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THE SUPREME COURT'S DECISION IN *GOLDMAN SACHS* CONFIRMS COURTS MUST CONSIDER ALL RELEVANT "PRICE IMPACT" EVIDENCE WHEN ADDRESSING CLASS CERTIFICATION IN FEDERAL SECURITIES FRAUD CLASS ACTIONS

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In a significant ruling for securities class action defendants, the Supreme Court recently confirmed in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System* that district courts must consider at the class certification stage "all evidence relevant to price impact." The "price impact" analysis in a federal securities fraud action considers whether a defendant's alleged misrepresentation actually affected the company's stock price, as required to support a presumption of reliance under the "fraud-on-the-market" theory. A recent line of Supreme Court decisions permits a securities fraud defendant to defeat class certification by demonstrating the lack of price impact. But those decisions left some uncertainty about the type of evidence a defendant could present to make that showing. In *Goldman Sachs*, the Court confirmed that, when deciding class certification in a securities fraud case, "[t]he district court's task is simply to assess all the evidence of price impact . . . and determine whether it is more likely than not that the alleged misrepresentations had a price impact."

Background: Reliance, the *Basic* Presumption, and "Price Impact"

To recover damages for securities fraud, a plaintiff must prove—among other things—that it relied on the defendant's misstatement when entering into a securities transaction. The "traditional (and most direct) way" to prove reliance is for the plaintiff to show that it knew of the alleged misrepresentation and relied on it when deciding to engage in a securities transaction.[1] In *Basic Inc. v. Levinson*, the Supreme Court held that a securities fraud plaintiff could also invoke a rebuttable

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presumption of reliance based on the "fraud-on-the-market" theory.[2] Under the *Basic* presumption, a plaintiff is presumed to rely on a statement if it is incorporated in the market price when the plaintiff buys the stock, and a misstatement is presumed to be incorporated in the market price if the plaintiff can show that the stock trades in an efficient market.[3] "*Basic* emphasized that the presumption of reliance was rebuttable rather than conclusive."[4] Thus, even if a plaintiff establishes that the defendant's stock traded in an efficient market, "if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price . . . then the presumption of reliance would not apply."[5] This question—whether the alleged misrepresentation actually affected the stock price—is referred to as "price impact."

While the *Basic* presumption can be invoked in any federal securities fraud case, it has "particular significance in securities-fraud class actions."[6] Under Rule 23(b)(3), in order to certify any class, the plaintiff must show through evidentiary proof that common questions of fact predominate over individualized ones. Without the *Basic* presumption, individual reliance issues ordinarily would predominate and "preclude certification" of a securities-fraud class action.[7] Thus, whether the *Basic* presumption applies—*i.e.*, whether the plaintiff has successfully shown an efficient market and, if so, whether the defendant has rebutted the presumption by showing a lack of price impact—is often the key contested issue in class certification proceedings in federal securities fraud cases.

In a series of decisions over the past decade, the Supreme Court revisited and refined the parameters of when the *Basic* presumption applies. First, in *Erica P. John Fund, Inc. v. Halliburton Co.*,[8] (*Halliburton I*), the Court held that plaintiffs do not need to establish loss causation—that the decline in price was a direct result of the alleged misrepresentations—at the class certification stage for the *Basic* presumption to apply. Next, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*,[9] the Court held that plaintiffs need not prove that the alleged misstatements were material in order to benefit from the presumption. Then, in *Halliburton II*, the Court held that "defendants must be afforded an opportunity before class certification to defeat the presumption through evidence that . . . the alleged

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misrepresentation had no price impact" when the misrepresentation was made.[10]

On its face, *Halliburton II* seemed to offer defendants a meaningful opportunity to rebut the *Basic* presumption. But since the decision, plaintiffs have sidestepped its effect by increasingly relying on a theory of price maintenance—*i.e.*, instead of arguing that a misrepresentation caused a stock's price to increase, they argue that the alleged misstatement prevented the price from declining in the amount that it would have if the truth had been disclosed—in other words, instead of causing an artificial increase in the price, the misstatement artificially "maintained" an inflated price. Under the price maintenance theory, there would be no expectation that a misrepresentation would be associated with a contemporaneous rise in price, and plaintiffs could demonstrate price impact simply by pointing to a price drop after a corrective disclosure of the earlier alleged misrepresentation. While pointing to the stock drop following an alleged corrective disclosure as evidence of price impact, plaintiffs typically seek to foreclose defendants from contesting price impact by characterizing defendants' arguments as improper attempts to argue materiality or loss causation at the class certification stage, which *Halliburton I* and *Amgen* prohibit.[11]

In *Goldman*, the Supreme Court addressed the standards that apply when a defendant seeks to rebut the *Basic* presumption by showing a lack of price impact and provided guidance for lower courts considering evidence of price impact under the price maintenance theory.

The *Goldman* Decision

The *Goldman* Court considered two recurring questions arising when defendants seek to rebut the *Basic* presumption: (i) whether, in light of *Amgen*'s and *Halliburton I*'s prohibitions on inquiries into loss causation and materiality at the class certification stage, courts may consider evidence about the generic nature of a misrepresentation offered to show lack of price impact under *Halliburton II*; and (ii) whether defendants bear the ultimate burden of proof to prove the absence of price impact by a preponderance of the evidence.

Plaintiffs in *Goldman* alleged that the bank and three former executives maintained an artificially inflated price by making various misstatements about Goldman Sachs' ability to manage potential conflicts of interest. Among the statements the plaintiffs challenged were generic statements such as "We have extensive procedures and controls that are designed to identify and address conflicts of interest." Plaintiffs alleged that the "truth"—that those generic statements were false—was revealed when the SEC filed an enforcement action against Goldman Sachs concerning alleged conflicts of interest in the structuring of a complex structured finance transaction.

Plaintiffs moved to certify the class in the Southern District of New York, seeking to invoke the *Basic* presumption. Goldman Sachs attempted to rebut the presumption with evidence of a lack of price impact, including evidence that news articles had already placed information about the alleged conflicts into the market and the stock price did not react at that time.

In a 2015 order, the district court initially refused to consider Goldman's evidence of lack of price impact and certified the class.[12] The district court required Goldman to prove that there was no possibility that the statements had price impact in order to rebut the *Basic* presumption, finding that, "here, where Defendants cannot demonstrate a complete absence of price impact, and where Plaintiffs have demonstrated an efficient market, the *Basic* presumption applies."[13] On appeal, the Second Circuit vacated the class certification order, holding that the defendant bears the burden of persuasion to prove a lack of price impact by a preponderance of the evidence and that the district court erred by holding Goldman to a higher burden of proof. The Second Circuit also found error in the district court's refusal to consider Goldman's price impact evidence.[14]

On remand, the district court certified the class again, finding that Goldman's expert testimony failed to establish by a preponderance of the evidence a lack of price impact.[15] In a split decision, the Second Circuit affirmed, finding that the district court's price impact determination was not an abuse of discretion.[16] The court found that evidence Goldman presented regarding the generic nature of the alleged misstatements touched on materiality and was not confined to the price maintenance analysis, and "materiality is irrelevant at the Rule 23 stage."[17] Judge Richard J. Sullivan dissented, observing that given "the generic quality of Goldman's alleged misstatements" and in light of its expert testimony, Goldman had met its burden to prove lack of price impact.[18] The Supreme Court granted certiorari to consider two questions:

1. Whether a defendant in a securities class action may rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson*,[19] by pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality.

2. Whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion.

As to the first question, the Supreme Court held that, "[i]n assessing price impact at class certification, courts should be open to <u>all</u> probative evidence on that question . . . regardless whether the evidence is also relevant to a merits question . . ."[20] And the Court recognized it is particularly important to consider "<u>all</u> probative evidence" where the plaintiff relies on the "price maintenance theory."[21] As the Court explained, under the "price maintenance" theory, "[p]laintiffs typically try to prove the amount of inflation indirectly: They point to a negative disclosure about a company and an associated drop in stock price; allege that the disclosure corrected an earlier misrepresentation; and then claim that the price drop is equal to the amount of inflation maintained by the earlier misrepresentation." But, the Court explained, "that final inference—that the back-end price drop equals front-end inflation—starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure." Thus, defendants in "price maintenance" cases must be given the opportunity to present evidence of the "mismatch between the contents of the misrepresentation and the corrective disclosure." While the Court recognized that price impact evidence may overlap with evidence that is relevant to materiality and loss causation, it explained that " 'a district court may not use the overlap [between "merits" questions and price impact] to refuse to consider the evidence.' "

As to the second question, the Court agreed with the plaintiff that defendants bear the burden of persuasion to show that the alleged misrepresentations had no impact on stock price. However, the Court further observed that "[t]he defendant's burden of persuasion will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise." Regardless of the allocation of evidentiary burdens, the Court confirmed "the district court's task is simply to assess all the evidence . . . and determine whether it is more likely than not that the alleged misrepresentations had a price impact."

Takeaways

The Supreme Court's decision in *Goldman* confirms that district courts must consider "all probative evidence" when assessing price impact and that the Court's earlier decisions in *Halliburton I* and *Amgen* do not limit the evidence that defendants may present to show the lack of price impact at the class certification stage. The Court further confirmed that, after considering "all probative evidence," district courts must weigh that evidence and determine whether it is more likely than not that the alleged misstatements actually affected the stock price. Taken together, these holdings should make it more difficult for securities fraud plaintiffs simply to point to a stock drop following an alleged corrective disclosure as evidence that an earlier alleged misstatement had price impact.

ENDNOTES:

[1]*Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267, 134 S. Ct. 2398, 189 L. Ed. 2d 339, Fed. Sec. L. Rep. (CCH) P 98003, 88 Fed. R. Serv. 3d 1472 (2014) (*Halliburton II*).

[2]*Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).

[3]*Halliburton II* at 277-278.

[4]*Halliburton II* at 268; *see also Basic* at 248.

[5]*Halliburton II* at 268.

[6]*Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 462, 133 S. Ct. 1184, 185 L. Ed. 2d 308, Fed. Sec. L. Rep. (CCH) P 97300, 84 Fed. R. Serv. 3d 1151 (2013) (*Amgen*).

[7]*Amgen* at 462-63.

[8]*Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 131 S. Ct. 2179, 180 L. Ed. 2d 24, Fed. Sec. L. Rep. (CCH) P 96323, 79 Fed. R. Serv. 3d 945 (2011).

[9]*Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 133 S. Ct. 1184, 185 L. Ed. 2d 308, Fed. Sec. L. Rep. (CCH) P 97300, 84 Fed. R. Serv. 3d 1151 (2013).

[10]*Halliburton II*, 573 U.S. at 284.

[11]As the Seventh Circuit observed, "[e]vidence supporting or refuting the Basic presumption of reliance is often relevant to three other closely related issues in a securities fraud case—materiality, loss causation, and transaction causation." *In re Allstate Corporation Securities Litigation*, 966 F.3d 595, 600, Fed. Sec. L. Rep. (CCH) P 100866, 107 Fed. R. Serv. 3d 178 (7th Cir. 2020).

[12]*In re Goldman Sachs Group, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 98823, 2015 WL 5613150 (S.D. N.Y. 2015), vacated and remanded, 879 F.3d 474, Fed. Sec. L. Rep. (CCH) P 99952, 105 Fed. R. Evid. Serv. 499, 99 Fed. R. Serv. 3d 932 (2d Cir. 2018).

[13]*In re Goldman Sachs* at *6.

[14]*Arkansas Teachers Retirement System v. Goldman Sachs Group, Inc.*, 879 F.3d 474, Fed. Sec. L. Rep. (CCH) P 99952, 105 Fed. R. Evid. Serv. 499, 99 Fed. R. Serv. 3d 932 (2d Cir. 2018).

[15]*In re Goldman Sachs Group, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 100240, 2018 WL 3854757 (S.D. N.Y. 2018), aff'd, 955 F.3d 254, Fed. Sec. L. Rep. (CCH) P 100790 (2d Cir. 2020), cert. granted, 141 S. Ct. 950, 208 L. Ed. 2d 488 (2020) and vacated and remanded, 141 S. Ct. 1951 (2021).

[16]*Arkansas Teachers Retirement System v. Goldman Sachs Group, Inc.*, 879 F.3d 474, Fed. Sec. L. Rep. (CCH) P 99952, 105 Fed. R. Evid. Serv. 499, 99 Fed. R. Serv. 3d 932 (2d Cir. 2018).

[17]*Arkansas Teachers Retirement System v. Goldman Sachs Group, Inc.* at 268.

[18]*Arkansas Teachers Retirement System v. Goldman Sachs Group, Inc.* at 279.

[19]*Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).

[20](emphasis in original).

[21](emphasis in original).

RENEWED REGULATORY FOCUS ON SHORT SALE AND SWAP POSITION REPORTING

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When the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or, the "Act") was passed in 2010, many commentators focused on the breadth of the legislation. Yet one of the underappreciated aspects of Dodd-Frank was the extent to which it passed responsibility for a large number of rulemakings and studies back to the Securities and Exchange Commission (the "SEC" or, the "Commission") and the Staff of its various divisions. While many of these rulemakings, as well as several studies that the Act required the Commission to undertake, have generated a great deal of sustained interest over time as the Commission has completed those projects, the Commission has yet to complete all of its required work. One such required rulemaking under Dodd-Frank, which has recently begun to garner more widespread attention, directed the Commission to expand the current investment position reporting required under Section 13(f) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to include short sale positions.

That required rulemaking, which can be found in Dodd-Frank Section 929X, amended Exchange Act Section 13(f) to require the Commission to "prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period," with the further direction that, "[a]t a minimum, such public disclosure shall occur every month."[1] While this provision has been part of existing law for more than 10 years, the Commission has never acted on it. Recent events, however, including Congressional hearings related to the volatility of trading in GameStop, Inc. ("GameStop"),[2] and the unraveling of Archegos Capital Management,[3] have brought renewed focus to Section 929X. Moreover, what was once a long list of mandatory SEC rulemakings required by Dodd-Frank has become a much shorter list, with Section 929X remaining as one of only three mandatory rulemakings for which the Commission has yet to put forth a rulemaking proposal.[4] And, while the SEC's unified regulatory agenda has during several recent periods indicated that the SEC's Division of Trading and Markets was "considering recommending that the Commission propose rules to implement section 929X(a) of the Dodd-Frank Act," such consideration had been characterized as a "Long-Term Action" until the most recently released agenda, issued on June 11, 2021, which changed its status to the "Proposed Rule Stage," with a targeted Notice of Proposed Rule-Making by November 2021.[5]

These recent events highlight and underscore the likelihood that the SEC will introduce rulemaking concerning short sale position disclosure for institutional investment managers in the near future.

