the public about the meaning of the case.

B. Disagreement

In addition to avoiding doctrinal limitations, the SEC can pursue theories that are contrary to prior judicial precedent. In doing so, it risks the dismissal of its case. In such disagreement cases, the SEC behaves like an entrepreneurial enforcer seeking to stretch the boundaries of the law. However, the SEC is often more successful than private plaintiffs given the agency's reputation as a credible expert on securities law. When the SEC disagrees with a doctrine, it can influence courts to change that doctrine. SEC disagreement with court precedent has been recently evident in cases involving risk disclosures, channel stuffing, and the puffery doctrine.

1. Risk Disclosures

The SEC has expressed disagreement with doctrine governing whether a risk disclosure is misleading. Corporations are required to disclose "material factors" that make investment in their securities "speculative or risky."[119] The SEC requires such risk disclosure so that investors will be on notice of the various considerations that could affect the value of their investment. Corporations also have an incentive to voluntarily disclose a wide variety of risks to preempt arguments that an investor was misled about the nature of an investment.

Plaintiffs often challenge the adequacy of risk disclosures in securities fraud cases. They often argue that a risk disclosure was misleading because it warned of a risk as hypothetical at a time when the risk had been actualized. Companies commonly assert the defense that the risk disclosure was broad enough to sufficiently warn investors about the risk that was actualized. Plaintiffs in turn might respond that the risk disclosure was generic boilerplate that remained the same while the risks faced by the company changed. Companies should be required to update risk disclosures to ensure that such disclosures continue to be accurate. Some courts have faulted companies for failing to update generic cautionary language.[120]

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[119] *See* 17 C.F.R. § 229.105 (2024). Prior to 2020, this provision required disclosure of the "most significant risk factors" rather than "material factors." *See* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63744 (proposed Oct. 8, 2020).

[120] *See, e.g.*, Slayton v. Am. Exp. Co., 604 F.3d 758, 772–73 (2d Cir. 2010) (noting that the defendants' language remained consistent despite their receipt of new information); Asher v. Baxter Int'l

Still, many courts have been reluctant to impose a duty to update on public companies. Because of the plethora of risks that can arise in the course of a company's business, it would be impractical to require companies to constantly revise and fine-tune their disclosure of risk.[121] Risk disclosures are necessarily generic because of the difficulty of identifying every specific risk that could impact a company's stock price.

Despite the questionable status of the duty to update, the SEC continues to bring suits under the theory that companies must update their risk disclosures. In 2019, the SEC sued Facebook for inadequacies in its risk disclosures relating to the misuse of its user data.[122] The company learned that a researcher had sold data on 30 million Facebook users to the political-consulting firm Cambridge Analytica.[123] Despite knowing about the misuse of information, Facebook continued to issue the same generic risk disclosure and did not issue additional disclosures to warn investors. When the sale of data was later revealed, the news harmed Facebook's reputation and triggered a stock price decline.[124] Facebook settled the case for $100 million the same day that it was filed.[125]

In its complaint, the SEC pointed to one of Facebook's risk disclosures that warned investors: "Any failure to prevent or mitigate security breaches and improper access to or disclosure of our data or user data could result in the loss or misuse of such data, which could harm our business and reputation and diminish our competitive position."[126] According to the SEC, this disclosure and others like it were misleading because they "presented the potential for misuse of user data as merely a hypothetical investment risk" when the risk had been actualized.[127] The implication of the SEC's

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Inc., 377 F.3d 727, 734 (7th Cir. 2004) (noting that the defendants' "cautionary language remained fixed even as the risks changed"). These rulings have analyzed the issue in the context of whether a company issued meaningfully cautionary language that would prevent a forward-looking statement from being the basis of Rule 10b-5 liability.

121 *See, e.g.*, *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1432–33 (3d Cir. 1997) (discussing the risks of imposing the duty to update); Stransky v. Cummins Engine Co., 51 F.3d 1329, 1333 (7th Cir. 1995) (limiting liability for forward-looking disclosures).

122 Complaint at 2–3, SEC v. Facebook, Inc., No. 3:19-cv-04241 (N.D. Cal. July 24, 2019).

123 *Id.* at 2.

124 *Id.* at 13. The SEC filed its complaint soon after the FTC announced its vote to approve a $5 billion fine against the company. *See* Cecilia Kang, *F.T.C. Approves Facebook Fine of About $5 Billion*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/technology/facebook-ftc-fine.html [https://perma.cc/4KAD-7PWU].

125 Press Release, SEC, Facebook to Pay $100 Million for Misleading Investors About the Risks It Faced from Misuse of User Data (July 24, 2019), https://www.sec.gov/news/press-release/2019-140 [https://perma.cc/PC47-ZZR5].

126 Complaint at 10, *supra* note 122.

127 *Id.* at 2.

position is that Facebook should have updated its risk disclosures to inform investors that a previously identified risk had actually occurred.[128]

The case was filed in the Northern District of California—a court with precedent contrary to the SEC's position. A 2007 decision in that district rejected the argument that a disclosure was misleading because it stated that risks "may" affect a company's results instead of stating that risks "are" affecting the company's results.[129] A 2016 decision by the Ninth Circuit held that disclosure of a risk factor that "could" have affected the ability of loan customers to repay was not misleading simply because "that risk had already come to fruition."[130] The SEC may have believed that it could distinguish these cases if it had to litigate against Facebook, but even so, the agency faced the difficult task of advancing the claim in a jurisdiction that previously rejected its theory.

Not long after it settled the *Facebook* matter, the Northern District of California rejected the SEC's theory in a case it filed against Volkswagen (VW), the German automobile manufacturer.[131] VW had disclosed the risk that "[a] decline in our product quality or consumer perception . . . could have a material adverse effect on our general business activities . . . and results of operations."[132] This statement was allegedly misleading because at the time it was made, the company was engaged in a scheme that portrayed its cars as clean enough to pass emissions tests when in fact they were not clean and were instead rigged to evade government emissions testing. The SEC argued that VW's risk disclosures were misleading because "they leave the reader with the false impression that the stated risks are mere future possibilities despite the fact that those risks have already begun to materialize."[133] Unlike Facebook, VW did not immediately settle the case and instead filed a motion to dismiss. The district court cited both district and appellate court precedent in dismissing the SEC's claim.[134]

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128 The SEC took a similar position a year before in a case arising out of a securities breach involving Yahoo. The Commission argued that the company's risk disclosure warning that "[i]f our security measures are breached, our products and services may be perceived as not being secure," was rendered misleading by a data breach that affected 500 million accounts. *In re* Altaba, Inc., f/d/b/a Yahoo! Inc., Securities Act Release No. 10485, Exchange Act Release No. 3937, 2018 WL 1919547, at *5, *9 (Apr. 24, 2018).

129 *In re* LeapFrog Enters., Inc. Sec. Litig., 527 F. Supp. 2d 1033, 1048 (N.D. Cal. 2007).

130 Lloyd v. CVB Fin. Corp., 811 F.3d 1200, 1207 (9th Cir. 2016).

131 *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 480 F. Supp. 3d 1050, 1061 (N.D. Cal. 2020).

132 *Id.*

133 *Id.*

134 *Id.* at 1055–56, 1061. Not all of the SEC's claims against VW were dismissed by the court, so the litigation continued.

Even with its loss in *VW*, the SEC continued to assert the same theory in other cases involving risk disclosures. In 2021, it agreed to settle a case alleging material misstatements against Pearson, an educational company.[135] The company had warned of a "[r]isk of a data privacy incident" in a boilerplate disclosure that remained unchanged even though it was already aware of a cyber attack that accessed and downloaded student data.[136] While Ninth Circuit precedent would not have governed that case, its filing evidences the SEC's persistence in disagreeing with the prior cases.[137]

The SEC's position was vindicated in 2023. The Ninth Circuit reversed the district court's earlier dismissal of a private securities class action against Facebook which alleged claims similar to those the SEC had settled for $100 million.[138] The court agreed that failure to disclose the actualization of a hypothetical risk of a data breach was misleading.[139] It based its decision partly on a 2021 decision involving a cyber security breach at Alphabet.[140] In that case, the Ninth Circuit concluded that a risk disclosure that spoke "entirely of as-yet-unrealized risks and contingencies" without warning investors that "some of these risks may have already come to fruition" could be misleading.[141] Notably, there was a dissenting opinion in the Ninth

135 *In re* Pearson PLC, Securities Act Release No. 10963, Exchange Act Release No. 92676, 2021 WL 3627064 (Aug. 16, 2021).

136 *Id.* at 3.

137 The SEC made similar allegations against the drug company Mylan. In its complaint, the SEC alleged that Mylan's risk disclosure that "a governmental authority may take a position contrary to a position we have taken" with respect to the classification of a drug was misleading because the government had already questioned Mylan's classification of one of its drugs. *See* Complaint at 11, SEC v. Mylan N.V., No. 1:19-cv-02904 (D.D.C. Sept. 27, 2019). Mylan paid $30 million to resolve the matter. Press Release, SEC, Mylan to Pay $30 Million for Disclosure and Accounting Failure Relating to EpiPen (Sept. 27, 2019), https://www.sec.gov/newsroom/press-releases/2019-194 [https://perma.cc/JYW5-VRCZ].

It is notable that the SEC did not charge Facebook, Pearson, or Mylan with scienter and proceeded only pursuant to subsections 17(a)(2) and (3). Given the uncertain validity of its position that risk disclosures must be updated, and the fact that some courts had held there was no such duty, the SEC may have concluded that it would not have been fair to conclude that the failure to update was motivated by fraudulent intent. It may have been that these parties noted the adverse precedent and insisted on such weaker charges.

138 *In re* Facebook, Inc. Sec. Litig., 87 F.4th 934 (9th Cir. 2023), *cert. granted in part sub nom.*, Facebook, Inc. v. Amalgamated Bank, No. 23-980, 2024 WL 2883752 (mem.).

139 *In re Facebook, Inc.*, 87 F.4th at 950.

140 *Id.* at 948–52.

141 *In re* Alphabet, Inc. Sec. Litig., 1 F.4th 687, 703 (9th Cir. 2021) (quoting Berson v. Applied Signal Tech. Inc., 527 F.3d 982, 985–87 (9th Cir. 2008)).

