Rationalizing Enforcement in the U.S. Financial System

Progress since June 2018

November 21, 2019

In June 2018, the Committee on Capital Markets Regulation (the "**Committee**") released a report, *Rationalizing Enforcement in the U.S. Financial System* (the "**Enforcement Report**"), which included nineteen recommendations for regulators to improve enforcement efforts for the U.S. financial system. [1] The recommendations fell under four broad categories: (i) enhancing the structure of the U.S. enforcement system by improving coordination and procedural fairness, (ii) rationalizing sanction-setting, (iii) ensuring the appropriate use of monetary sanctions, and (iv) promoting individual accountability.

To enhance the structure of the U.S. enforcement system, the Committee recommended that agencies develop policies governing enforcement-related cooperation with other agencies, further efforts to avoid duplicative sanctions, and empower enforcement targets to remove enforcement proceedings from administrative tribunals to federal court in non-settled matters. Since the Enforcement Report was released in June 2018, regulators have taken a number of actions to enhance cooperation. The SEC and CFTC signed an enhanced memorandum on international enforcement cooperation with key foreign authorities, banking regulators released a policy statement on interagency enforcement cooperation, the CFTC and DOJ increased their enforcement coordination, and the White House formed an interagency task force aimed at improving interagency cooperation when prosecuting of fraud and other financial crimes. With respect to duplicative sanctions, the DOJ has continued to incorporate foreign and civil penalties into its sanction-setting analysis under its anti-piling on policy. With respect to procedural removal, recent judicial developments have curbed the SEC's use of administrative proceedings for enforcement.

To rationalize sanction-setting, the Committee recommended that agencies more carefully calibrate automatic disqualifications, release public penalty-setting principles, and develop centralized databases of enforcement actions to enhance transparency. Following the release of the Enforcement Report, the SEC revised its system of disqualification waivers, but FINRA has proposed rules that exacerbate the effect of automatic disqualifications. With respect to penalty-setting principles, regulators have offered much greater guidance on how enforcement targets can reduce

[1] COMMITTEE ON CAPITAL MARKETS REGULATION, *Rationalizing Enforcement in the U.S. Financial System* (June 2018), https://www.capmktsreg.org/wp-content/uploads/2018/10/Rationalizing-Enforcement-in-the-US-Financial-System.pdf; COMMITTEE ON CAPITAL MARKETS REGULATION, *Enforcement Data for Calendar 2018* (May 2019), https://www.capmktsreg.org/wp-content/uploads/2019/05/5_8_19_Enforcement_Data_Update.pdf. The company updated its statistical findings in September 2018 and May 2019. COMMITTEE ON CAPITAL MARKETS REGULATION, *U.S. Enforcement Agencies Impose $18 Billion in Fines on Financial Institutions in 2017* (Sept. 2018), https://www.capmktsreg.org/wp-content/uploads/2018/10/09_24_18_CCMR_Staff_Enforcement_Update.pdf; COMMITTEE ON CAPITAL MARKETS REGULATION, *Enforcement Data for Calendar 2018* (May 2019), https://www.capmktsreg.org/wp-content/uploads/2019/05/5_8_19_Enforcement_Data_Update.pdf.

penalties by enhancing their compliance and cooperation efforts, and the DOJ has increased its transparency with respect to how duplicative penalties are incorporated into the sanction-setting analysis.

With respect to ensuring the appropriate use of monetary sanctions, the Committee recommended that agencies develop more thoughtful rules for the use of sanctions and increase transparency generally. There have been no significant developments with respect to this topic.

With respect to promoting individual accountability, the Committee recommended that the DOJ and other authorities work to develop a centralized database of individual enforcement statistics and that an affirmative defense based on compliance and cooperation should be introduced with respect to enforcement actions. With respect to the compliance and cooperation defense, the DOJ has offered additional transparency as to how its corporate enforcement policy will be applied by publicizing its declination letters under the policy.

As a result, although authorities have taken several actions consistent with the Enforcement Report's recommendations, considerable work remains to be done. The reminder of this update recounts specific regulatory actions and other developments that are relevant to the recommendations contained in the Enforcement Report. Below are certain defined terms used in the Enforcement Report and herein.