Recent SEC Efforts to Amend Rule 13f-1

After many years in which the current reporting requirements of Rule 13f-1 had gone unchanged, on July 10, 2020, the Commission issued a proposed rulemaking to adjust upward the reporting thresholds for Exchange Act Section 13(f) reporting.[6] That proposal was met with significant pushback from commenters, and was ultimately abandoned by the Commission. At the time of the proposal, the SEC acknowledged in a footnote that they had previously "received petitions for rulemakings regarding other aspects of Form 13F," including one cited proposal asking the Commission to "consider requiring periodic public disclosure of short-sale activities of managers on Form 13F."[7] At that time, however, the Commission said that they believed that "it is appropriate to propose changes to the scope of managers required to file reports on Form 13F before considering other potential amendments to the Form."[8]

Among the critics of the SEC's July 2020 13(f) proposal were Senators Tammy Baldwin (D-WI), Sherrod Brown (D-OH), Jack Reed (D-RI), and Chris Van Hollen (D-MD), who co-signed an October 22, 2020 letter to then-SEC Chair Jay Clayton that called on the SEC to "Withdraw Proposal that Undermines Transparency." The Senators noted that, "While proposing an unprecedented 3,400% increase in the Form 13F reporting threshold, the Commission ignores several ways to improve transparency and provide more information to investors and market participants. For example, the Commission fails to acknowledge the required rulemaking under Section 929X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Wall Street Reform Act), which directed the Commission to require Form 13F filers to report short sales each month."[9] Chair Clayton subsequently acknowledged during questioning before the Senate Banking Committee in November 2020 that the Commission was abandoning this proposal,[10] and Congressional calls for the SEC to take up its required rulemaking under Dodd-Frank Section 929X appeared temporarily to have lost any momentum heading into a change in administrations.

Renewed Congressional and SEC Focus on 929X and Short Sale Reporting Legislation

With the new administration, and recent events concerning trading in GameStop and the losses suffered by Archegos Capital, Congressional and Commission focus appears to have shifted back towards expanding the scope of reporting obligations under Section 13(f).

Congressional calls for action began shortly after the change in administration, and were initially prompted by interest in the volatility around trading in GameStop. For example, on January 29, 2021, Senator Elizabeth Warren (D-MA) sent a letter to SEC Commissioner (and then-Acting Chair) Lee asking a number of pointed questions about the SEC's response to volatility in the trading of GameStop.[11] In a February 25, 2021 response letter later made public by Senator Warren, then-Chair Lee wrote, "I believe the Commission should consider requiring increased disclosure of short-selling to regulators and the general public as well as completion of the Dodd-Frank mandate for a rule under Section 929X of Dodd-Frank."[12]

Subsequently, on March 17, 2021, the House Financial Services Committee ("HFSC") held the second of three hearings on trading in the securities of GameStop, titled, "Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part II." In a memorandum released prior to the hearing, the HFSC Majority Staff took up the baton from then-Acting SEC Chair Lee's February 25, 2021 letter by noting the fact that the Commission had yet to undertake any action with respect to Section 929X.[13] Specifically, the HFSC Majority Staff noted that "929X(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires the Commission to '. . . prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period.' " The HFSC Majority Staff memorandum then went on to note that "the SEC has not engaged in this rulemaking to date."[14]

Perhaps motivated by the lack of engagement by the Commission on the issue to date, on May 3, 2021, the HFSC released for discussion several bills in connection with their third GameStop-related hearing, which was held on May 6, 2021.[15] While none of these bills have yet to be sponsored or formally introduced, one of the noticed draft bills, titled "Capital Markets Engagement and Transparency Act of 2021," proposes modifying Exchange Act Section 13(f) to:

- Redefine the scope of Section 13(f) to apply to "covered securities," a new defined term which would expand the current coverage from any equity security of a class described in Exchange Act Section 13(d)(1) to also include any "direct or indirect short interest or position in an equity security," as well as any "direct or indirect derivative interest or position in an equity security";

- Increase the frequency of Section 13(f) reporting by requiring Form 13F reports to be filed "not later than 5 business days after the end of each month with the Commission in such form as the Commission may prescribe by rule";

- Require the Commission to "conduct a study to evaluate the standards and criteria used to determine whether confidential treatment shall apply" to Form 13F reports filed by institutional investment managers; and

- Require the Commission, within two years of the enactment of the proposed Act, to "issue rules to improve the transparency of equity ownership positions by reducing the use of confidential treatment" for positions required to be reported on Form 13F, including by limiting "the duration of such confidential treatment" and "the number or types of securities for which such treatment applies."[16]

Whether or not spurred to speak to the issue by this draft legislation, SEC Chair Gensler subsequently addressed the possibility of future rulemaking in his prepared testimony before the HFSC in the May 2021 GameStop-related hearings. In that testimony, Chair Gensler wrote, "While FINRA and the exchanges currently publish or make available certain short sale data, Congress directed the SEC under the Dodd-Frank Act to publish rules on monthly aggregate short sale disclosures. In addition, Dodd-Frank provided authority to the SEC to increase transparency in the stock loan market. I've directed SEC Staff to prepare recommendations for the Commission's consideration on these issues."[17]

Similarly, when Chair Gensler was asked by Representative Alma Adams (D-NC) if he thought Form 13F filings should be expanded to include derivatives, Chair Gensler replied, "I do think that Congress anticipated this by giving authority to the SEC to do that. I think these derivatives are what's known in this case [Archegos] as total return swaps, being included in those filings would be positive. I can't speak on behalf of the Commission . . . but I've asked Staff to prepare recommendations to the five-member Commission to use that authority that the SEC has. I also think that there might be other updates that we should do beyond just derivatives as well."[18]

Similarly, when Chair Gensler was asked by Representative William Timmons (R-SC) if he believes that it is necessary for short sellers to disclose their short positions on Form 13F filings, and whether such a requirement could lead to regulatory over-reach, Chair Gensler replied, "Congress anticipated and gave authorities to the SEC to, on a monthly basis, require aggregate information in the short-selling market. FINRA [. . .] already publishes some information on a bi-weekly basis.[19] I think that transparency is positive to markets, and I've asked Staff to put forward recommendations to our five-member Commission. It was actually a *mandate* from Congress. It wasn't a 'may,' it was a 'shall.' So, we're going to lean in and follow Congress' mandate from 12 years ago."[20]

Possible Expansion of Swap Reporting Under Exchange Act Sections 13(d) and 16

As with possible regulatory activity in the context of Exchange Act Section 13(f), recent Commission actions suggest that the SEC may also be interested in revising the definition of beneficial ownership for purposes of Exchange Act Sections 13(d) and 16 in order to expand the scope of reporting required under those provisions to cover additional types of swap positions.[21]

For example, Chair Gensler remarked in his prepared testimony for the most recent GameStop hearings that, "[u]nder Dodd-Frank, Congress gave the SEC rulemaking authority to extend beneficial ownership reporting requirements to total return swaps and other security-based swaps."[22] As with Dodd-Frank's direction to the SEC concerning monthly aggregate short sale disclosures, Chair Gensler noted that he had directed the SEC Staff to "consider recommendations for the Commission about whether to include total return swaps and other security-based swaps under new disclosure requirements, and if so how."[23] Similarly, when asked by Representative Anthony Gonzales (R-OH) during the recent GameStop hearings whether greater than 5% beneficial ownership reporting should be "triggered instead by exposure, as opposed to outright ownership," and whether that would have solved the problems that arose with Archegos, Chair Gensler replied, "I think you raised a very good point. Congress anticipated this and in reforms passed 12 years ago [in] the Dodd-Frank Act [. . .] gave authority to the SEC with certain conditions, with authority to bring what's called security-based swaps into these regimes, this five and ten percent disclosure. I've asked Staff to try to prepare recommendations for the full commission. I think this Archegos circumstance where this family office had well in excess of those numbers shows some of the market-based and systemic-based reasons why, even if they didn't have the vote, it was an important set of exposures."[24]

Chair Gensler's comments have been borne out by the Commission's recently released regulatory agenda, which separately introduced for the first time an entry titled "Disclosure Regarding Beneficial Ownership and Swaps."[25] Pursuant to this agenda item, the Division of Corporation Finance and the Division of Trading and Markets have been identified as "considering recommending that the Commission propose amendments to enhance market transparency, including disclosure related to beneficial ownership of interests in security-based swaps."[26] While the Commission has yet to provide any detailed gloss on the form of this separate agenda item, it is possible, and probably likely, that any proposed rulemaking in this space will serve as a complement to proposed legislation under 929X.