Circuit's Facebook decision.[142] One judge argued that the failure to update the risk was not misleading because the risk had not in fact fully actualized.[143]

The SEC has navigated a complex landscape in its risk disclosure cases. If Facebook had decided to litigate, it could have cited similar precedent that rejected the SEC's theory. Indeed, in *VW*, the SEC suffered an embarrassing loss in an important case. Ultimately, the SEC's strategy paid off as the Ninth Circuit issued subsequent opinions that adopted the SEC's view of the law. It is possible that the Ninth Circuit distanced itself from its prior cases because of the persistence of the SEC and private plaintiffs in arguing for a duty to update risk disclosure.

The SEC also advanced its views on risk disclosure in a case where a material risk had not yet been actualized. In 2023, the SEC filed a case against Activision for its failure to maintain internal controls to monitor risk related to its "ability to identify, attract, hire, retain, motivate, and utilize the abilities of qualified personnel."[144] Unlike its cases against VW and Facebook, the SEC did not argue that Activision had issued a misleading risk disclosure. Instead, it claimed that the company did not "collect or analyze employee complaints related to workplace misconduct" and thus could not have adequately monitored such risk.[145] It also found that Activision made employees sign separation agreements requiring them to notify the company of requests from an administrative agency concerning a complaint.[146] The SEC's action claimed that such a requirement would undermine its whistleblower program, which incentivizes employees to come forward

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142 *In re Facebook, Inc.*, 87 F.4th at 958–60 (Bumatay, J., concurring in part and dissenting in part).

143 The Supreme Court granted certiorari to review the Ninth Circuit's decision. Facebook, Inc. v. Amalgamated Bank, 144 S. Ct. 2629 (2024). The SEC has continued to advance its risk disclosure misstatement theory in cybersecurity enforcement actions. In March 2023, it announced the settlement of claims brought under subsections 17(a)(2) and (3) by the software company Blackbaud. The SEC alleged a disclosure that "[a] compromise of our data security that results in customer or donor personal or payment card data being obtained by unauthorized persons could adversely affect our reputation with our customers" was misleading because it "omitted the material fact that such customer or donor personal data" had already been "exfiltrated" by a cybercriminal. *See In re* Blackbaud, Inc., Securities Act Release No. 11165, Exchange Act Release No. 97098, 2023 WL 2455417, at *4 (Mar. 9, 2023). In October 2023, it filed a case alleging securities fraud under multiple provisions, including Rule 10b-5, against the software company SolarWinds. The company's registration statement for an initial public offering contained a "generic and hypothetical" version of a "cybersecurity risk disclosure" that did not change "despite both ongoing problems and the increasing red flags in 2020 that SolarWinds was not only being specifically targeted for a cyberattack, but that the attackers had already gotten in." Complaint at 3–4, SEC v. SolarWinds Corp., No. 1:23-cv-9518 (S.D.N.Y. Oct. 30, 2023), 2024 WL 3461952. In a notable decision, a federal district court dismissed substantial portions of the SEC's complaint. *See SolarWinds Corp.*, 2024 WL 3461952.

144 *In re* Activision Blizzard, Inc., Exchange Act Release No. 96796, 2023 WL 1765354, at *3 (Feb. 3, 2023) (quoting Activision's Form 10-Ks for fiscal years 2017–2019).

145 *Id.* at *3–4.

146 *Id.* at *4–5.

with evidence of securities law violations, by deterring employees from communicating with the agency.[147] This case is notable in part because it presumes that workplace violations would be relevant not only to government agencies that regulate workplace misconduct, but to an agency that regulates disclosure to investors.

The SEC cited Activision for a violation of SEC Rule 13a-15(a), which requires a public company to maintain "disclosure controls and procedures."[148] Rather than point to a particular disclosure that was materially misleading,[149] the SEC faulted Activision for not putting in controls that would flag that its disclosure had become misleading. Like other provisions passed pursuant to section 13 of the Securities Exchange Act, there is no requirement that the SEC establish scienter to find a violation of Rule 13a-15(a).[150] There were no allegations indicating that the failure to implement controls was part of a deceptive scheme. Despite not describing a materially misleading statement and fraudulent intent in its administrative order, the SEC required Activision to pay a substantial $35 million fine to resolve the matter.[151] The amount of the fine perhaps reflected the SEC's belief that Activision's conduct was not simply negligence.

The SEC has thus advanced its theory that risk disclosures can be materially misleading, both by pointing to risk disclosures that have become misleading and by making the broader point that companies should have controls in place to monitor the continued validity of its risk disclosures. In doing so, the agency has taken on positions in tension with prior decisions dismissing private litigation advancing a similar theory.

2. *Channel Stuffing*

The SEC has also expressed disagreement with federal courts' reluctance to find so-called "channel stuffing" (a form of real earnings management) misleading under the securities laws.[152] Courts have described channel stuffing as "inducing purchasers to increase substantially their purchases before they would, in the normal course, otherwise purchase products from the company" in order to "shift[] earnings into earlier

[147] *Id.* at *5.

[148] 17 C.F.R. § 240.13a-15(a) (2024).

[149] Indeed, the SEC acknowledged that it was "not aware of any specific instances in which a former Activision Blizzard employee was prevented from communicating with Commission staff about potential violations of securities laws or in which Activision Blizzard took action to enforce the notification clause or otherwise prevent such communications." *In re Activision Blizzard, Inc.*, 2023 WL 1765354, at *5.

[150] *See* cases cited *supra* note 111–112.

[151] *In re Activision Blizzard, Inc.*, 2023 WL 1765354, at *6.

[152] *In re* Under Armour, Inc., Securities Act Release No. 10940, Exchange Act Release No. 91741, 2021 WL 1737508 (May 3, 2021).

quarters."[153] Like an accounting fraud where a company reports sales earlier than permitted by accounting rules, channel stuffing allows companies to report higher revenue and income to persuade investors that the company's business is growing and thus warrants a high market valuation.

With channel stuffing, however, the company does not issue an affirmative misstatement to investors. In an accounting fraud, a public company publishes financial statements that are incorrect under accounting rules. There is a straightforward misstatement in such a case because public companies affirmatively represent that their financial reports will follow GAAP.[154] If a company misrepresents its compliance with GAAP, the market will rely on the false assumption that its results are comparable to those of companies that followed GAAP. In contrast, channel stuffing involves sales that have actually occurred and can be properly recorded under GAAP in the period that they were completed. In the absence of a clear accounting violation, plaintiffs must rely on the more tenuous argument that such tactics are misleading because investors may want to know that certain sales are the result of a concerted effort to push sales earlier to report higher revenue.

In a 2021 case it settled with the sports-apparel company Under Armour, the SEC argued that the company's channel stuffing was materially misleading. The company had pushed sales to earlier periods to meet its projected 20% annual revenue growth.[155] In that case, the SEC was careful to specify that it was not alleging accounting misstatements against the company. In a footnote in its administrative order, the agency explained that it did "not make any findings that revenue from these sales was not recorded in accordance with generally accepted accounting principles ("GAAP")."[156] *Under Armour* thus squarely presented a fact pattern where the SEC targeted channel stuffing, independent from accounting fraud, as being misleading.

Like other forms of real earnings management, it is difficult to distinguish improper channel stuffing from the proper exercise of discretion by corporate managers. Encouraging sales at the end of the quarter or year to meet performance targets is a common practice. Companies often offer year-end discounts to customers or incentives for salespersons to boost sales. If they are legitimate efforts to move inventory, there is "nothing inherently

[153] Greebel v. FTP Software, Inc., 194 F.3d 185, 202 (1st Cir. 1999); *see also* Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998) (defining channel stuffing as "the oversupply of distributions in one quarter to artificially inflate sales, which will then drop in the next quarters as distributors no longer make orders").

[154] In contrast, public companies do not affirmatively represent that they will refrain from channel stuffing tactics.

[155] *In re Under Armour, Inc.*, 2021 WL 1737508, at *5.

[156] *Id.* at *2 n.2.

improper in pressing for sales to be made earlier."[157] To the extent that such practices are common, and investors are aware of them, it is difficult for them to argue that they were defrauded.[158]

The Supreme Court has described some channel stuffing as legitimate. In *Tellabs, Inc. v. Makor Issues & Rights*, the Court concluded that offering discounts to incentivize purchases was generally not problematic. It distinguished between illegitimate channel stuffing, which includes "writing orders for products customers had not requested," from legitimate channel stuffing, which can involve "offering customers discounts as an incentive to buy."[159] On remand, the Seventh Circuit observed that "[a] certain amount of channel stuffing could be innocent and might not even mislead."[160]

The SEC's case against Under Armour largely targeted the type of sales incentives that the Supreme Court viewed as legitimate in *Tellabs*. Under Armour asked various customers that had ordered its equipment for delivery in later periods to accept such equipment earlier so it could meet the market's projections.[161] It persuaded customers to take delivery sooner in part by offering sales incentives.[162] The SEC did not describe other allegations such as unsolicited orders or the unconditional right to return orders that courts have viewed as making channel stuffing problematic.[163] The SEC thus appears to have taken the position that practices viewed as acceptable by the Supreme Court could be misleading.

While arguably in tension with precedent, the SEC's position was not completely unsupported by existing case law. The SEC has successfully litigated channel stuffing claims in the courts from time to time.[164] Some

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[157] *Greebel*, 194 F.3d at 202.

[158] *In re* ICN Pharmaceuticals, Inc., Sec. Litig., 299 F. Supp. 2d 1055, 1062 (C.D. Cal. 2004).

[159] Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 325 (2007).

[160] Makor Issues & Rts., Ltd. v. Tellabs Inc., 513 F.3d 702, 709 (7th Cir. 2008).

[161] *In re Under Armour, Inc.*, 2021 WL 1737508, at *3.

[162] *Id.*

[163] *See, e.g.*, *Makor Issues & Rts., Ltd.*, 513 F.3d at 710 (noting "huge number of returns" as evidencing "that the purpose of the stuffing was to conceal the disappointed demand for the product rather than to prod distributors to work harder to attract new customers"); *In re* Hain Celestial Grp. Inc. Sec. Litig., No. 2:16-CV-04581, 2022 WL 18859055, at *21 (E.D.N.Y. Nov. 4, 2022) (emphasizing abuse of unconditional right to return).