- Capital Markets Regulators:
  - Securities and Exchange Commission (the "***SEC***")
  - Commodity Futures Trading Commission (the "***CFTC***")
- Consumer Financial Protection Bureau (the "***CFPB***")
- Banking Regulators
  - Federal Deposit Insurance Corporation (the "***FDIC***")
  - Federal Reserve (***the "Fed***")
  - National Credit Union Administration (the "***NCUA***")
  - Office of the Comptroller of the Currency (the "***OCC***")
- Trade restrictions, money laundering and terrorist financing
  - Financial Enforcement Network (the "***FinCEN***")
  - Office of Foreign Assets Control (the "***OFAC***")
- Department of Justice (the "***DOJ***")

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	RECOMMENDATION	ACTION
	Chapter 1: Enhancing the Structure of the U.S. Enforcement System – Improving Coordination and Procedural Fairness	
1. –	**Enforcement Coordination Policies**: Each enforcement authority should develop formal, written policies, subject to public notice and comment, that detail how the enforcement authority will coordinate with other enforcement authorities in conducting investigations, requesting access to documents and witnesses, and negotiating settlements.	*Responsive Actions* ▲ • SEC, CFTC – IOSCO Enhanced MOU on Cross-Border Enforcement Cooperation: (June 2019) The SEC and CFTC signed an enhanced memorandum of understanding with 13 foreign agencies to improve cooperation, particularly with respect to: (i) enhanced information-sharing, (ii) compelling physical appearance and testimony, and (iii) cooperating on freezing or sequestering a target's assets. [MOU] [Cleary Description] Signatories include agencies in Canada, Hong Kong, Singapore, the Bahamas, Korea, Switzerland, the UK, and Australia. [Signatories]
2.	**Collaboration in Formulating Policies**: Federal enforcement authorities should collaborate with one another on the development of their coordination policies.	*Relevant Development – Efforts at Cooperation* ▲ • Fed, FDIC, OCC – Policy Statement on Interagency Enforcement: (June 2018) First, if a banking agency determines to bring an enforcement action against an insured depository institution, bank holding company, or their affiliate, then the agency should evaluate if the action involves the interest of another federal bank agency. If so, then the agency should notify the other agency. Second, if two or more agencies considers bringing complementary enforcement actions, then the agencies should coordinate on preparation, processing, and penalty-setting. [Federal Register] • Interagency – Task Force on Market Integrity and Consumer Fraud: (July 2018) Executive Order 13844 directed the DOJ to establish a task force which would, among other things, "make recommendations… to enhance cooperation among agencies in the investigation and prosecution of fraud and other financial crimes." [Federal Register] The task force includes the DOJ, CFPB, SEC, and FTC and is directed to invite representatives from, among others, the Treasury, Fed, CFTC, FDIC, and OCC. [Press Release] The Task Force does not appear to have issued recommendations or findings. • CFTC – Speech on Coordination with DOJ, SEC: (Oct. 2018) Chairman Giancarlo asserts that the CFTC has increased its efforts to coordinate with DOJ and SEC, and it is focused on increasing coordination with other government and self-regulatory agencies. [Speech] • SEC – Speech International Cooperation: (Dec. 2018) At a forum hosted by PIFS, Steven Peikin, Co-Director of the SEC's Enforcement Division, highlighted areas of cooperation with international regulatory authorities. In the crypo-assets space, this includes cooperating to prosecute frauds based internationally but targeting US