Anticipated Developments

Given the direction given to the Commission in the language of Section 929X, its place on the diminishing list of SEC rulemakings required by Dodd-Frank that have not yet been acted upon, the focus on expanding short position disclosure in recent Congressional hearings (whether through changes to Section 13(f) reporting or the expansion of beneficial ownership reporting), and the recent statements of SEC Chair Gensler (referring to the required rulemaking as a "mandate," noting that he had directed Commission Staff to put forward recommendations, and remarking that the Commission is going to "lean in" to this issue), some form of rulemaking to require institutional investment managers to disclose additional information regarding their short positions should be expected. Whether such a rulemaking will mirror the concerns of the draft discussion bill drafted by the Majority Staff of the HFSC remains to be seen, but that draft stands as a marker that may have some influence on the Commission Staff's thinking.

Any proposed rulemaking by the SEC will be subject to a notice and comment period, and parties who will be impacted by any resulting legislation are well advised to consider in advance any potential concerns that such legislation might raise for their business, and to assess whether such concerns should be raised with the Commission, whether in advance of, or in connection with, a formal notice and comment period.[27]

This article is not intended to provide legal advice, and no legal or business decision should be based on its contents.

ENDNOTES:

[1]*See* Dodd-Frank Wall Street Reform and Consumer Protection Act Section 929X(a) (codified as amended at 15 U.S.C.A. § 78m(f)(2) (2012)).

[2]*See* Memorandum, Financial Services Committee, Majority Staff, May 6, 2021 Full Committee Hearing Entitled, "Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Pt. III?" (May 3, 2021), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-20210506-sd002.pdf.

[3]*See* Matthew Goldstein, Archegos Left a Sparse Paper Trail for a $10 Billion Firm, N.Y. Times (Apr. 12, 2021), *available at* https://www.nytimes.com/2021/04/12/business/archegos-capital-management-sec.html.

[4]The SEC has published on its website a status report on its efforts to implement the mandatory rulemakings required of the Commission under Dodd-Frank. *See* Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, *available at* https://www.sec.gov/spotlight/dodd-frank.shtml. To date, the SEC has adopted final rules for 67 mandatory rulemakings required under the Act. An additional eight mandatory rulemakings have been proposed and are awaiting action, leaving a total of only three mandatory rulemakings yet to see a rulemaking proposal. Of these three, Section 929X is one, with the remaining two relating to stress tests and regulations for the Office of Investor Advocate.

[5]*See* Press Release 2021-99, SEC Announces Annual Regulatory Agenda (June 11, 2021), *available at* https://www.sec.gov/news/press-release/2021-99?utm_medium=email&utm_source=govdelivery (noting that the "notable proposed and final SEC rulemaking areas" in the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions, includes "short sale disclosure, securities-based swaps ownership, and the stock loan market," and "[u]nfinished work directed by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, including, among other things, securities-based swaps and related rules . . ."). The specific agenda item regarding Dodd-Frank Section 929X can be found at Regulation Identifier Number 3235-AM34, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM34. Prior to the Spring 2021 Agenda, the SEC's Spring and Fall agendas for the years 2018 through 2020 had each included an entry for the Division of Trading and Markets titled "Short Sale Disclosure Reforms." In each such instance, the abstract read, "The Division is considering recommending that the Commission propose rules to implement section 929X(a) of the Dodd-Frank Act," with the "Agenda Stage of Rulemaking" falling into the category of "Long-Term Actions," with no specified time frame for proposing a rule.

[6]*See* Fried Frank, SEC Issues Rulemaking Proposal to Increase the Rule 13f-1 Reporting Threshold to $3.5 Billion and Revise SEC Form 13F (July 24, 2020), *available at* https://www.friedfrank.com/siteFiles/Publications/FFTOCProposedRulemakingConcerning13fReporting072420201.pdf.

[7]*See* Proposed Rulemaking, "Reporting Thresh-

old for Institutional Investment Managers," Exchange Act Rel. No. 89290 (July 10, 2020) at fn.28, *available at* https://www.sec.gov/rules/proposed/2020/34-89290.pdf.

[8]*See* Exchange Act Rel. No. 89290.

[9]*See* Letter to SEC Chair Jay Clayton from Senators Baldwin, Brown, Reed and Van-Hollen (Oct. 21, 2020), *available at* https://www.banking.senate.gov/imo/media/doc/Ltr_to_Chair_Clayton_Form13F_10212020.pdf.

[10]*See* Hearing Testimony, Senate Committee on Banking, Housing and Urban Affairs, Oversight of the Securities and Exchange Commission at 1:48:33 (Nov. 17, 2020), *available at* https://www.banking.senate.gov/hearings/10/23/2020/oversight-of-the-securities-and-exchange-commission.

[11]*See* Letter from Senator Elizabeth Warren to SEC Acting Chair Alison Herren Lee (Jan. 29, 2021), *available at* https://www.warren.senate.gov/imo/media/doc/01.29.2021%20Letter%20from%20Senator%20Warren%20to%20Acting%20Chair%20Lee.pdf.

[12]*See* Letter from Acting SEC Chair Lee to Senator Elizabeth Warren, (Feb. 25, 2021), *available at* https://www.warren.senate.gov/imo/media/doc/Warren%20-%20GameStop%20%20ES159891%20Response.pdf?pdf. While the language inserted by Dodd-Frank into Section 13(f) can be read to require such a rulemaking, then Acting Chair Lee's description of the rulemaking as a "mandate" is notable, and would presage comments about the same topic made later by Chair Gary Gensler. *See infra*.

[13]Memorandum, Financial Services Committee, Majority Staff, March 17, 2021 Full Committee Hearing Entitled, "Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Pt. II?" (Mar. 15, 2021), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-20210317-sd002.pdf.

[14]*See id.* Although the Majority HFSC Staff referenced Dodd-Frank Section 929X in its Committee Memorandum in advance of this hearing, the testimony during this second GameStop hearing did not address Exchange Act Section 13(f) in detail. The one exception came in the form of testimony from Michael Blaugrund, the Chief Operating Officer of the New York Stock Exchange ("NYSE"), who noted that NYSE sits "at the nexus of investors and issuers" and that, based on dialogue between representatives of both groups, NYSE believes that "the SEC should consider shortening the delay for 13(f) reporting . . . and consider mechanisms . . . that enable direct disclosures to corporate issuers when a reportable position is established or fully divested." *See* Prepared Testimony of Michael Blaugrund, *available at* https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-wstate-blaugrundm-20210317.pdf.

[15]*See supra* n.2 at p.6 (describing draft discussion legislation titled "H.R.___, to amend the Securities Exchange Act of 1934 to modernize reporting requirements under section 13(f) of such Act, and for other purposes: this discussion draft would shorten the reporting period for 13-F disclosures from quarterly to monthly and require the disclosure of short positions and certain derivatives"). A copy of the draft legislation can be found on the HFSC's website at https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407748.

[16]*See* H.R.___, the "Capital Markets Engagement and Transparency Act of 2021," *available at* https://financialservices.house.gov/uploadedfiles/5.06.2021_bills-117pih-disclosures.pdf. An earlier report from the SEC's Office of Inspector General had similarly raised issues with the agency's process for granting or denying confidential treatment requests, finding that the SEC's Division of Investment Management had on some occasions "not rendered a final decision on a timely basis, thus affording certain filers de facto confidential treatment of their 13F reports." *See* Report of the SEC's Office of Inspector General, Office of Audits, Review of the SEC's Section 13(f) Reporting Requirements, (Sept. 27, 2010), *available at* https://www.sec.gov/about/offices/oig/reports/audits/2010/480.pdf.

[17]*See* Chair Gary Gensler, Testimony Before the House Committee on Financial Services (May 6, 2021), *available at* https://www.sec.gov/news/testimony/gensler-testimony-20210505. Chair Gensler's remarks left open the possibility that the Commission could address short sale reporting through rulemaking directed at the standards of beneficial ownership under Exchange Act Sections 13(d) and 16, and the rules promulgated thereunder.