[164] SEC v. Winemaster, 529 F. Supp. 3d 880, 916 (N.D. Ill. 2021); SEC v. Dunn, 587 F. Supp. 2d 486, 502–05 (S.D.N.Y. 2008). In one case, the SEC won a settlement based partly on a channel stuffing theory, but a claim asserted by a private plaintiff that the channel stuffing violated Rule 10b-5 was dismissed for failure to adequately allege scienter. *Compare* Complaint, SEC v. Bristol-Myers Squibb Co., No. 04-3680 (D.N.J. Aug. 4, 2004), *and* Press Release, SEC, Bristol-Myers Squibb Company Agrees to Pay $150 Million to Settle Fraud Charges (Aug. 4, 2004), https://www.sec.gov/news/press/2004-105.htm [https://perma.cc/5D32-MQXG], *with In re* Bristol-Myers Squibb Sec. Litig., 312 F. Supp. 2d 549, 566–68 (S.D.N.Y. 2004). It has also alleged channel stuffing in settled administrative proceedings.

courts have found that channel stuffing can be deceptive if it involves a substantial amount of a company's revenue. In one case, a court permitted a securities class action to proceed when channel stuffing affected $50–70 million of a company's inventory and 35% of its revenue.[165] In *Under Armour*, the company moved forward $408 million in orders.[166] However, the impact of its channel stuffing only affected between 4–13% of its quarterly revenue. Some courts have also found that channel stuffing can make misleading a company's statements representing there was "strong consumer demand" because it did not disclose that its sales growth "was achieved in significant part by the offer of unsustainable channel stuffing incentives."[167] The SEC made a similar argument that Under Armour violated disclosure rules by remaining silent about its channel stuffing practices.

The SEC itself may have viewed its case as being on the weaker side. It accepted what would be considered these days to be a relatively small settlement of $9 million, and it characterized the case as involving a "disclosure failure."[168] It did not charge Under Armour under Rule 10b-5, which would have required a showing of fraudulent intent. Given some uncertainty about whether Under Armour's channel stuffing was abusive, it might have been difficult for the SEC to prove that the company acted with scienter. The purpose of the settlement may have been to signal the SEC's interest in scrutinizing a wider variety of channel stuffing practices than it has in the past.

The SEC's position in *Under Armour* affected a federal court's decision in concurrent litigation against the company by private plaintiffs. A district

See, e.g., *In re* Bayerische Motoren Werke Aktiengesellschaft, BMW of N. Am., LLC, Securities Act Release No. 10850, 2020 WL 5746879, at *2 (Sept. 24, 2020) (alleging company increased sales "toward the end of a given month, often on the last day" to meet targets); *In re* Marvell Tech. Grp., Ltd., Securities Act Release No. 10684, Exchange Act Release No. 86971, 2019 WL 4447393, at *2 (Sept. 16, 2019) (alleging company executed "plan to accelerate, or pull-in, sales that had originally been scheduled for future quarters" to meet projections).

165 Okla. Firefighters Pension & Ret. Sys. v. Lexmark Int'l, Inc., 367 F. Supp. 3d 16, 26, 38 (S.D.N.Y. 2019). In another case, the court did not permit a securities class action to proceed when it did not impact the company's revenue by more than 5%. *In re* Novatel Wireless Sec. Litig., 830 F. Supp. 2d 996, 1015 (S.D. Cal. 2011).

166 *In re Under Armour, Inc.*, 2021 WL 1737508, at *2.

167 *In re* Hain Celestial Grp., Inc. Sec. Litig., 20 F.4th 131, 137 (2d Cir. 2021).

168 Press Release, SEC, SEC Charges Under Armour Inc. with Disclosure Failures (May 3, 2021), https://www.sec.gov/news/press-release/2021-78 [https://perma.cc/KW62-UY6S]. Twenty years ago, a $10 million penalty against Xerox was viewed as a substantial amount. However, in an era where it is not unusual to see penalties exceed $100 million, a $9 million penalty seems modest.

court initially dismissed a securities class action against Under Armour.[169] The complaint in that case did not allege channel stuffing and mainly alleged that the company knew that statements about its revenue growth were false. The court then reconsidered its decision after the *Wall Street Journal* released information that Under Armour was under SEC investigation.[170] It eventually reversed its earlier dismissal, finding sufficient facts to support that the company's channel stuffing resulted in "a misleading impression of how Under Armour was meeting or beating analysts' revenue estimates."[171] In reconsidering the earlier dismissal, it cited the factual allegations in the SEC's order and took judicial notice of the order.[172] It is significant that while the SEC did not allege that Under Armour acted with scienter, the securities class action alleged claims under Rule 10b-5.[173]

3. Puffery

The SEC also disagrees with the federal courts about the scope of the puffery doctrine, which holds that certain statements are too ambiguous to be actionable. Any securities fraud claim must point to a disclosure by the defendant that is materially misleading.[174] The strongest cases identify a specific statement by the defendant that is demonstrably false. If a company represents that it earned $100 million in annual revenue when, in fact, it earned only $50 million, it is clear there is a misstatement that can serve as a basis for a securities fraud claim. When plaintiffs are unable to identify such a specific statement, they may argue that more general statements issued by the company deceived investors. Such cases are weaker because the meaning of a broad statement is often unclear, and thus, it is more difficult to prove its falsity.

Federal courts often use the puffery doctrine to dismiss securities class actions when they only point to vague rather than specific corporate

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[169] *In re* Under Armour Sec. Litig., 342 F. Supp. 3d 658, 669, 694 (D. Md. 2018) (dismissing the complaint without prejudice). The district court permitted the plaintiff to amend its complaint and then granted the defendant's motion to dismiss the amended complaint. *See In re* Under Armour Sec. Litig., 409 F. Supp. 3d 446, 463 (D. Md. 2019).

[170] *In re* Under Armour Sec. Litig., No. RDB-17-0388, 2020 WL 363411, at *5 (D. Md. Jan. 22, 2020) (finding that new evidence required the prior judgment to be vacated and remanded).

[171] *In re* Under Armour Sec. Litig., 540 F. Supp. 3d 513, 521–22, 523 (D. Md. 2021) (quoting *In re* Under Armour, Inc., 2021 WL 1737508, at *9 (May 3, 2021) (order instituting proceedings)).

[172] *Id.* at 521–22.

[173] Consolidated Third Amended Complaint for Violations of the Federal Securities Laws at 1, *In re* Under Armour Sec, Litig., 540 F. Supp. 3d 513 (No. RDB-17-0388).

[174] *See, e.g.*, Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 157 (2008) (describing elements of a Rule 10b-5 claim as: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation").

statements.[175] Many of these cases arise out of a corporate scandal that creates bad publicity and regulatory scrutiny for the company. Because of the wide range of activities that can trigger a scandal, it is unlikely that the corporation made a specific representation about the specific risk resulting in the scandal. Plaintiffs will thus argue that a company's prior claims that it has high standards of ethics and compliance are shown to be false by the scandal. Such a theory often falls afoul of the "well-established" rule "that general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery.'"[176]

Courts scrutinize broad corporate statements under the puffery doctrine because they are wary of using securities fraud rules to police every form of corporate misconduct that could create losses for investors. The puffery doctrine helps ensure that not every bad corporate action triggers securities law liability. Courts argue that investors should understand that general statements of compliance are aspirational and that not every corporate scandal is preventable.[177] The concern is that without some way of limiting the universe of statements characterizable as misleading, the costs of defending securities class actions might become unmanageable. Courts have thus required that a statement be "capable of objective verification" to be the basis of a Rule 10b-5 claim.[178]

The SEC has filed several notable enforcement actions against public companies that primarily relied on statements that are arguably puffery. In the *VW* complaint, the SEC based its case against the automobile manufacturer on statements in bond-offering documents about "its cars' compliance with environmental regulations and its commitment to protecting the environment."[179] In a case against the Brazilian mining company Vale, the SEC alleged the company's claim that it "adhered to the 'strictest' and best international practices for dam safety and 'rigorously' complied with regulatory requirements" was misleading in light of the actual

[175] *See, e.g.*, *In re* Vivendi, S.A. Sec. Litig., 838 F.3d 223, 245 (2d Cir. 2016) (describing puffery as including "'statements [that] are too general to cause a reasonable investor to rely upon them' and thus 'cannot have misled a reasonable investor'" (citation omitted) (first quoting ECA, Loc. 134 IBEW Joint Pension Tr. v. JP Morgan Chase, 553 F.3d 187, 206 (2d Cir. 2009); then quoting San Leandro Emergency Med. Plan v. Philip Morris, 75 F.3d 801, 811 (2d Cir. 1996))).

[176] City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014).

[177] *See, e.g.*, Howard v. Arconic Inc., 395 F. Supp. 3d 516, 549 (W.D. Pa. 2019) (noting that aspirational statements about safety were "not a guarantee that no safety issues would occur"); *see also In re* Ford Motor Co. Sec. Litig., 381 F.3d 563, 570 (6th Cir. 2004) (concluding that statements were "mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they are misleading").

[178] Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 606 (9th Cir. 2014).

[179] Complaint & Demand for Jury Trial at 4, SEC v. Volkswagen Aktiengesellschaft, No. 19-civ-01391 (N.D. Cal. Mar. 14, 2019).

condition of its dams, one of which collapsed and caused significant environmental damage.[180] In a case it settled against Danske Bank, the SEC alleged that a disclosure that the Danish bank had "a comprehensive set of processes to support all risk management disciplines" was misleading when it provided services to suspicious customers that may have been engaging in money laundering.[181] The statement by Boeing that its 737 MAX "is as safe as any airplane that has ever flown the skies" could also be described as puffery.[182]

By consistently citing ambiguous statements about compliance and product quality in its complaints, the SEC has expressed its view that the puffery doctrine should not serve as an insurmountable barrier to securities fraud liability. The agency's position is that even vague statements that should be discounted by investors can be deceptive depending on the context.[183] The SEC's cases in this space have been carefully developed to show that even while the statements at issue were vague, under the circumstances they should not be barred by the puffery doctrine. Some courts have agreed. For example, in a securities class action brought by investors against VW that targeted the same statements as the SEC's case, the district court found that the puffery doctrine did not bar Rule 10b-5 claims against the company.[184]

The SEC's message on puffery is in tension with the Supreme Court's view of what it regards as "generic" statements of compliance. In *Arkansas Teachers Retirement System v. Goldman Sachs*, plaintiffs brought a securities class action alleging that the investment bank's statements about its ability to manage conflicts of interest were materially misleading and violated Rule 10b-5 in light of the discovery of a conflicted transaction that resulted in a $500 million SEC penalty.[185] The bank had sold a collateralized debt obligation backed by mortgages selected by an investor it knew would

180 Complaint & Demand for Jury Trial at 4, SEC v. Vale S.A., No. 22-cv-2405 (E.D.N.Y. Apr. 28, 2022).

181 Complaint & Demand for Jury Trial at 4, SEC v. Danske Bank A/S, No. 22-CV-10509 (S.D.N.Y. Dec. 13, 2022).

182 *In re* Boeing Co., Securities Act Release No. 11105, 2022 WL 4445459, at *2 (Sept. 22, 2022).