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		investors. Under the foreign corrupt practices act, he highlighted increased DOJ and SEC cooperation with foreign authorities, including "the settlements that (i) [the SEC], the DOJ, and Dutch regulators entered into with VimpelCom, a telecommunications provider based in the Netherlands, (ii) the SEC, DOJ and Brazilian authorities entered into with aircraft manufacturer Embraer and oil-and-gas company Petrobras, (iii) the SEC, DOJ, and Brazilian and Swiss authorities entered into with petrochemical manufacturer Braskem, and (iv) the collaboration between the SEC, DOJ, and Dutch and Swedish law enforcement authorities with regard to telecommunications provider Teliasonera." The SEC has also cooperated internationally to target internet-based micro-cap fraud. He noted that unrelated data privacy and national security laws hinder cooperation. [Speech] • SEC – Criminal Coordination Conference: (Oct. 2019) According to the SEC's 2019 Annual Enforcement Report, "in October 2019 the [Enforcement] Division hosted a Criminal Coordination Conference to discuss best practices and strategies for parallel criminal and civil enforcement of the federal securities laws. The conference was attended by over 300 representatives of the Commission staff, Department of Justice (including 16 United States Attorneys), FBI, and other law enforcement agencies." [2019 Annual Report] • SEC – Recent Efforts at Parallel Criminal Enforcement: (Nov. 2019) The SEC's 2019 Annual Enforcement Report featured a section dedicated to highlighting eight notable cases where the SEC pursued enforcement in parallel with criminal prosecutions by U.S. attorneys. [2019 Annual Report] • CFTC, DOJ – Enhanced Interagency Cooperation: (Nov. 2019) The CFTC and DOJ have stepped up their cooperation, information-sharing and parallel enforcement efforts with each other. "In fiscal 2018, the CFTC brought 14 civil enforcement actions in parallel with the Justice Department, more than the number of parallel cases it brought in the preceding five years combined. The final tally is expected to be even higher in fiscal 2019, [CFTC Enforcement Director James McDonald] said." The agencies are particularly focused on cooperating to bring anti-spoofing cases, where the CFTC has considerable institutional knowledge and the DOJ has strong data analytics capabilities, and foreign corruption cases. [Bloomberg Analysis]
3.	**Non-Duplicative Sanctions**: Enforcement authorities should consider the sanctions	*Responsive Actions* ▲

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	that other enforcement authorities, including foreign enforcement authorities, have imposed or are about to impose when setting sanctions in their own enforcement actions. Enforcement authorities should explain how they have taken such other sanctions into consideration.	• DOJ – Anti-Piling-on Policy: (Sept. 2018) In a speech by Matthew Miner, the Deputy Assistant Attorney General of the DOJ's Criminal Division who oversees the DOJ's Fraud Section, stated that the DOJ's role "is not to impose penalties that disproportionately punish innocent employees, shareholders, customers, and other stakeholders." Miner also spoke about the implementation of the DOJ's Anti-Piling on policy. For example, in an investigation of Societe Generale for FCPA violations and manipulation of LIBOR, the DOJ credited approximately $300 million that the bank is going to pay to French authorities under its agreement with those law enforcement agencies. [Speech] *Relevant Developments – Evidence of Coordination* • SEC, DOJ – Petrobras Case: (Sept. 2018) The DOJ and SEC coordinated with each other and Brazilian authorities when setting penalties for violation of U.S. securities laws and the Foreign Corrupt Practices Act. "Under the [DOJ] non-prosecution agreement, the United States will credit the amount that Petrobras pays to the SEC and Brazil under their respective agreements." [Press Release]
4.	**Forum Selection and Removal**: When enforcement authorities have lawful discretion to choose to bring a case in federal court or an administrative proceeding, like the SEC, CFTC, and CFPB do, defendants should have the right to remove a case filed in an administrative forum to federal court in non-settled matters.	*Relevant Developments* • SEC – Administrative Judges: (June 2018) In Lucia v. SEC, the Supreme Court raised doubt as to the constitutionality of the appointment of SEC's administrative judges. The decision has led to additional litigation over whether their removal protections (a key feature of their purported independence) are proper. "The SEC Enforcement Division reduced the number of actions brought as administrative cases after *Lucia*. In a recent interview, SEC Co-Enforcement Director Steven Peikin told me that the division would continue to bring matters such as insider trading and financial fraud to federal district court, while it would refer cases seeking special remedies, such as officer or director bars, for administrative hearings." [Bloomberg]
	Chapter 2: Rationalizing the Setting of Sanctions	
5.	**Calibrating Automatic Disqualification**: Automatic disqualifications (whether statutory or otherwise) prohibit a firm from engaging in certain activities when the firm	*Responsive Actions – Disqualification* ▲ • SEC – Disqualification Waivers: (July 2019): Chairman Jay Clayton announced in a speech that the SEC would begin considering enforcement settlements and automatic disqualification waiver *together in one decision*. [Clayton Statement] Previously, the