[18]*See* Webcast of hearing beginning at 3:29:00, *available at* https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407748.

[19]FINRA, answering its own calls to expand upon its short position requirements, recently pub-

lished a notice of proposed rulemaking to increase the frequency of this required reporting. See Regulatory Notice 21-19, FINRA Requests Comment on Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting, *available at* https://www.finra.org/rules-guidance/notices/21-19.

[20]*See* Webcast of hearing beginning at 3:45:37, available at https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407748.

[21]Dodd-Frank Section 929X is separate from and in addition to Dodd-Frank Section 766, which added to the Exchange Act Section 13(o), which provides that, for purposes of Exchange Act Section 13 and 16, "a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the Commission, by rule, determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the security-based swap, or class of security-based swap, provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of this section that the purchase or sale of the security-based swaps, or class of security-based swap, be deemed the acquisition of beneficial ownership of the equity security." *See* Exchange Act Section 13(o). In connection with Section 766, the SEC on June 8, 2011 readopted without change parts of Exchange Act Rules 13d-3 and 16a-1 in order to "preserve the application of [the SEC's] beneficial ownership rules to persons who purchase or sell security-based swaps after the effective date of Section 13(o)." *See* "Beneficial Ownership Reporting Requirements and Security-Based Swaps," Exchange Act Rel. No. 64628 (June 8, 2011). At that time, the SEC said that, although this rulemaking was "only intended to preserve the existing application of the beneficial ownership rules as they relate to security-based swaps, our staff is engaged in a separate project to develop proposals to modernize reporting under Exchange Act Sections 13(d) and 13(g)." Although that comment was made more than 10 years ago, such a proposal has to date not come to fruition.

[22]*See* Chair Gary Gensler, Testimony Before the House Committee on Financial Services (May 6, 2021), *available at* https://www.sec.gov/news/testimony/gensler-testimony-20210505.

[23]Gensler Testimony (May 6, 2021).

[24]*See* Webcast of Hearing beginning at 3:04:00, *available at* https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407748.

[25]The targeted date for a Notice of Proposed Rulemaking on this subject is April 2022. *See* Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions at Regulatory Identifier Number 3235-AM93, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM93.

[26]*See* Spring 2021 Unified Agenda at Regulatory Identifier Number 3235-AM93.

[27]The Managed Funds Association has in the past advocated that, if any rulemaking is adopted under 929X, the SEC should interpret the provision to require only "aggregate" short position reporting on an issuer-by-issuer basis (as opposed to an institutional investor-by-institutional investor based reporting as currently required for long positions under 13(f)). *See* Letter from the Managed Funds Association to James A. Brigagliano, Deputy Director, SEC Division of Trading & Markets (Feb. 7, 2011), *available at* http://www.sec.gov/comments/df-title-ix/short-sale-disclosure/shortsaledisclosure-26.pdf. Whether that position will prevail will be the subject of debate should any proposed rulemaking be issued. Compare *e.g.,* Letter from NYSE to Brent J. Fields, Secretary, SEC, Petition for Rulemaking Pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934 (Oct. 7, 2015), *available at* https://www.sec.gov/rules/petitions/2015/petn4-689.pdf.

GAMIFICATION OF STOCKS: HOW CAN THE SEC ACT?

In late June, ***Wall Street Lawyer*** *spoke to Amy Lynch, president and founder of the consulting firm FrontLine Compliance, on the topic of "meme stocks" and how the Securities and Exchange Commission may act to try to regulate them. Lynch has worked for the SEC in its New York and Washington, D.C. offices and was a special investigator with FINRA. She has also worked as the DOC for Mercantile Capital Advisors, as Chief Compliance Officer for E*Trade Advisory Services, and as vice president at RegEd.com.*

Wall Street Lawyer*: In terms of addressing the* *"gamification" of stocks, what options can the SEC pursue? What are some likely scenarios for them?*

Amy Lynch*:* Chairman Gensler has said publicly at conferences and when appearing before Congress that he's having his staff look into this. And that's good. We should start with definitions. The term gamification needs to be defined: what does that mean, really? What are these platforms that have been named in the recent frenzies, the very online trading platforms like Robinhood, these systems that provide a mechanism for trading? They are registered as broker/dealers but they market themselves as an app for your phone that you can easily go to and conduct securities transactions. They market heavily to younger people that are major users of mobile phone apps, and of gaming in particular on mobile devices.

So, they're using techniques that are often found in gaming—giving an instant reward for conducting a trade, such as the confetti that comes down on the Robinhood app whenever you place a trade, for instance (which has since been removed by Robinhood). Another mechanism on Robinhood is that they'll have users vie to be first in line to get access to a new product, so they have to keep clicking on a page or button. Things like that are essentially gamification techniques. That's what I think the SEC will be looking at—these apps and how they function. What they're worried about is: are they inciting or inducing people to trade heavily in their accounts? Because studies have shown that frequent trading often costs the trader more in transaction-related fees or other losses than if they were simply buying and holding securities. The SEC is going to look at the functionality of these systems and if these are inducing trading. But I think that's going to be a hard thing for them to determine.

WSL*: One thing Chairman Gensler has suggested was for the likes of Robinhood to issue pop-up disclosures, basically issuing warnings before someone can make a trade on an app.*

Lynch: Those kind of pop-up disclosures already occur in many trading platforms when transactions are placed. These mechanisms are there for other reasons, so it would be fairly simple for providers to do that. A pop-up that showed the risks and downfalls of frequent trading, perhaps after x number of trades in an account in one day, may be one way the SEC can effectively address the issue, by requiring disclosures to make sure users do understand the risk they face by conducting frequent trading.

WSL*: Are there other gamification-related areas that the SEC is currently examining?*

Lynch: There's already been a lot of debate on the blowup that happened in January and what resulted from that. We had hearings, we had Citadel under the gun, Robinhood was under the gun, Reddit was under the gun. Everyone was asking questions. The trading had gotten so off the charts with GameStop that it had repercussions within the actual systems that basically execute transactions, [showing a] general weakness within the whole market structure around how trades take place. Chairman Gensler has already mentioned he's going to take a look at that. Many people would love to get us to at least a T-plus one if not T-plus zero settlement cycle because that reduces the risk to clearing firms. That clears up the plumbing, gets the blockage out by shortening the lifespan of the trade.

WSL*: Another of the Chairman's recent comments was about considering new rules around market structure, such as a ban of payment for order flow, as seen in Canada and Australia. Is that possible?*

Lynch: I think [the SEC] is going to take a look at payment for order flow again, but first they're going to conduct their studies, look at firms that conduct trades mainly via that practice, and see what kind of executions clients are receiving in those trades. I've noticed recently some interactive brokers have commercials about payment for order flow. They're basically telling their customers you have a choice: you can either pay zero commission and be part of the payment for order flow system, or pay a fee and IBKR will aggregate your order with institutional customers. They're giving their retail clients a chance to trade alongside their larger institutional accounts.

I think you might see more of that. Due to the bad publicity around payment for order flow lately, the industry may find its own fix.

***WSL**: Anything else to keep an eye on in the near future?*

Lynch: Keep in mind that app trading is a good thing if it means that having a brokerage account is now more accessible to the average person; it's a good thing to have accounts with low minimums, no fees or charges, easy transactions—just a few shares here and there. This allows younger people and people with lower incomes to participate in the market, and that's going to generate wealth.

But what's happening with the meme stocks is something the SEC needs to figure out: what's really going on here. That's why they're looking at GameStop, looking at AMC—they need to find out if there are bigger market structural issues behind what we're seeing. If it really is just a bunch of people on Reddit, "average joes" taking advantage of their social media and online skills and being able to move the price of a security, that's fine. But the SEC needs to see if there is something more untoward happening here, if there's been any kind of front-running by insiders or if hedge funds are masquerading as Redditors.