183 *See, e.g.*, Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967, 971–73 (2019) (describing difficulty the courts have had in consistently applying puffery doctrine).

184 *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., No. 2672-CRB, 2017 WL 3058563, at *7–8 (N.D. Cal. July 19, 2017). The decision was issued before the SEC filed its complaint, which may have supported the SEC's decision to move forward with the case. As noted earlier, the district court later dismissed the parts of the SEC's complaint alleging that VW's disclosure about a hypothetical risk of a problem with its products was misleading in light of VW's knowledge that the risk had been actualized.

185 Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 594 U.S. 113, 116 (2021).

short the investment. Goldman arguably favored the interests of this investor over the interests of the purchasers of the mortgage securities.

Goldman argued that the case should be dismissed because even if its statements about conflict management were not true, those statements did not impact its stock price. In considering this price impact defense,[186] the Supreme Court in 2021 instructed the lower court to consider whether the generic nature of the conflicts statements at issue meant that they were unlikely to affect its stock.[187] On remand, the lower court found that the statements could have impacted investor decisions,[188] but the Second Circuit reversed and dismissed the securities class action on the ground that there was insufficient evidence that the statements affected Goldman's stock price.[189]

Unlike private plaintiffs, who cannot proceed with a securities fraud claim if the defendant establishes the misstatements at issue did not impact the company's stock price, the SEC need not establish price impact.[190] The agency is thus able to bring cases based on "generic" statements of compliance despite the skepticism of some courts about whether such statements are actionable. On the other hand, the SEC's position that such generic statements can be materially misleading is in tension with the Supreme Court's skepticism about the market impact of such statements in *Goldman*. To the extent that it continues to bring cases based on disclosures that are arguably puffery, the SEC risks adverse decisions. The agency's willingness to assume that risk illustrates its entrepreneurial approach to enforcement.

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Ultimately, the SEC's avoidance of scienter requirements under Rule 10b-5 and willingness to express disagreement with prior court precedent evidence its increasingly entrepreneurial approach to enforcement. Like a private plaintiff, the SEC is not deterred by difficult cases or bad case law. Rather, the SEC is willing to aggressively pursue cases against a wide variety of material misstatements.

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186 In *Halliburton Co. v. Erica P. John Fund, Inc.*, the Supreme Court created a defense to the fraud-on-the-market presumption, which permits plaintiffs to certify a class action on the ground that they uniformly relied on the integrity of a stock's market price. 573 U.S. 258, 276 (2014). If the defendant can prove that the misstatements at issue did not impact the stock price, it can rebut the presumption and the case cannot go forward as a class action. *Id.* at 279–84.

187 *Goldman*, 594 U.S. at 126–27.

188 *See In re* Goldman Sachs Grp., Inc. Sec. Litig., 579 F. Supp. 3d 520, 535–38 (S.D.N.Y. 2021).

189 Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc., 77 F.4th 74, 105 (2d Cir. 2023).

190 *Halliburton*, 573 U.S. at 279–84.

III. WHAT MOTIVATES THE SEC?

The previous Part established that it is now more difficult to describe the SEC as a cautious enforcer that only brings cases that are straightforward on the merits. One explanation for the evolution of SEC enforcement is that the increasing importance of penalties has made the agency more of an entrepreneurial enforcer. Because the collection of penalties is a measure of its success, the SEC has an incentive to avoid doctrinal limitations to increase its collections. A second explanation is that the SEC has become more entrepreneurial in implementing an ambitious regulatory agenda. The SEC can use enforcement to change industry norms and to build support for increasing disclosure obligations.

A. Penalties

The first explanation for the SEC's increasingly entrepreneurial enforcement is the incentive to collect penalties. In 1980, when the Supreme Court gave the SEC the option to proceed under subsections 17(a)(2) and (3) against material misrepresentations without establishing scienter, the agency did not yet have the power to impose penalties for securities law violations. Congress did not grant the SEC the general authority to seek penalties until 1990.[191] Furthermore, the agency did not begin imposing substantial penalties on public companies until the early 2000s.[192] It is now routine for the SEC to impose large penalties in cases where it does not cite a provision that requires a showing of scienter.[193] Considering the Supreme Court's skepticism towards financially motivated plaintiffs in *Ernst & Ernst*, it may have been more reluctant to read subsections 17(a)(2) and (3) as only requiring a showing of negligence if it had known that the SEC would routinely use these provisions to collect substantial penalties.

The SEC now highlights on an annual basis the total monetary sanctions it imposed in resolved enforcement cases for the year. For example, in its 2022 enforcement report, it noted that the \$4.194 billion in penalties it had ordered were "the highest on record."[194] The emphasis on monetary sanctions

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[191] Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 101, 104 Stat. 931, 932 (codified as amended at 15 U.S.C. § 78a).

[192] *See* PARK, *supra* note 37, at 28.

[193] *See, e.g.*, David Rosenfeld, *Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis*, 22 U. PA. J. BUS. L. 135, 167–68 (2019) (reporting that from fiscal years 2010 to 2018, almost 90% of SEC enforcement cases without a scienter allegation resulted in the imposition of a penalty, while a penalty was assessed in only about 70% of SEC enforcement cases with a scienter allegation).

[194] Press Release, SEC, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), https://www.sec.gov/news/press-release/2022-206 [https://perma.cc/5LXE-Y9EY]. The Commission

has not been limited to periods when the SEC's chair is a Democrat. In 2020, when the SEC's chair was a Republican, the agency reported that the total amount of penalties and disgorgement it ordered was "a record amount for the Commission."[195] In its enforcement reports, the agency often notes when the amount ordered represents an increase from the prior year.[196] The SEC will also acknowledge when the amount of penalties it ordered in a year declined from the prior year.[197]

Moreover, Congress now expects that the SEC will impose penalties through enforcement. The Dodd–Frank Act included a provision requiring the agency to compensate, as a percentage of the penalty imposed, any whistleblower who "voluntarily provided original information to the Commission that led to" a "successful" SEC action resulting in "monetary sanctions exceeding $1,000,000."[198] In order to continue incentivizing whistleblowers to provide information, the SEC now has reason to seek greater penalties that will reward valuable information. It now often highlights the increasing amounts it awarded whistleblowers.[199] Professor Alexander Platt has shown how a network of attorneys—some of whom previously worked at the SEC—has developed to take advantage of the potential monetary rewards.[200] The whistleblower program illustrates how penalties have become an expected output of SEC enforcement.

also collected about $2 billion in disgorgement that year. *Id.* The following year, 2023, the SEC noted that its collection of "$4.949 billion in financial remedies" was "the second highest amount in SEC history, after the record-setting financial remedies ordered in fiscal year 2022." Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2023 (Nov. 14, 2023), https://www.sec.gov/news/press-release/2023-234 [https://perma.cc/P7RR-KUQA].

195 Press Release, SEC, SEC Division of Enforcement Publishes Annual Report for Fiscal Year 2020 (Nov. 2, 2020), https://www.sec.gov/news/press-release/2020-274 [https://perma.cc/W44H-MAMQ] (reporting that $4.68 billion in penalties and disgorgement was "a record amount for the Commission").

196 *See, e.g.*, Press Release, SEC, SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238 [https://perma.cc/Y59A-QY3H] (reporting an increase of 33% in penalties collected from the prior year); DIV. OF ENF'T, SEC, 2018 ANNUAL REPORT 11 (2018) (noting penalties and total amount collected was an increase from the prior year); Press Release, SEC, SEC Announces Enforcement Results for FY 2013 (Dec. 17, 2013), https://www.sec.gov/news/press-release/2013-264 [https://perma.cc/4N55-YJSU] (reporting increase in penalties of 10% compared to prior year).

197 *See* DIV. OF ENF'T, SEC, ANNUAL REPORT: A LOOK BACK AT FISCAL YEAR 2017, at 7 (2017).

198 Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(a)–(b).

199 *See, e.g.*, SEC OFF. OF THE WHISTLEBLOWER, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2023, at 1 (2023) (reporting that it awarded $600 million, "the highest annual total by dollar value in the Program's history").

200 *See* Alexander I. Platt, *The Whistleblower Industrial Complex*, 40 YALE J. ON REGUL. 688, 693 (2023).

The SEC faces political pressure to report strong enforcement numbers.[201] Reporting high penalties implies that the SEC is not only bringing large numbers of routine cases but that these cases are consequential. Multi-million-dollar penalties signal that the agency's cases are challenging, involve egregious misconduct, and are against powerful institutions that impact a significant number of investors. Additionally, achieving substantial penalties could help the agency preempt criticism when it fails to detect a major securities fraud. The failure to prevent a significant corporate scandal results in Congressional scrutiny and questions about whether the SEC has been captured by industry.[202] If its monetary sanctions decline substantially, the SEC will leave itself vulnerable to the criticism that its enforcement efforts have become less vigorous.

The agency's shift to a more entrepreneurial approach in enforcement cases against large corporations for material misstatements is partly explainable by pressure on the SEC to generate monetary penalties. Such cases are typically only a minority of the enforcement matters brought by the SEC, but they often involve corporate defendants that can pay substantial amounts to resolve a matter.[203] The annual penalties that the SEC imposes for corporate misreporting are far from a majority of the penalties it collects in a year,[204] but as shown in Table 1, corporate material misstatement cases are consistently noted in the agency's annual enforcement reports. Many of the highlighted cases impose substantial penalties despite the lack of an allegation of scienter. By avoiding limitations on Rule 10b-5, the SEC can bring more cases and resolve them faster, so it has a steady stream of significant corporate misstatement cases to report.

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201 *See* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 908–10 (2016) (describing political significance of SEC enforcement).

202 *See, e.g.*, Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 968, 124 Stat. 1376, 1914 (2010) (mandating study of "SEC Revolving Door").