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	or an affiliate has resolved certain criminal or civil enforcement matters. These disqualifications should only be triggered when there is a clear nexus between the conduct underlying the triggering enforcement action and the disqualification. Where a clear nexus does not exist, disqualifications should have to be affirmatively imposed by the relevant regulator using appropriate due process protections.	SEC approved settlements and waivers separately, and it might approve a settlement reached with the expectation of a waiver, and then disapprove the waiver itself. The new approach allows enforcement targets to negotiate settlement and waiver together. In this manner, targets can decide whether to litigate the enforcement action on an informed basis. Likewise, the SEC can more closely calibrate the disqualification with the underlying violation [Cleary Analysis] *Relevant Developments Adverse to Recommendation* ▲ • FINRA – Proposed Rule on Restricted Firms: (May 13, 2019) FINRA proposed a Rule 4111 by which it could designate high-risk firms with a history of misconduct as "restricted firms" and limit their operation. Proposed Rule 9559 would create an expedited appeals process, including a process for challenging a designation as a Restricted Firm and any obligations imposed. This represents a shift towards greater disqualification that is not necessarily tailored to the underlying conduct. [FINRA Notice] [Cleary Analysis]
6.	**Penalty-Setting Principles**: Enforcement authorities should adopt publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties. FSOC should establish these principles or guideposts and they should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. Enforcement authorities should explain how the guideposts were applied in each enforcement action.	*Responsive Actions – Compliance and Cooperation* ▲ • DOJ – Rosenstein Speech on Criminal Enforcement: (Nov. 2018) "Under the revised policy, in order to qualify for 'any cooperation credit' in criminal cases, companies now have to work 'in good faith to identify individuals who were substantially involved in or responsible for wrongdoing,' and disclose that information to DOJ. … "in order to qualify for *any* cooperation credit in a civil case, companies now 'must identify all wrongdoing by senior officials, including members of senior management or the board of directors.' Assuming information regarding wrongdoing by senior executives is disclosed, cooperation credit in the civil context is no longer an 'all or nothing' proposition." [Sidley Analysis] • CFTC – Enforcement Advisory: (Mar. 2019) When an entity or individual voluntarily discloses violations of the Commodity Exchange Act involving foreign corrupt practices, and disclosure is followed by full cooperation and remediation, the CFTC will apply a presumption against civil monetary penalties absent aggravating circumstances. [CFTC Advisory] [Cleary Analysis] • OFAC – Guidance on Compliance Programs: (May 2019) OFAC released guidance on how OFAC will evaluate a company's compliance programs in the context of any

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		enforcement action and the imposition of monetary penalties. [OFAC Analysis] [Cleary Analysis] • DOJ – False Claims Act Guidance: (May 2019) The DOJ issued guidance explaining the factors that the DOJ will consider when determining whether to award cooperation credit in False Claims Act investigations and the types of credit available. [DOJ Release] [Cleary Analysis] Deputy Assistant AG Matthew Miner described the changes in a May 2019 speech: "To earn maximum credit, which at most would result in recompensing the government for its full losses attributable to the misconduct (including interest, cost of the government's investigation, and any relator's share), a company or individual would need to voluntarily self-disclose, fully cooperate, and take appropriate remedial action to prevent similar instances of misconduct in the future." [Speech] • DOJ – Corporate Compliance Checklist: (May 2019) The DOJ released a "compliance checklist" for directors listing the elements of a strong compliance program that will be taken into account in criminal enforcement actions. The list includes: the adoption of a well-designed compliance program that addresses the greatest compliance risks to the company, effective implementation, the adequacy of the compliance program at the time of any misconduct, and the response to misconduct. [DOJ Guidance] [Cleary Analysis] • SEC – Share Class Selection Disclosure Initiative: (Sept. 2019) Historically, the SEC has had limited resources to pursue the very many cases where mutual funds violate their duty to notify clients when they offer the same investment options in multiple share classes with higher and lower fees. Steven Peikin, Co-Director of the SEC's Enforcement Division, gave a speech describing the SEC's new "Share Class Selection Disclosure Initiative," whereby mutual funds can report their own violations and pay compensation without suffering additional penalties. [Speech] According to the SEC's 2019 Annual Report, "as a result of [the] Share Class Selection Disclosure Initiative, 95 investment advisory firms that voluntarily self-reported… were ordered to return a total of over $135 million to affected mutual fund investors." [2019 Annual Report] • SEC – 2019 Annual Enforcement Report: (Nov. 2019) In its annual report on enforcement, the SEC affirmed its commitment to message to companies that compliance and cooperation efforts will be credited in their favor when the SEC determines penalties. It cited recent cases like PPG and Comscore, where such