They need to find out who the real players are. I have to say: for me, someone who's been in the industry on a regulatory compliance side for over 25 years, it does look suspicious. It seems like it would be very hard to get that many true retail traders to band together and act as one, even with social media, to all trade together like that, to move a stock that quickly that fast, up 1,000%. That's a bit unbelievable for the retail side of the world. It's why I think the SEC may find there's something else moving these stocks—once they determine that, they can say, 'this is what happened, here's how it happened' and then they can try to find a solution. Because it will continue until they find a fix; it's going to keep happening.

***WSL**: How would they find this out, by trying to figure out who's really saying what on message boards?*

Lynch: They can find out which hedge funds were involved. They know who the big short sellers are. They get tons of market data and transaction data sent to them every day for thousands and thousands of trades. To figure out who's behind the trades—that's the hard part. They have to back into it. The Reddit side of it is all anonymous, people using handles, and you could be one person and literally have 100 different handles. They need to find out if there are bot programs on these platforms. There's a lot to dig into, it gets very technical and that's a problem for the SEC—they're not that technologically savvy. The SEC may need to get help to figure this out, by using contractors who are experts at determining this type of internet activity and who could better figure out what is behind it.

THE GENSLER AGENDA: EARLY INDICATIONS

In June 2021, SEC Chairman Gary Gensler made a series of speeches that outlined his upcoming agenda for the Commission. The following are excerpted highlights from two of them.

The Reform Agenda: Three Key Areas

Chairman Gensler spoke at London City Week on June 23, 2021.

I'm honored to be speaking again at London City Week. It's been eight years since I last spoke here. That was about benchmark interest rates and the London Interbank Offered Rate ("LIBOR"). I may come back to that, but I'm mostly going to take the opportunity to discuss three key areas of the reform agenda at the Securities and Exchange Commission.

The SEC was set up in the 1930s by Franklin Delano Roosevelt and the U.S. Congress to look after working families' savings in the depths of the Great Depression. Congress passed a number of laws with the same basic ideas—among them, that investors get to decide what risks they wish to take, as long as companies provide appropriate disclosures; that working families should be protected with regard to their investment advisers; and that the stock exchanges themselves should be free of fraud and manipulation.

Those protections put in place by Congress and the early SEC have stood the test of time. I think they're a large part of our economic success—why the U.S. has the largest, most vibrant capital markets in the world.

We can't rest on our laurels, though. Technology is always changing the face of finance. Technology and finance have coexisted in a symbiotic relationship since antiquity. That was true long ago of the invention of money; it's true today of mobile brokerage apps, robo-advising, and artificial intelligence. But our core principles stay the same: protecting investors, facilitating capital formation for individuals and companies, and maintaining fair, orderly, and efficient markets between them.

As the new Administration has gotten underway in the United States, we at the SEC have recently published a new regulatory agenda. It covers a lot of ground: investment fund rules, insider trading, shareholder democracy, special purpose acquisition companies, and much more. Today, I won't cover the nearly 50 items on the agenda. Instead, I'm going to focus on three broad areas: public company disclosure, market structure, and transparency initiatives.

Public Company Disclosure

First, I've asked staff to put together recommendations on mandatory company disclosures on climate risk and on human capital.

Today, investors increasingly want to understand the climate risks of issuers. Investors representing literally tens of trillions of dollars of assets under management are looking for consistent, comparable, decision-useful information to determine whether to invest, sell, or make a proxy vote one way or another.

I've asked staff for recommendations for our consideration around governance, strategy, and risk management related to climate risk. In addition, staff are looking into a range of specific metrics, such as greenhouse gas emissions, to determine which are most relevant to investors in our markets. Further, I've asked staff to consider potential requirements for companies that have made forward-looking climate commitments, or that have significant operations in jurisdictions with national requirements to achieve specific, climate-related targets.

We just received at the SEC more than 400 unique comment letters on these subjects in a public statement released by my fellow Commissioner Allison Herren Lee. Many comments referenced the work of various groups, such as the Task Force on Climate-related Financial Disclosures ("TCFD"). I'm really struck by the call for enhanced disclosures.

I've also asked staff to consider the ways that funds are marketing themselves to investors as sustainable, green, and "ESG," and what factors undergird those claims. Further, investors have said that they want to better understand one of the most critical assets of a company: its people. To that end, I've asked staff to propose recommendations for the Commission's consideration on human capital disclosure. This builds on past agency work and could include a number of metrics, such as workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety.

Disclosure helps companies raise money. It helps the efficient allocation of capital across the market. And it helps investors place their money in the companies that fit their investing needs.

Market Structure

Next, let me turn to market structure. At the SEC, we oversee the nearly $45 trillion public equity markets and the $50 trillion fixed income markets, including Treasury markets, corporate bonds, municipal bonds, and more.

I've asked staff to consider the impact that technology has made in every one of these markets, and how we can ensure that we bring the greatest competition and efficiency to those markets—for investors and issuers.

In 1998, after the internet came along, the SEC stood-up new rules for alternative trading systems to govern equity trading off of traditional exchanges. The SEC continued to update equity market rules in 2005, stitching together a framework for both on- and off-exchange trading. I've asked the staff to take a broader look at how we might update our rules for the current technologies and business models in the equity markets.

For example, I've asked SEC staff to consider the practice known as payment for order flow. We've seen a notable rise in payment for order flow in the U.S., something that you've banned in the United Kingdom.[1] Canada[2] and Australia[3] also don't allow broker-dealers to route retail orders to wholesalers in return for payments. The European Securities and Markets Authority has raised concerns about these potential conflicts of interest between payment for order flow and best execution.[4]

Today, our markets essentially have three different segments. While the public generally thinks of lit markets when they think of buying or selling equities—markets like Nasdaq and the New York Stock Exchange—those big public exchanges only accounted for about 53 percent of trading volume in January.[5]

So where's the other 47 percent—trading interest that's not displayed on the lit markets? It's executed by alternative trading systems, which include dark pools, and by off-exchange wholesalers. Thus, significant trading interest on these platforms is not necessarily being reflected in the commonly cited National Best Bid and Offer quote. I've asked staff to consider whether this equity market structure, as currently composed, best promotes efficiency and competition.

Separately, I've asked staff how we can bring greater transparency and resiliency to the ways in which U.S. Treasury securities are bought and sold across the market. Early in the pandemic, we witnessed a deterioration of liquidity affecting critical parts of the Treasury market. We also saw challenges in this market in September 2019 and in October 2014. I've asked staff to work closely with our colleagues at the U.S. Department of the Treasury, the Federal Reserve, and the Commodity Futures Trading Commission to determine whether we can bring greater transparency and resiliency to these markets.

This work could build on Commission action last year to increase operational transparency to a subset of platforms as well as previous reforms regarding post-trade reporting. I've also asked staff to consider the potential benefits of central clearing in the Treasury cash and repo markets.

Whether it's equity markets, Treasury markets, or any other markets for that matter, for me it all comes down to how we best promote efficiency and maintain resilient markets in light of new business models and technologies.

Transparency

Finally I will briefly discuss how we might consider updating various rules related to transparency.

One such area is beneficial ownership. In 1968, our Congress mandated that large shareholders of public companies disclose information that helps the public understand their ability to influence or control that company. Under current rules, beneficial owners of more than five percent of a public company's equity securities who have control intent have 10 days to report their ownership.

We haven't updated that deadline in over 50 years. Those rules might've been appropriate for the 1970s, but I have my doubts about whether they continue to make sense given the rapidity of current markets and technologies. I've asked staff how we might update these rules, including possibly shortening reporting deadlines.

Another area is around security-based swaps—essentially, derivatives on individual companies that provide exposure to the company without traditional equity ownership. The disclosures there aren't as robust as they are in the rest of the market. The collapse in March of the family office Archegos Capital Management is a reminder of why that could be relevant.