203 *See, e.g.*, Urska Velikonja, *Public Enforcement After* Kokesh*: Evidence from SEC Actions*, 108 GEO. L.J. 389, 428 (2019) (finding that public companies paid bulk of SEC civil fines 2010–2018).

204 The SEC often imposes substantial fines in a variety of settings such as misconduct by broker–dealers. *See, e.g.*, *In re* Morgan Stanley & Co., Exchange Act Release No. 99336, 2024 WL 147833 (Jan. 12, 2024) (ordering approximately $249 million in disgorgement and penalties against broker–dealers for securities law violations relating to block trading).

TABLE 1: SEC ENFORCEMENT CASES CITED IN ANNUAL REPORTS FROM 2010 TO 2023 WITH: (1) CORPORATE DEFENDANT; (2) MATERIAL MISSTATEMENT; (3) NO SCIENTER CHARGE; AND (4) PENALTY OF $5,000,000 OR MORE

Reporting Year	Defendant	Penalty
2023	Fluor Corp.	$14,500,000
2023	Newell Brand, Inc.	$12,500,000
2023	Spruce Power	$11,000,000
2022	Boeing	$200,000,000
2022	Compass Minerals	$12,000,000
2022	NVIDIA	$5,500,000
2021	General Electric	$200,000,000
2021	Kraft Heinz	$62,000,000
2021	Under Armour	$9,000,000
2021	Healthcare Services Company	$6,000,000
2020	Bausch/Valeant	$45,000,000
2020	Super Micro	$17,500,000
2020	BMW	$18,000,000
2019	Facebook	$100,000,000
2019	Mylan	$30,000,000
2019	Herbalife	$20,000,000
2019	Hertz	$16,000,000
2019	Marvell Technology Group	$5,500,000
2018	Petrobras	$85,320,000
2018	Yahoo	$35,000,000
2018	Rio Tinto	$28,000,000
2018	Walgreens	$34,500,000
2018	Clovis	$20,000,000
2018	Tesla	$20,000,000
2016	Monsanto	$80,000,000
2016	Logitech	$7,500,000
2016	Navistar	$7,500,000
2015	Deutsche Bank	$55,000,000
2014	Bank of America	$7,650,000
2014	Fifth Third	$6,500,000
2013	JP Morgan	$200,000,000
2010	Citigroup	$75,000,000

Note. These data come from a combination of the SEC's yearly reports and the press releases associated with the cases listed therein. Appendix Table A1 provides these sources.

It is important to acknowledge that the SEC also has incentive to signal that its enforcement program is measured and fair. Reporting numerous corporate penalties could attract criticism that the SEC's enforcement is excessive and unprincipled.[205] To its credit, the SEC has addressed past objections to its enforcement approach. In the 2000s, it responded to concerns about the size of corporate penalties by attempting to more clearly describe the standards considered in imposing such penalties.[206] In 2015, the SEC altered its reporting policies following a study by Professor Urska Velikonja documenting how it inflated its annual reporting of enforcement cases by counting multiple actions relating to the same matter as separate cases.[207] Soon after that study's publication,[208] the agency changed the way it reports the number of cases it brings to eliminate double-counting that may have overstated the extent of its enforcement activity.[209]

B. Regulatory Goals

A second explanation for the SEC's entrepreneurial enforcement strategy is that it reflects the agency's pursuit of broader regulatory goals. In addition to using enforcement to deter violations of existing rules, SEC enforcement can also support shifts in regulatory policy. The agency can use enforcement to gather evidence that would justify new rulemaking. It can use enforcement to convey new directions in its regulatory priorities. It might even create new rules by reading old provisions more expansively. Rather than resulting solely from a crude desire to simply collect more penalties, the SEC's more entrepreneurial approach to enforcement also reflects a more ambitious regulatory agenda.

The SEC has often advanced innovative enforcement theories that reflect its policy preferences. During the 1980s and 1990s, insider trading

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205 *See, e.g.*, Sonia A. Steinway, Comment, *SEC "Monetary Penalties Speak Very Loudly," but What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 YALE L.J. 209, 230 (2014) (criticizing the SEC's growing use of monetary sanctions).

206 *See Statement of the Securities and Exchange Commission Concerning Financial Penalties*, SEC (Jan. 4, 2006), http://www.sec.gov/news/press/2006-4.htm [https://perma.cc/9M8T-88C3] ("The Commission believes it is important to provide the maximum possible degree of clarity, consistency, and predictability in explaining the way that its corporate penalty authority will be exercised.").

207 Velikonja, *supra* note 201.

208 Sarah N. Lynch, *Study by U.S. Law Professor Says U.S. SEC Pads Enforcement Statistics*, REUTERS (Sept. 24, 2015, 3:16 PM), https://www.reuters.com/article/sec-enforcement-study/study-by-law-professor-says-u-s-sec-pads-enforcement-statistics-idUSL1N11U2NX20150924/ [https://perma.cc/7LBB-ZBCQ].

209 The press publicized the study in September of 2015. *See id*. The SEC changed its reporting methodology in November 2015. *See* Press Release, SEC, SEC Announces Enforcement Results for FY 2015 (Oct. 22, 2015), https://www.sec.gov/news/press-release/2015-245 [https://perma.cc/T85V-GNKH].

was the centerpiece of SEC enforcement efforts.[210] The agency has long believed that investors should have relatively equal access to material corporate information. The SEC, along with federal prosecutors, asserted broad readings of Rule 10b-5 in cases involving the trading of non-public material information. The federal courts pushed back on some of the government's positions. For example, the Supreme Court initially appeared to restrict insider trading prosecutions under Rule 10b-5 almost exclusively to corporate insiders.[211] The SEC persisted for many years in its insistence that Rule 10b-5 reached more broadly to settings where non-insiders misappropriated material information in violation of a duty of confidentiality.[212] The agency's position was vindicated in 1998 when the Supreme Court endorsed this theory.[213]

By the end of the 1990s, the SEC became more concerned with the problem of accounting fraud in public companies. A string of public company frauds motivated by the desire to report favorable numbers led the SEC to believe that many companies were misstating their financial statements.[214] The SEC made a concerted effort to investigate such accounting fraud. It uncovered enough examples to support corporate governance reforms enacted by major stock exchanges to enhance the

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[210] Various surveys of SEC enforcement activity during the 1980s and 1990s emphasized insider trading as an area of major enforcement activity. *See* William R. McLucas, Stephen M. DeTore & Arian Colachis, *SEC Enforcement: A Look at the Current Program and Some Thoughts About the 1990s*, 46 BUS. LAW. 797 (1991). Though there were some cases filed against public companies for accounting violations, these cases did not involve substantial amounts relative to later accounting frauds targeted by the SEC. *Id.*

[211] *See, e.g.*, Dirks v. SEC, 463 U.S. 646 (1983) (reversing insider trading judgment against research analyst who received information from insider who did not breach fiduciary duty); Chiarella v. United States, 445 U.S. 222 (1980) (reversing insider trading conviction against individual without fiduciary duty to company whose stock he traded).

[212] *See, e.g.*, SEC v. Willis, 787 F. Supp. 58, 59 (S.D.N.Y. 1992) (charging defendant under Rule 10b-5 misappropriation theory of liability). The agency also often appeared as an amicus in federal prosecutions that tested the boundaries of insider trading law. *See, e.g.*, United States v. Chestman, 947 F.2d 551, 554, 566–67 (2d Cir. 1991) (en banc) (noting SEC appearance as amicus in case asserting the misappropriation theory).

[213] *See* United States v. O'Hagan, 521 U.S. 642 (1997). Professor Fernán Restrepo found evidence that *O'Hagan* impacted trading relating to merger transactions, indicating that the Supreme Court created new law with the decision. *See* Fernán Restrepo, The Impact of Insider Trading Doctrine on the Incidence of Insider Trading: An Analysis of the Effect of the Misappropriation Theory 3 (Nov. 8, 2023) (unpublished manuscript), https://papers.ssrn.com/a=4627327 [https://perma.cc/D3BX-9UM2].

[214] *See, e.g.*, Arthur Levitt, Chairman, SEC, The "Numbers Game," Address to the NYU Center for Law & Business (Sept. 28, 1998), (transcript available at https://www.sec.gov/news/speech/speecharchive/1998/spch220.txt [https://perma.cc/47vq-pf7u]) ("I fear that we are witnessing an erosion in the quality of earnings, and therefore, the quality of financial reporting. Managing may be giving way to manipulation; Integrity may be losing out to illusion.").

independence of boards and audit committees.[215] As significant instances of securities fraud continued to come to light, Congress passed the Sarbanes–Oxley Act of 2002, which prioritizes the integrity of financial reporting for public companies.[216]

The SEC has thus consistently used its enforcement program in the context of its broader regulatory efforts. As Professor Donald Langevoort has noted, the agency's insider trading efforts constitute a significant part of the agency's identity as an umpire of fair securities markets.[217] Ensuring the integrity of public company accounting has also become a core part of the SEC's mission. More recently, the SEC cited several settled enforcement actions relating to fees and expenses improperly disclosed by private fund advisors to support additional disclosure requirements for private funds.[218]

In recent years, the SEC has routinely filed cases against public companies after they experience a high-profile corporate scandal. Its enforcement against Citigroup, General Electric, Boeing, Facebook, and Volkswagen all involved catastrophic, and public, business failures.[219] While some of these cases, such as *General Electric*, related to traditional regulatory concerns such as transparent financial reporting, others involved

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[215] *See* Blue Ribbon Comm. on Improving the Effectiveness of Corp. Audit Comms., *Report and Recommendations*, 54 BUS. LAW. 1067, 1072–76 (1999).

[216] Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at scattered sections of 15, 18, 28, & 29 U.S.C.).

[217] *See* Donald C. Langevoort, *Rereading* Cady, Roberts*: The Ideology and Practice of Insider Trading Regulation*, 99 COLUM. L. REV. 1319, 1328–29 (1999).