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		cooperation reduced or eliminated the ultimate penalties imposed, as examples. [2019 Annual Report] *Responsive Actions – Avoiding Duplicative Penalties* • SEC – Anti-Piling-on Policy: (Sept. 2018) In a speech by Matthew Miner, the Deputy Assistant Attorney General of the DOJ's Criminal Division who oversees the DOJ's Fraud Section, stated that the DOJ's role "is not to impose penalties that disproportionately punish innocent employees, shareholders, customers, and other stakeholders." Miner also spoke about the implementation of the DOJ's Anti-Piling on policy. For example, in an investigation of Societe Generale for FCPA violations and manipulation of LIBOR, the DOJ credited approximately $300 million that the bank is going to be to French authorities under its agreement with those law enforcement agencies. [Speech] • SEC, DOJ – Petrobras Case: (Sept. 2018) The DOJ and SEC coordinated with each other and Brazilian authorities when setting penalties for violation of U.S. securities laws and the Foreign Corrupt Practices Act. "Under the [DOJ] non-prosecution agreement, the United States will credit the amount that Petrobras pays to the SEC and Brazil under their respective agreements." [Press Release] *Recent Developments – Transparency in General* • CFTC – First Public Enforcement Manual: (May 13, 2019) The CFTC's Division of Enforcement released a public enforcement manual for the first time in its history. It does not introduce new substantive guidance, but it collates prior guidance into one source. [CFTC Manual] [Clearly Notice] *Recent Developments – The Scope of Valid Penalties* • SEC – Disgorgement Remedy: (Nov. 2019) The Supreme Court has agreed to hear a case challenging whether the SEC may seek and obtain "disgorgement" as a penalty for securities law violations. The news is the latest potential blow to the SEC's enforcement powers following the 2017 Supreme Court decision in *Kokesh v. SEC* that restricted the agency's disgorgement powers to a five-year statute of limitations. [Petition for Writ of Certiorari] [Writ of Certiorari] The SEC noted the effect of these decisions in its 2019 Annual report: "The Division estimates that the Kokesh ruling has caused the Commission to forgo approximately $1.1 billion dollars in disgorgement in filed cases. … [I]t is likely that Kokesh will continue to impact our ability to recover for harmed investors in long-running frauds." [2019 Annual Report]

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7.	**DOJ Guideposts**: The DOJ should establish similar publicly available guideposts for the setting of sanctions imposed in both DOJ civil matters under FIRREA and the FCA, as well as in criminal matters, including those resolved through NPAs and DPAs.	
8.	**Centralized Enforcement Database**: Each enforcement authority should establish an easily accessible, searchable, centralized database of all of its enforcement actions.	
	Chapter 3: Ensuring Appropriate Use of Monetary Sanctions	
9.	**Centralized Monetary Sanctions Database**: Enforcement authorities should provide an annual accounting that discloses the amount of monetary sanctions assessed through orders, judgments, and settlements, and the amount of such monetary sanctions actually collected.	
10.	**Accounting for Use of Monetary Sanctions**: Each federal enforcement authority should provide an annual accounting of how monetary sanctions imposed in their enforcement actions are used. The accounting should include: (1) the amount of monetary sanctions that the enforcement authority collected and deposited with the Treasury; and (2) the	