Thirdly, I think we can bring more transparency to short selling. We have unused authorities in that space that were granted by Congress nearly a dozen years ago.

Finally, I've asked staff to consider whether we should enhance transparency related to companies buying back their stock.

When investors cannot access critical information, particularly when some other market participants may have such information, such information asymmetry can increase risk and reduce liquidity. I believe we should update the transparency regimes to better reflect current business models and practices.

Before I close, I said I'd come back to LIBOR. In my last speech here, I said it was critical for regulators to "identify alternative interest rate benchmarks"[6] with a robust underlying market. Eight years and a different job later, I still feel that way.

To that end, I have concerns that as LIBOR is replaced, a number of commercial banks are advocating for replacement indices that are still reliant on short-term, unsecured, bank-to-bank lending. One such rate, called the Bloomberg Short-Term Bank Yield Index (BSBY), has many of the same flaws as LIBOR. They both rely on a relatively thin market that tends to disappear in times of stress. Like with LIBOR, we're seeing a modest market, shouldering the weight of hundreds of trillions of dollars in transactions. When a benchmark is mismatched like that, there's a heck of an economic incentive to manipulate it.

When I last spoke here, I basically said the emperor had no clothes. At the time, the emperor was LIBOR. But make no mistake: Though we might gussy it up, short-term, unsecured, bank-to-bank lending is still the same emperor with no clothes. I'll leave you with that.

On Executive Stock and Insider Trades

Chairman Gensler spoke at the CFO Network Summit on June 7, 2021.

I welcome the opportunity to share some thoughts on executive stock ownership and the means by which insiders—CFOs, other executives, directors, and senior officers—sell shares in the companies with which they're affiliated.

The core issue, as this audience knows, is that these insiders regularly have material information that the public doesn't have.

When I started out in finance, the accepted practice was that such insiders would limit their transactions to what was known, then and now, as open trading windows: limited periods of time following quarterly earnings announcements and other major company disclosures. About 20 years ago, the SEC further addressed this issue in Exchange Act Rule 10b5-1. This rule provided affirmative defenses for corporate insiders and companies themselves to buy and sell stock as long as they adopt their trading plans in good faith, before becoming aware of material nonpublic information.

In my view, these plans have led to real cracks in our insider trading regime. Thus, I've asked staff to make recommendations for the Commission's consideration on how we might freshen up Rule 10b5-1.

First, when insiders or companies adopt 10b5-1 plans, there's currently no cooling off period required before they make their first trade. I worry that some bad actors could perceive this as a loophole to participate in insider trading. Research has shown that 14 percent of sales of restricted stock in 10b5-1 plans initiate the planned transactions within 30 days of plan adoption, and about two in five plans within the first two months.[7]

Proposals to mandate four- to six-month cooling-off periods have received public, bipartisan support from former SEC Chair Jay Clayton and current Commissioners Caroline Crenshaw and Allison Herren Lee.[8] I believe this approach deserves further consideration.

Second, there currently are no limitations on when 10b5-1 plans can be canceled. As a result, insiders can cancel a plan when they do have material nonpublic information. This seems upside-down to me. It also may undermine investor confidence.

In my view, canceling a plan may be as economically significant as carrying out an actual transaction. That's because material nonpublic information might influence an insider's decision to cancel an order to sell. Thus, I've asked staff to consider limitations on when and how plans can be canceled.

Third, there are no mandatory disclosure requirements regarding Rule 10b5-1 plans. I believe more disclosure regarding the adoption, modification, and terms of Rule 10b5-1 plans by individuals and companies could enhance confidence in our markets.

Fourth, there are no limits on the number of 10b5-1 plans that insiders can adopt. With the ability to enter into multiple plans, and potentially to cancel them, insiders might mistakenly think they have a "free option" to pick amongst favorable plans as they please. I have asked staff to consider whether there should be a limit on the number of 10b5-1 plans.

Make no mistake: As the rule stands today, cancelling or amending any 10b5-1 plans calls into question whether they were entered into in good faith. If insiders don't act in good faith when using 10b5-1 plans, those plans will not offer them an affirmative defense. In addition, I've asked staff to consider other potential reforms to the rule, including the intersection with share buybacks.

Many of your companies may already do these things as they're considered best practices for 10b5-1 plans. I believe, though, that our capital markets might be better served if these practices were consistently required. In addition to evaluating the rule itself, SEC staff will use all of the tools in our toolbox to ensure we are identifying and punishing abuses of 10b5-1 plans.

These issues speak to the confidence that investors have in the markets—that everybody, from working families to big institutions to insiders, has a level playing field. Anytime we can increase investor confidence in the markets, that's a good thing. It helps both investors and businesses seeking to raise capital, grow, and innovate.

Rebuttal: Moving Forward or Falling Back?

On June 14, SEC Commissioners Hester M. Peirce and Elad L. Roisman issued a response to the SEC Chair's Agenda.

Last Friday [June 11], the Office of Information and Regulatory Affairs released the Spring 2021 Unified Agenda of Regulatory and Deregulatory Action ("Agenda"), which includes the SEC Chair's Agenda. While there are important and timely items on the list, including rules related to transfer agents and government securities alternative trading systems, the Agenda is missing some other important rulemakings, including rules to provide clarity for digital assets, allow companies to compensate gig workers with equity, and revisit proxy plumbing. Perhaps the absence of these rules is attributable to the regrettable decision to spend our scarce resources to undo a number of rules the Commission just adopted.

The Agenda makes clear that the Chair's recent directive to SEC staff to consider revisiting recent regulatory actions taken with respect to proxy voting advice businesses was not an isolated event, but just the opening salvo in an effort to reverse course on a series of recently completed rulemakings.[9] On the agenda are proposals to further amend Rule 14a-8 and Rule 14a-2(b) under the Securities Exchange Act of 1934 (together, the "Proxy Updates"); Rule 13q-1 (the "Resource Extraction Payments Rule"); the rules pertaining to the accredited investor definition and the integration framework (together, the "Harmonization Rules"), and our whistleblower rules.[10] Not only are the Commission's most recent amendments to each of these rules less than a year old; they have only been effective for a range of three to seven months. As far as we can tell, the agency has received no new information which would warrant opening up any of these rules for further changes at this time. We are disappointed that the Commission would dedicate our scarce resources to rehashing newly completed rules.

The agency historically has embraced a transparent, methodical, and rigorous rulemaking process to ensure its rules reflect sound policy, transcend political differences, and thus enable our registrants to operate in a consistent, predictable regulatory regime. For all SEC rulemakings, the Commission adheres to the Administrative Procedure Act ("APA"), which celebrated its 75th anniversary on the day the Agenda was released. This years-long process generally requires publishing a rule proposal for public review and comment, reviewing and considering all comments received, and then explaining the determination to adopt or modify the proposed rule in light of those comments.

For most of the specific rulemakings that the Agenda reopens, however, the Commission and its staff undertook an even more extended and rigorous process to obtain public input. The Proxy Updates were shaped by a roundtable hosted by the SEC staff in 2018 and accompanied by a call for public comments and research.[11] The Harmonization Rules similarly began with the Commission gathering public input through a concept release and request for public comment,[12] which informed the proposal. The Resource Extraction Payments Rule represented an even greater investment of agency time and resources—it was the Commission's third attempt at producing a rule in response to a 2010 Congressional mandate. Courts and Congress voided two prior attempts.[13] Threading the needle to ensure compliance with the statutory mandate while steering clear of the court and congressional hurdles required thousands of hours of staff and Commission time and expertise and ingenuity of people across the agency.