[218] Private Fund Advisors; Documentation of Registered Investment Adviser Compliance Reviews, 88 Fed. Reg. 63206, 63209 (Sept. 14, 2023) (to be codified at 17 C.F.R. pt. 275). The Fifth Circuit vacated this rule, partly on the ground that these cases did not establish that there was systematic fraud in the industry. *See* Nat'l Ass'n of Priv. Fund Managers v. SEC, No. 23-60471, 2024 WL 2836655 (5th Cir. June 5, 2024). This was not the first time that the SEC cited enforcement actions to help justify new regulation. During the 1970s, the SEC brought cases against large public companies that paid bribes to win business overseas. *See* SEC, QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 3 (1976). Federal securities law at the time did not prohibit such payments, but the SEC's enforcement division made the innovative argument that failure to disclose the bribe payments was misleading. *See, e.g.*, Note, *Disclosure of Payments to Foreign Governments Under the Securities Acts*, 89 HARV. L. REV. 1848, 1850–51 (1976) (noting the Commission's response to the discovery of payments to foreign governments). Some commentators criticized this position as problematic because it was unclear that such payments were large enough to be economically material to investors. *See* ROBERTA S. KARMEL, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA 146–59 (1982); John C. Coffee Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1258–59 (1977). The SEC's work in uncovering the extent of the problem provided a basis for the Foreign Corrupt Practices Act (FCPA), which prohibits the payment of bribes by public companies and requires that a company maintain accurate books and records. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

[219] *See supra* Part II.

disclosures relating to consumer safety and environmental compliance that have typically been addressed by other regulators.

Some of these recent enforcement efforts reflect the SEC's reaction to investor demands to increase public companies' obligation to disclose ESG information.[220] Now it is not enough for corporate managers to monitor risk with respect to their core financial performance. Investors expect them to be aware of risks relating to cybersecurity, environmental compliance, and consumer safety. If public companies can implement compliance measures to ensure accurate financial statements, there is an argument that they should be able to implement compliance measures on a broader range of issues.

SEC enforcement is an essential part of implementing ESG policy.[221] Rather than solely relying on mandatory disclosure, the SEC can sanction companies that mislead investors about ESG risk. The agency can target ESG misstatements in voluntary disclosures. It can also argue that companies in certain circumstances have obligations to disclose timely information about ESG risk. Moreover, as ESG mandates increase, there will be more opportunities to contend that public companies issued materially misleading statements about ESG risk.[222]

As it has sought to increase corporate obligations to disclose ESG risk through enforcement, the SEC has run into barriers erected to screen excessive private litigation.[223] The puffery doctrine, discussed earlier in this Article, is an example of a doctrinal limitation on Rule 10b-5 and section 17 of the Securities Act that stands in the way of the SEC's ESG enforcement. The scienter requirement is also a potential barrier to the SEC's ESG efforts because it can be difficult to establish that a corporation, through its managers, intended to deceive investors about the sudden emergence of an ESG scandal. The SEC has avoided and disagreed with these doctrines in

220 *See, e.g.*, Jaime Lizárraga, Commissioner, SEC, Meeting Investor Demand for High Quality ESG Data, Address at The Future of ESG Data 2022 conference (Oct. 17, 2022) (transcript available at https://www.sec.gov/news/speech/lizarraga-speech-meeting-investor-demand-high-quality-esg-data [https://perma.cc/ME6U-PH5U]) (noting the "lively topic" of ESG, and identifying three SEC rule proposals that "would each help facilitate comparable ESG disclosures and focus on ensuring statements made to investors are not false or misleading").

221 Indeed, the SEC has formed a special enforcement group that focuses on ESG issues. *See* Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 [https://perma.cc/BP3H-T53W]; *see also* Jena Martin & Rachel Chambers, *The Securities and Exchange Commission as Human Rights Enforcer?*, 18 VA. L. & BUS. REV. 93 (2023) (discussing reasons why the SEC has prioritized ESG enforcement).

222 *See, e.g.*, James J. Park, *ESG Securities Fraud*, 58 WAKE FOREST L. REV. 1149 (2023) (noting how misleading voluntary disclosure can be the basis for ESG enforcement).

223 *See, e.g.*, Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 114 (2017) (arguing that courts arbitrarily limit the scope of Rule 10b-5 because of skepticism about the utility of securities class actions).

advancing its view that public companies should inform investors about ESG risk.

The SEC has shown that its efforts can support a change in adverse precedent. Its risk-disclosure litigation in the Ninth Circuit illustrates how it can prompt courts to reconsider restrictive doctrine. The fact that the SEC advances a particular legal theory could cause courts to take notice and amend law meant to limit private litigation. Such a dynamic might be troubling if the courts reflexively defer to agency expertise. On the other hand, courts may roll back adverse precedent because the compelling factual narratives developed through SEC investigations convince them to read prior precedents flexibly. So long as courts critically assess the SEC's positions when it disagrees with case law, their amendment of such precedent will not be problematic.

The importance of enforcement as a regulatory tool for the SEC is a reason why the agency should not adopt the proposal that it hire law firm attorneys to litigate significant cases. The point of a major enforcement case often goes beyond punishing and deterring wrongdoers. High-profile enforcement actions give the SEC the opportunity to express its views on public company disclosure obligations. While investing substantial amounts to hire private attorneys could result in more thorough development of particular cases, it is questionable that any one case will be so significant for the SEC's agenda that it would justify spending millions of dollars for private sector attorneys. Moreover, it would be difficult and perhaps problematic to delegate the framing of an enforcement theory that makes a regulatory point. The SEC's current approach, where it uses government attorneys who are part of a broader administrative apparatus to bring a wide variety of significant cases, is preferable.

Proposals that go the other way and seek to drastically reduce private enforcement are also problematic. The fact that SEC enforcement has become more robust does not eliminate the need for entrepreneurial private enforcement.[224] The SEC's enforcement resources are limited and must be used selectively.[225] Private enforcers have monetary incentive to doggedly develop the facts in more cases than the agency does. They also do not face the risk of industry capture that can periodically reduce the SEC's effectiveness.

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[224] For an argument that more effective SEC enforcement reduces the need for private enforcement, see Amanda M. Rose, *Better Bounty Hunting: How the SEC's New Whistleblower Program Changes the Securities Fraud Class Action Debate*, 108 NW. U. L. REV. 1235 (2014).

[225] *See, e.g.*, James J. Park & Howard H. Park, *Regulation by Selective Enforcement: The SEC and Initial Coin Offerings*, 61 WASH. U. J.L. & POL'Y 99 (2020) (describing SEC's strategic decisions in deploying limited enforcement resources to address unregistered initial coin offerings).

It is notable that the SEC has taken entrepreneurial stances in areas other than enforcement relating to material misstatements by public companies. As noted earlier, the SEC has long taken innovative positions with respect to insider trading enforcement.[226] Recently, the explosion of initial coin offerings resulted in the need to apply the vague *Howey* test to argue that many crypto assets are securities.[227] Both of these regulatory efforts have resulted in the old criticism of "regulation by enforcement" that questions the fairness of imposing sanctions based on broadly worded provisions that do not give sufficient notice of the boundaries of regulation.[228] Rather than developing law through enforcement, critics contend that the SEC should file new rules that go through a public notice and comment process.

The issues raised by the SEC's more entrepreneurial approach to enforcing Rule 10b-5 against public companies are not quite captured by the "regulation by enforcement" critique. The law governing corporate liability for misstatements has long been made by the courts rather than defined by administrative rulemaking. There is not a substantial effort to introduce detailed rules to further define the elements of broadly worded concepts such as scienter or materiality. Public company material misstatement cases are clearly part of the SEC's enforcement authority. The issue with entrepreneurial enforcement is not simply the lack of clear law governing an issue, but that it avoids or challenges adverse precedent. The SEC's enforcement in this space is thus potentially problematic for different reasons than in areas such as insider trading and crypto regulation.

IV. ENFORCEMENT LEGITIMACY

Regardless of its motivation, the SEC's more aggressive enforcement approach will still raise questions of legitimacy. To what extent should the agency be given the discretion to levy substantial penalties for material misstatements while avoiding judicial limitations? To what extent should it

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[226] *See, e.g.*, Geeyoung Min, *Strategic Compliance*, 57 U.C. DAVIS L. REV. 415, 429–30 (2023) (discussing broad reading of insider trading prohibition in *SEC v. Panuwat*); *see also* Yoon-Ho Alex Lee & Alessandro Romano, *Shadow Trading and Macroeconomic Risk*, 13 HARV. BUS. L. REV. 393 (2023) (contending that prohibition of shadow trading targeted in *Panuwat* reduces macroeconomic risk).

[227] Park & Park, *supra* note 225, at 101, 125–26 & n.142; (citing *Framework for "Investment Contract" Analysis of Digital Assets*, SEC. & EXCH. COMM'N (April 3, 2019), https://www.sec.gov/about/divisions-offices/division-corporation-finance/framework-investment-contract-analysis-digital-assets [http://perma.cc/3ETH-NKEX]).

[228] *See generally, e.g.*, *id.*. *See also, e.g.*, James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 635 (2007) (discussing regulation by enforcement critique); Pitt & Shapiro, *supra* note 36 (same); *see also* Chris Brummer, Yesha Yadav & David Zaring, *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297 (2024) (discussing regulation by enforcement critique in different contexts).

disagree with or seek to alter doctrine in order to advance its regulatory policy? This Part concludes by discussing how the SEC can help ensure the legitimacy of its enforcement efforts.

A. Concerns About Legitimacy

In the context of enforcement cases against large public companies, there is an argument that entrepreneurial enforcement is unproblematic. If the SEC raises novel theories, corporate defendants can point out the weaknesses in the SEC's case and litigate. If sophisticated corporations instead choose to settle SEC matters rather than defend themselves in court, there is little need for intervention. Some of the SEC's decisions to charge defendants under some provisions rather than others are likely the result of negotiation.[229] For example, a defendant may prefer to pay a higher settlement than be charged with a Rule 10b-5 violation. It could offer additional money to resolve a matter if the SEC agrees to file an order or complaint that only cites provisions that do not require a showing of fraudulent intent. The defendant might point out adverse precedent and threaten to litigate to gain leverage in the negotiations. Moreover, the SEC has a policy of rewarding cooperation by defendants. The fact that it brings lesser charges against a corporate defendant could reflect such cooperation. The decision by the SEC to not cite Rule 10b-5 in a case may not be an issue of avoidance, but rather could simply reflect the complexities of resolving a case against a sophisticated defendant.

Critics of the SEC's more aggressive enforcement approach will object that it is difficult for defendants to challenge the SEC's positions. While corporate settlements with the SEC are voluntary, there are generally strong incentives for public companies to settle rather than litigate a questionable theory. First, a public company will prefer to quickly resolve disputes with the SEC, which is the primary regulator of its access to capital markets. The uncertainty about the result of an enforcement matter can weigh more heavily on a company's stock price than the actual payment of a penalty. After the cost of a fine is clear, the action may no longer cloud the future prospects of the company.