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	amount of monetary sanctions that the enforcement authority directed to Congressionally authorized programs (itemized by program).	
11.	**Fair Funds Accounting**: The SEC should publicly disclose annually the amount of funds distributed through its Fair Funds authority and the amount of money in Fair Funds that remains available for distribution (on both an aggregate and individual fund basis).	*Relevant Developments Not Directly Responsive – General Disclosures* • SEC – 2018 Annual Report on Enforcement: (Nov. 2018) The annual report noted that 70% of cases brought (not including delinquent filers) included individual defendants. The SEC brought 821 enforcement actions in FY 2018, distributed almost $800 million to harmed investors from Fair Funds or Disgorgement Funds, and obtained orders for penalties of more than $3.9 billion (including $1.4 billion in CMPs and $2.5 billion in disgorgement). The largest 5% of cases made of 77% of total monetary penalties. [2018 Annual Report] The next annual report is likely forthcoming at the beginning of November 2019. • SEC – 2019 Annual Report on Enforcement: (Nov. 2019) In line with the previous year, 69% of the SEC's standalone cases (excluding actions under the Share Class Initiative, which only apply to entities) involved charges against one or more individuals. The SEC brought 862 enforcement actions in FY 2019, 526 of which were stand-alone actions (as opposed to follow-on actions and 126 actions seeking to deregister delinquent filers). These standalone cases concerned investment advisers and investment companies (36%), securities offerings (21%), issuer reporting (17%), broker-dealers (7%), insider trading (6%), and market manipulation (6%). The SEC ordered $1.1 billion in penalties and $3.25 billion in disgorgement, with the largest 5% of cases representing 70% of all penalties and disgorgement. The median penalty was $200,000, and the median disgorgement was $694,663. Of the $1.2 billion in money distributed to harmed investors, $950 million came from Fair Funds and $247 million came from Disgorgement Funds. [2019 Annual Report]
12.	**Evaluate Civil Penalty Fund**: The CFPB should conduct a retrospective analysis of the Civil Penalty Fund that evaluates whether: (1) the Civil Penalty Fund is effectively compensating injured	

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	consumers; (2) victims are being adequately identified; and (3) there should be a cap on the total amount of money that can remain in the Civil Penalty Fund (with the balance distributed to the Treasury) to encourage efficient distribution of funds to injured consumers.	
13.	**Reform Three Percent Fund**: The DOJ Three Percent Fund should be reformed so that: (1) the DOJ can only use money from the Three Percent Fund as Congress intended – i.e., on activities to collect delinquent debts; and (2) the DOJ provides a public annual accounting of the amount of money deposited into the Three Percent Fund, the amount of money distributed from the Three Percent Fund, and how money distributed out of the Three Percent Fund was spent.	
14.	**Use of Third-party Settlement Funds**: Third parties that receive settlement funds from extraordinary restitution should be prohibited from using those funds to engage in political activities. Federal enforcement authorities should adopt policies and guidelines to effectively implement the ban	
15.	**Extraordinary Restitution Accounting**: Each federal enforcement authority should provide an annual accounting of the amount	

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	of settlement funds paid out as extraordinary restitution.	
16.	**State-level Sanctions Accounting**: The states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds from using those funds to engage in political activities.	
	Chapter 4: Promoting Individual Accountability	
17.	**DOJ Annual Enforcement Statistics**: The DOJ should publish annual statistics analyzing trends of criminal actions against financial professionals. Useful data would disclose the annual number of cases brought and average and median penalties imposed in categories of white-collar crimes committed by officers and directors of firms and gatekeepers such as lawyers and accountants.	*Recent Developments Adverse to the Recommendation* ▲ • SEC – Speech on "Lies and Statistics": (Oct. 2018) SEC Commissioner Hester Peirce gave a speech aggressively arguing for the use of qualitative rather than quantitative measures of enforcement. She argued against the broad disclosure of these metrics as a distraction. "Quite simply, the number of enforcement cases initiated or settled in any particular twelve-month period doesn't matter. … In the aftermath of the painful and devastating financial crisis, the Commission found itself drawn into a game of numbers unbounded by the exercise of reasonable discretion. Political, academic, and journalistic observers of the agency egged it on. To the Chairman's credit, the SEC is now focused on a meaningful enforcement agenda that focuses on the quality and not quantity of cases. … My closing message is simple: people outside of the Commission who are pushing us to meet numerical and penalty targets are unwittingly distracting us from protecting investors and the markets. We should resist this distraction and concentrate our resources in areas in which we can make a real difference." [Speech] • SEC – Speech on Enforcement Statistics: (Sept. 2019) Steven Peikin, Co-Director of the SEC's Enforcement Division, gave a speech in which he argued that enforcement statistics are a misleading and counter-productive measure of real enforcement activity. "I believe statistics are a poor proxy for the quality and effectiveness of our efforts. Indeed, in my view, judging our work primarily through the lens of statistics can not