Second, a settlement avoids the risk of an adverse judgment that will make it difficult to defend a private securities class action. SEC settlements typically do not require defendants to admit the truth of the SEC's

[229] *See, e.g.*, Eaglesham, *supra* note 82 ("[T]he SEC sometimes persuaded individuals to agree to narrow negligence charges in order to settle the case, rather than fight the agency in court over more-serious allegations, according to defense lawyers.").

allegations.[230] A settling company can thus argue that a securities class action should be dismissed even though it has paid a settlement to resolve a similar SEC action. If it were to lose a securities fraud case to the agency in court, the defendant may be collaterally estopped from denying that it committed fraud in defending a private securities class action that could amplify the amount it would have to pay.[231]

The ritual of negotiation and settlement of SEC matters generally serves the interest of the parties, but there are also dangers with a system where the SEC knows that it can almost always settle a major enforcement matter. There is a temptation for the SEC to use enforcement as a means of extracting financial penalties that enable the agency to convey its effectiveness to Congress. It may also be troubling that the SEC can implement regulatory policy through its enforcement in ways that are not subject to public input. While some regulatory discretion is inevitable and desirable, such discretion must be carefully exercised, particularly as it becomes exercised more aggressively.

There have been efforts to clarify the scope of the SEC's enforcement discretion. As noted earlier, soon after it began seeking substantial penalties against public companies, the SEC issued a statement providing guidance with respect to how it sets penalties.[232] This statement gave some insight into the SEC's decision-making process, but it still afforded the agency substantial discretion in seeking penalties. For example, it cited general considerations, such as deterrence, that would justify penalties in a wide set of cases.[233] It is difficult to assess how the guidance has been applied and it has not prevented the increasing use of corporate penalties.

The SEC could face backlash if the public increasingly views its enforcement process as unfair. The mixed message of a high penalty in cases without an allegation of fraudulent intent is difficult for the public to decipher.[234] There are already signs that the agency's aggressive pursuit of penalties has made it vulnerable to the argument that its enforcement is

230 *See* 17 C.F.R. § 202.5(e) (2024) (describing SEC policy as not permitting explicit denial of complaint's allegations in a settlement but considering "a refusal to admit the allegations" as "equivalent to a denial").

231 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 324–25, 332 (1979).

232 *Statement of the Securities and Exchange Commission Concerning Financial Penalties*, *supra* note 206.

233 *Id.*

234 *See, e.g.*, Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 565–67 (2011) (describing the danger of failing to provide clarity with respect to securities fraud cases).

arbitrary.[235] Without sufficient explanation of its enforcement decisions, critics can justify further limits on the SEC's discretion.

Furthermore, the SEC may face more litigation by public companies as it takes more entrepreneurial stances. In the *VW* litigation, the SEC filed its case after a securities class action was filed.[236] The district court, which initially decided a motion in favor of the private plaintiffs, later dismissed significant parts of the SEC's case. This was a rare situation where a district court determined that a case brought by private plaintiffs had more merit than a case developed by the SEC. VW continued to litigate the SEC's case rather than settle it.[237]

Even as it has become more entrepreneurial, there is still a substantial difference between the SEC and private enforcers. The SEC will not file cases without sufficient factual and legal basis to extract a nuisance settlement from a public company. Private securities litigation has become less meritless after the passage of the PSLRA,[238] but private plaintiffs still file many more questionable cases than the SEC. The SEC as an institution has many checks and balances that help ensure it is not abusing its authority.

Moreover, entrepreneurial enforcement also can reinforce the SEC's legitimacy. More vigorous enforcement assures the public that the SEC is not captured by industry. Instead of meekly limiting itself to enforcing trivial rule violations, an entrepreneurial SEC is doing more to further public values through its enforcement. The SEC thus should not return to its passive approach to public company enforcement.

[235] *See, e.g.*, Dave Michaels, *Wall Street Is Furious over Rising Fines from SEC*, WALL ST. J. (Sept. 16, 2023, 9:00 AM), https://www.wsj.com/finance/regulation/wall-street-is-furious-over-rising-fines-from-sec-e35e25b7 [https://perma.cc/3VGJ-JY8C].

[236] Indeed, VW attempted to assert an unclean-hands defense against the SEC because it "waited until after three years of litigation" to file its case. *See In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs. & Prods. Liab. Litig., 517 F. Supp. 3d 994, 997 (N.D. Cal. 2021). The court found that VW "plausibly alleged that the SEC 'unreasonably delayed' in bringing [the] suit" but held that there was no plausible allegation of the misconduct needed to establish "an unclean hands defense." *Id.* at 1000.

[237] *See, e.g.*, Mike Scarcella, *SEC Loses Bid to Sanction VW in Dispute over Emissions Case Witness*, REUTERS (April 21, 2023, 3:41 PM), https://www.reuters.com/legal/government/sec-loses-bid-sanction-vw-dispute-over-emissions-case-witness-2023-04-21/ [https://perma.cc/FCU4-7YTX]. The case ultimately settled, with VW paying $34.35 million in disgorgement. *See SEC Obtains Final Judgment Against Volkswagen Financing Subsidiary in Connection with "Clean Diesel" Emissions Fraud*, SEC (April 5, 2024), https://www.sec.gov/litigation/litreleases/lr-25969 [https://perma.cc/DXL4-YM3T].

[238] *See, e.g.*, Stephen J. Choi, Karen K. Nelson & A.C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 36 (2009) (noting increase in merit-related factors in securities class actions filed after passage of the PSLRA).

B. Bolstering Enforcement Legitimacy

It is possible that the SEC's entrepreneurial enforcement will ebb and flow over time. A new administration or change in regulatory priorities could reduce the SEC's willingness to bring innovative cases. Nonetheless, some of the pressures that incentivize strategies such as avoidance and disagreement will likely continue. The SEC should thus take several steps to ensure the continued legitimacy of its enforcement efforts involving the accuracy of reporting by public companies.

First, the SEC should save substantial penalties for cases where it uncovers facts supporting an inference of fraudulent intent. When it has such evidence, it should not trade a Rule 10b-5 claim for a higher penalty from the defendant.[239] Cases that are settled based solely on violations of subsections 17(a)(2) and (3) of the Securities Act or section 13 of the Securities Exchange Act should generally impose minimal penalties. The SEC should only seek substantial payments from corporate defendants in cases without an allegation of fraudulent intent when there is clear evidence of substantial investor harm that should be compensated or concrete benefits to the defendant that should be disgorged.[240]

High penalties are often justified on deterrence grounds, but deterrence should be calibrated to target the most egregious misconduct. To the extent that a corporate defendant can trade a payment for a complaint that does not allege scienter, the message sent by the settlement will be obscured. A more consistent link between larger penalties and more serious charges could improve the deterrent effect of SEC enforcement.[241]

Second, the SEC should be more transparent about its settlement of enforcement matters. When the SEC imposes a substantial penalty in the absence of an allegation of fraudulent intent,[242] it should explain why such a penalty was imposed without such an allegation. It should acknowledge when it is trading a more serious charge to facilitate a settlement. In situations where judicial precedents pose a barrier to its theory, the SEC should discuss and distinguish those precedents.

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239 The concern that alleging scienter would leave the settling defendant vulnerable to private litigation would be mitigated by the fact that a settling defendant need not admit the allegations of the SEC's complaint.

240 The SEC might provide an economic analysis that documents the damages from a material misstatement, which would establish that the misstatement caused substantial harm to investors.

241 Another argument for high penalties even in the absence of scienter is that for the largest companies, only high penalties are meaningful. There is some merit to this argument, and there may well be cases where large companies will warrant penalties high in absolute terms, but modest relative to their size.

242 If the first proposal is adopted, the second would be less necessary.

Third, in reviewing and approving settlements, the SEC's Commissioners should carefully discuss the strength of the securities fraud theory that is the underlying basis for the settlement. The enforcement staff should highlight conflicting precedents that could be a barrier to a claim and explain why it believes such precedents do not apply or should be overruled. Individual Commissioners should independently review such precedents, ask questions about them, and issue dissenting statements highlighting an adverse precedent when the majority of the Commissioners vote to approve a settlement despite the precedent.

Fourth, in some cases, rather than settle a case involving an issue on which there is problematic precedent, the SEC should fully litigate the case and directly challenge the precedent. While the SEC often influences the courts through its settlements, such indirect influence is no substitute for the adversarial process. Courts should not simply defer to the SEC's views of the law. They should not change existing precedent solely because the SEC disagrees with it.

Finally, as other securities law scholars have previously argued, the SEC should not measure the success of its enforcement program based on the penalties it collects or enforcement cases it brings in a year.[243] Instead of highlighting quantitative measures of success, the agency should continue to find ways of describing the quality of cases it has brought. Rather than emphasizing the goal of deterring violations by imposing penalties, it should better explain how enforcement is used to support its broader regulatory goals. To the extent that the SEC is attempting to use enforcement to change adverse precedent or build support for a particular regulatory effort, it should discuss such efforts.

CONCLUSION

The SEC looks increasingly like an entrepreneurial enforcer that is willing to bring novel claims against public companies. The agency shares similar incentives with private plaintiffs to extract monetary penalties through settlements with corporate defendants. Unlike a private plaintiffs' attorney, however, the SEC uses its enforcement power within the context of a broader regulatory strategy. Courts often defer to the SEC's positions. The SEC's more vigorous approach may be warranted given the need to deter fraud and address new problems. Yet the agency should take care not to squander its credibility in pursuing a more aggressive enforcement approach. It should do more to be transparent in its enforcement decisions, particularly

[243] *See, e.g.*, Velikonja, *supra* note 201, at 932–57 (describing issues such as overstating number of stand-alone cases filed by the SEC).

when its complaints are in tension with existing doctrine. It should not trade an allegation that a defendant acted with fraudulent intent for larger monetary penalties.

APPENDIX

TABLE A1: SOURCES FOR TABLE 1

Reporting Year	Defendant	Penalty
2023[244]	Fluor Corp.	$14,500,000[245]
2023	Newell Brand, Inc.	$12,500,000[246]
2023	Spruce Power	$11,000,000[247]
2022[248]	Boeing	$200,000,000[249]
2022	Compass Minerals	$12,000,000[250]
2022	NVIDIA	$5,500,000[251]
2021[252]	General Electric	$200,000,000[253]
2021	Kraft Heinz	$62,000,000[254]
2021	Under Armour	$9,000,000[255]

244 SEC, ADDENDUM TO DIVISION OF ENFORCEMENT PRESS RELEASE: FISCAL YEAR 2023, at 14–15 (2023), https://www.sec.gov/files/fy23-enforcement-statistics.pdf [https://perma.cc/SR6A-VS2C].

245 Press Release, SEC, SEC Charges Fluor Corp. for Accounting Improprieties (Sept. 6, 2023), https://www.sec.gov/newsroom/press-releases/2023-170 [https://perma.cc/W9CF-MMYM].

246 Press Release, SEC, SEC Charges Newell Brands and Former CEO for Misleading Investors About Sales Performance (Sept. 29, 2023), https://www.sec.gov/newsroom/press-releases/2023-210 [https://perma.cc/8VUX-AE6C].

247 Press Release, SEC, SEC Charges Electric Vehicle Co. for Misleading Revenue Projections Ahead of SPAC Merger (Sept. 28, 2023), https://www.sec.gov/newsroom/press-releases/2023-208 [https://perma.cc/VW3K-FD7B].

248 SEC, ADDENDUM TO DIVISION OF ENFORCEMENT PRESS RELEASE: FISCAL YEAR 2022, at 14–15 (2022), https://www.sec.gov/files/fy22-enforcement-statistics.pdf [https://perma.cc/MT57-PV7B].

249 Press Release, SEC, Boeing to Pay $200 Million to Settle SEC Charges that It Misled Investors About the 737 MAX (Sept. 22, 2022), https://www.sec.gov/newsroom/press-releases/2022-170 [https://perma.cc/49ZN-AJ5J].

250 Press Release, SEC, SEC Charges Compass Minerals for Misleading Investors About Its Operations at World's Largest Underground Salt Mine (Sept. 23, 2022), https://www.sec.gov/newsroom/press-releases/2022-171 [https://perma.cc/TZH5-HXH3].

251 Press Release, SEC, SEC Charges NVIDIA Corporation with Inadequate Disclosures About Impact of Cryptomining (May 6, 2022), https://www.sec.gov/newsroom/press-releases/2022-79 [https://perma.cc/J9HC-T2FC].

252 SEC, ADDENDUM TO DIVISION OF ENFORCEMENT PRESS RELEASE: FISCAL YEAR 2021, at 11–12 (2022), https://www.sec.gov/files/fy22-enforcement-statistics.pdf [https://perma.cc/MBB4-ECCS].

253 Press Release, SEC, General Electric Agrees to Pay $200 Million Penalty for Disclosure Violations (Dec. 9, 2020), https://www.sec.gov/newsroom/press-releases/2020-312 [https://perma.cc/MH7G-52WV].

254 Press Release, SEC, SEC Charges the Kraft Heinz Company and Two Former Executives for Engaging in Years Long Accounting Scheme (Sept. 3, 2021), https://www.sec.gov/newsroom/press-releases/2021174 [https://perma.cc/BLK9-RCGA].

255 Press Release, SEC, SEC Charges Under Armour Inc. with Disclosure Failures (May 3, 2021), https://www.sec.gov/newsroom/press-releases/2021-78 [https://perma.cc/XT56-VQA3].

2021	Healthcare Services Company	$6,000,000[256]
2020[257]	Bausch/Valeant	$45,000,000[258]
2020	Super Micro	$17,500,000[259]
2020	BMW	$18,000,000[260]
2019	Facebook	$100,000,000[261]
2019	Mylan	$30,000,000[262]
2019	Herbalife	$20,000,000[263]
2019	Hertz	$16,000,000[264]
2019	Marvell Technology Group	$5,500,000[265]
2018[266]	Petrobras	$85,320,000
2018	Yahoo	$35,000,000
2018	Rio Tinto	$28,000,000[267]
2018	Walgreens	$34,500,000[268]

[256] Press Release, SEC, SEC Charges Healthcare Services Company and CFO for Failing to Accurately Report Loss Contingencies as Part of Continuing EPS Initiative (Aug. 24, 2021), https://www.sec.gov/newsroom/press-releases/2021-162 [https://perma.cc/Z9SM-HMVZ].

[257] U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT: 2020 ANNUAL REPORT 41 (2020), https://www.sec.gov/files/enforcement-annual-report-2020.pdf [https://perma.cc/KCS4-8PFG].

[258] Press Release, SEC, Pharmaceutical Company and Former Executives Charged with Misleading Financial Disclosures (July 31, 2020), https://www.sec.gov/newsroom/press-releases/2020-169 [https://perma.cc/X6DX-LTSU].

[259] Press Release, SEC, SEC Charges Super Micro and Former CFO in Connection with Widespread Accounting Violations (Aug. 25, 2020), https://www.sec.gov/newsroom/press-releases/2020-190 [https://perma.cc/987T-9X7C].

[260] Press Release, SEC, SEC Charges BMW for Disclosing Inaccurate and Misleading Retail Sales Information to Bond Investors (Sept. 24, 2020), https://www.sec.gov/newsroom/press-releases/2020-223 [https://perma.cc/2J3C-QABD].

[261] U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT: 2019 ANNUAL REPORT 3, 25, 51 nn.87, 89 (2019), http://www.sec.gov/files/enforcement-annual-report-2019.pdf [https://perma.cc/5JYG-EJZZ].

[262] *Id.* at 3.

[263] Press Release, SEC, Herbalife to Pay $20 Million for Misleading Investors (Sept. 27, 2019), https://www.sec.gov/newsroom/press-releases/2019-195 [https://perma.cc/WBD7-A4AA].

[264] U.S. SEC. & EXCH. COMM'N, *supra* note 261, at 3.

[265] Press Release, SEC, SEC Charges Silicon Valley-Based Issuer with Misleading Disclosure Violations (Sept. 16, 2019), http://www.sec.gov/newsroom/press-releases/2019-175 [http://perma.cc/8KTK-S855].

[266] U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT: 2018 ANNUAL REPORT 8, 17, 38 n.17, 39 nn.65, 67–68, 70 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf [https://perma.cc/2BV5-YW65].

[267] *Rio Tinto: Settlement with Securities and Exchange Commission*, RIO TINTO (Nov. 22, 2023), https://www.riotinto.com/en/news/releases/2023/rio-tinto-settlement-with-securities-and-exchange-commission [https://perma.cc/D2P4-CFLV].

[268] Press Release, SEC, SEC Charges Walgreens and Two Former Executives with Misleading Investors About Forecasted Earnings Goal (Sept. 28, 2018), https://www.sec.gov/newsroom/press-releases/2018-220 [https://perma.cc/6UA4-768A].

2018	Clovis	$20,000,000[269]
2018	Tesla	$20,000,000[270]
2016[271]	Monsanto	$80,000,000[272]
2016	Logitech	$7,500,000[273]
2016	Navistar	$7,500,000[274]
2015[275]	Deutsche Bank	$55,000,000[276]
2014[277]	Bank of America	$7,650,000[278]
2014	Fifth Third	$6,500,000[279]
2013[280]	JP Morgan	$200,000,000[281]
2010	Citigroup	$75,000,000[282]

[269] Press Release, SEC, Biopharmaceutical Company, Executives Charged with Misleading Investors About Cancer Drug (Sept. 18, 2018), https://www.sec.gov/newsroom/press-releases/2018-199 [https://perma.cc/3HJM-RPJN].

[270] Press Release, SEC, Elon Musk Settles SEC Fraud Charges; Tesla Charged with and Resolves Securities Law Charge (Sept. 29, 2018), https://www.sec.gov/newsroom/press-releases/2018-226 [https://perma.cc/HCR3-2CMW].

[271] Press Release, SEC, SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016), https://www.sec.gov/newsroom/press-releases/2016-212 [https://perma.cc/QHX5-LQWT].

[272] Press Release, SEC, Monsanto Paying $80 Million Penalty for Accounting Violations (Feb. 9, 2016), https://www.sec.gov/news/pressrelease/2016-25.html [https://perma.cc/2BU5-474M].

[273] Press Release, SEC, SEC Announces Financial Fraud Cases (Apr. 19, 2016), https://www.sec.gov/news/pressrelease/2016-74.html [https://perma.cc/2DPN-F2M9].

[274] Press Release, SEC, SEC: Navistar International and Former CEO Misled Investors About Advanced Technology Engine (Mar. 31, 2016), https://www.sec.gov/news/pressrelease/2016-62.html [https://perma.cc/5NDS-RNJB].

[275] Press Release, SEC, SEC Announces Enforcement Results for FY 2015, *supra* note 209.

[276] Press Release, SEC, SEC Charges Deutsche Bank with Misstating Financial Reports During Financial Crisis (May 26, 2015), http://www.sec.gov/news/pressrelease/2015-99.html [https://perma.cc/SGY7-Q95V].

[277] Press Release, SEC, SEC's FY 2014 Enforcement Actions Span Securities Industry and Include First-Ever Cases (last updated Oct. 16, 2014), https://www.sec.gov/newsroom/press-releases/2014-230 [https://perma.cc/4QAT-V6XP].

[278] Press Release, SEC, SEC Charges Bank of America with Securities Laws Violations in Connection with Regulatory Capital Overstatements (Sept. 29, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543065483 [https://perma.cc/L6ZQ-8HVX].

[279] Press Release, SEC, SEC Charges Fifth Third Bancorp and Former CFO for Improper Accounting of Substantial Loan Losses During Financial Crisis (Oct. 16, 2014), https://www.sec.gov/newsroom/press-releases/2014-230 [https://perma.cc/NF5U-N859].

[280] Press Release, SEC, SEC Announces Enforcement Results for FY 2013, *supra* note 196.

[281] Press Release, SEC, JPMorgan Chase Agrees to Pay $200 Million and Admits Wrongdoing to Settle SEC Charges (Sept. 19, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539819965 [https://perma.cc/5XZF-YTX3].

[282] U.S. SEC. & EXCH. COMM'N, FY 2010 PERFORMANCE AND ACCOUNTABILITY REPORT 151 (2010), https://www.sec.gov/about/secpar/secpar2010.pdf [https://perma.cc/5LMQ-Y7QW].