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		only be misleading, but also counterproductive – incentivizing the wrong sorts of behaviors." [Speech] *Recent Developments Relevant to the Recommendation – General Disclosure* • SEC – 2019 Annual Report on Enforcement: (Nov. 2019) In line with the previous year, 69% of the SEC's standalone cases (excluding actions under the Share Class Initiative, which only apply to entities) involved charges against one or more individuals. The SEC brought 862 enforcement actions in FY 2019, 526 of which were stand-alone actions. These standalone cases concerned investment advisers and investment companies (36%), securities offerings (21%), issuer reporting (17%), broker-dealers (7%), insider trading (6%), and market manipulation (6%). The SEC ordered $1.1 billion in penalties and $3.25 billion in disgorgement, with the largest 5% of cases representing 70% of all penalties and disgorgement. The median penalty was $200,000, and the median disgorgement was $694,663. Of the $1.2 billion in money distributed to harmed investors, $950 million came from Fair Funds and $247 million came from Disgorgement Funds. [2019 Annual Report] The Wall Street Journal noted that the SEC brought a much higher "95 cases against investment advisers for inadequately disclosing their practice of selling more expensive funds to retail clients." [Wall Street Journal]
18.	**Affirmative Defense for Cooperation & Compliance**: An affirmative compliance and cooperation defense should be established in the United States to further promote effective compliance programs and harness their strengths to help identify and prevent individual misconduct. A successful application of the defense should require that the firm establish that the compliance procedures meet a baseline of reasonableness; and the firm promptly, transparently, and wholly disclosed known violations and all non-privileged relevant	*Reasonable Cooperation and Policies* ▲ • DOJ – Speech on Corporate Enforcement Policy: (Sept. 2018) Deputy Assistant Attorney General Matthew Miner provided an update on the implementation of the FCPA Corporate Enforcement Policy, which establishes a presumption that the DOJ will not prosecute a company for an FCPA violation if the company voluntarily discloses the violation, fully cooperates with the DOJ, and timely and appropriately remediates the problem. This policy was expanded in March 2018 to apply in a nonbinding fashion to all corporate criminal matters. He noted that the DOJ has already declined to prosecute three companies for FCPA violations (including two that had misconduct occur at senior management levels). [Speech] • DOJ – Application of Corporate Enforcement Policy: (Feb. 2019) By February 2019, the DOJ had declined 12 prosecutions under the policy. In the Cognizant declination letter, it listed ten factors relevant to its analysis, including: (1) swift voluntary self-disclosure upon learning of the conduct; (2) comprehensive investigation; (3) proactive

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	information uncovered during an internal investigation or review	cooperation; (4) the seriousness of the offense; (5) the company's lack of prior criminal history; (6) the company's pre-existing compliance program and steps taken to enhance its compliance program and internal accounting controls; (7) the company's full remediation and discipline; (8) the adequacy of remedies such as civil or regulatory enforcement actions, including by other agencies; (9) the company's agreement to disgorge the full amount gained; and (10) the fact that, as a result of the company's timely voluntary disclosure, the DOJ was able to conduct an independent investigation. [SEC Press Release] [Cleary Analysis] In a July 2018 speech, Deputy Assistant AG Matthew Miner enumerated similar factors. [Speech] In a September 2019 speech, Deputy Assistant AG Matthew Miner affirmed that the DOJ publishes declination letters to give guidance to companies on how cooperation credit will be applied [Speech] • DOJ – Revisions to Enforcement Policy: (April 2019) The revision eliminates the prohibition on companies using ephemeral instant messaging but conditions its use. "Additionally, the modified Enforcement Policy (1) now makes clear that one requirement of cooperation, de-confliction of witness interviews, should not interfere with a company's internal investigation; (2) confirms based on an earlier announcement, that the Policy applies in the context of a merger and acquisition ('M&A'), if an acquiring company discovers and self-discloses misconduct in a target; and (3) implements a change announced months before by the Deputy Attorney General that a company only needed to provide information about individuals 'substantially involved' in the offense." The DPJ also described how it will weigh aggravating factors that militate against declination. [Policy] [Cleary Analysis]
19.	**Aggregated Sanctions Database**: Enforcement authorities should coordinate to compile a single, publicly available resource that aggregates information on final judgments or orders imposing criminal or civil sanctions against financial professionals and present it in a user-friendly format.	

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	This recommendation differs from recommendation number 8 because the Committee Staff is recommending that enforcement actions against individuals that impose civil or criminal sanctions be provided by all the enforcement authorities in one accessible location as part of a comprehensive database. In recommendation 8, the Committee Staff is recommending that each enforcement agency develop its own searchable database of all enforcement action outcomes against any type of defendant.	