A change in administration naturally brings changes in policy, and the Agenda reflects that shift in the form of new rulemakings but reopening large swathes of work that was just completed without new evidence to warrant reopening is not normal practice. Past Commissions have generally refrained from engaging in a game of seesaw with our rulebook. The inclusion of these rules in the Agenda undermines the Commission's reputation as a steady regulatory hand. While we will keep an open mind on each proposal, it is hard to see how the Commission could change course on such complex matters before the Commission's latest actions have fully taken effect.

ENDNOTES:

[1]*See, e.g.,* CFA Institute, "Payment for Order Flow in the United Kingdom" at 1 (2016), available at https://www.cfainstitute.org/-/media/documents/article/position-paper/payment-for-order-flow-united-kingdom.ashx#:~:text=Payment%20for%20order%20flow%20(PFOF)%20is%20the%20practice%20of%20market,order%20flow%20by%20market%20makers.

[2]*See* Joint CSA/IIROC Consultation Paper 23-406, "Internalization within the Canadian Equity Market" at 8 (March 12, 2019) ("UMIR 6.4 requires that trades by marketplace participants and related entities, subject to some exceptions, are executed on a marketplace. The main policy objectives of this provision are to strengthen liquidity, support price discovery and contribute to transparency. UMIR 6.4 is relevant to internalization in the context that in jurisdictions such as the United States, the execution of retail orders can occur off-marketplace. This notable difference is a contributing factor in how the Canadian market has evolved and is a consideration in our review and discussion of any future policy work."), available at https://www.osc.ca/sites/default/files/pdfs/irps/csa_20190312_internalization-within-the-canadian-equity-market.pdf.

[3]*See* Australian Securities & Investments Commission Market Supervision Update Issue 45, available at https://asic.gov.au/about-asic/corporate-publications/newsletters/asic-market-supervision-update/asic-market-supervision-update-previous-issues/asic-market-supervision-update-issue-45/.

[4]*See* ESMA Newsletter - Nº21 (Feb. 26, 2021), *available at* https://www.esma.europa.eu/press-news/esma-news/esma-newsletter-n%C2%BA21.

[5]*See* Cboe Global Markets, *available at* https://www.cboe.com/us/equities/market_statistics/historical_market_volume/ (providing downloads of historical reported volume in NMS stocks by all self-regulatory organizations) ("SRO Volume Data"); *see* FINRA OTC (Non-ATS) Transparency Data, *available at* https://otctransparency.finra.org/otctransparency/OtcDownload (providing downloads of historical reported volume in NMS stocks by FINRA members) ("FINRA Member Volume Data").

[6]*See* "Remarks of Chairman Gary Gensler at London City Week on Benchmark Interest Rates" (April 22, 2013), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-140.

[7]*See* David F. Larcker, Bradford Lynch, Phillip Quinn, Brian Tayan, and Daniel J. Taylor, "Gaming the System: Three 'Red Flags' of Potential 10b5-1 Abuse" (Jan. 19, 2021), *available at* https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf.

[8]*See* Jay Clayton, Letter to Rep. Brad Sherman (Sept. 14, 2020), *available at* https://www.sec.gov/files/clayton-letter-to-chairman-sherman-20200914.pdf; Caroline Crenshaw and Daniel Taylor, "Insider Trading Loopholes Need to Be Closed" (Mar. 15, 2021), *available at* https://www.bloombergquint.com/gadfly/insider-trading-loopholes-need-to-be-closed; and Allison Herren Lee, Letter to Sen. Elizabeth Warren (April 14, 2021), *available at* https://www.w

arren.senate.gov/imo/media/doc/Warren%20et%20al%20-%20Rule%2010b5-1%20-%20ES159896%20Response.pdf.

[9]*See* Commissioner Hester M. Peirce & Commissioner Elad R. Roisman, "Response to Chair Gensler's and the Division of Corporation Finance's Statements Regarding the Application of the Proxy Rules to Proxy Voting Advice" (June 1, 2021), https://www.sec.gov/news/public-statement/peirce-roisman-response-statements-application-proxy-rules-060121.

[10]*See,* respectively, Exemptions from the Proxy Rules for Proxy Voting Advice, Rel. No. 34-89372 (July 22, 2020), https://www.sec.gov/rules/final/2020/34-89372.pdf; Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Rel. No. 34-89964 (Sep. 23, 2020), https://www.sec.gov/rules/final/2020/34-89964.pdf; Disclosure of Payments by Resource Extraction Issuers, Rel. No. 34-90679 (Dec. 16, 2020), https://www.sec.gov/rules/final/2020/34-90679.pdf; Accredited Investor Definition, Rel. No. 33-10824 (Aug. 26, 2020), https://www.sec.gov/rules/final/2020/33-10824.pdf; Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Rel. No. 33-10884 (Nov. 2, 2020), https://www.sec.gov/rules/final/2020/33-10884.pdf; and Whistleblower Program Rules, Rel. No. 34-89963 (Sep. 23, 2020), https://www.sec.gov/rules/final/2020/34-89963.pdf.

[11]*See, e.g.,* Roundtable on the Proxy Process (Nov. 15, 2018), comments available at https://www.sec.gov/proxy-roundtable-2018; Proxy Voting Roundtable (Feb. 19, 2015), comments available at https://www.sec.gov/comments/4-681/4-681.shtml; Roundtable on Proxy Advisory Services (Dec. 5, 2013), comments available at https://www.sec.gov/spotlight/proxy-advisory-services.shtml; Concept Release on the U.S. Proxy System, Rel. No. 34-62495 (Jul. 14, 2010), https://www.sec.gov/rules/concept/2010/34-62495.pdf, comments available at https://www.sec.gov/comments/s7-14-10/s71410.shtml.

[12]*See* Concept Release on Harmonization of Securities Offering Exemptions, Rel. No. 33-10649 (Jun. 18, 2019), https://www.sec.gov/rules/concept/2019/33-10649.pdf, comments available at https://www.sec.gov/comments/s7-08-19/s70819.htm.

[13]The Commission first adopted rules in this area in 2012, as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The 2012 rules were vacated by the U.S. District Court for the District of Columbia. The Commission then adopted new rules in 2016, which were disapproved by a joint resolution of Congress pursuant to the Congressional Review Act. In 2020, the Commission adopted final rules designed to achieve the statutory objective of the Dodd-Frank Act while complying with the Congressional Review Act.

SEC UPDATE: SEC ANNUAL REGULATORY AGENDA ANNOUNCED; SEC REMOVES DUHNKE FROM PCAOB; SEC CHARGES ICO ISSUER/CEO WITH FRAUD; SEC CHARGES ISSUER WITH CYBERSECURITY DISCLOSURE CONTROLS FAILURES; SEC AWARDS OVER $28 MILLION TO WHISTLEBLOWER

SEC Annual Regulatory Agenda Announced

On June 11, the Office of Information and Regulatory Affairs released the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions, which includes an agenda listing regulatory actions that the Securities and Exchange Commission may take in the short- and medium-term.[1]

"To meet our mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, the SEC has a lot of regulatory work ahead of us," said SEC Chair Gary Gensler. "I look forward collaborating with my fellow commissioners and the dedicated staff to propose and finalize rules that will strengthen our markets, increase transparency, and safeguard investors."

The SEC agenda consists of four "prerule" requests for public comment, nine final rule recommendations, and 36 proposed rules, the great majority of the list.

The four prerule requests may lead to recommendations that the Commission seek public comment on:

- ways to further update its rules related to exempt offerings to more effectively promote investor protection, including updating financial thresholds in the accredited investor definition, ensuring appropriate access to and enhancing the information available regarding Regulation D offerings, and amendments related to the integration framework for registered and exempt offerings;
- the role of certain third-party service providers, such as index providers and model providers, and the implications for the asset management industry;
- potential rules to prevent fraud, manipulation, and deception in connection with security-based swaps in accordance with section 9(j) of the Exchange Act; and
- potential rules related to gamification, behavioral prompts, predictive analytics, and differential marketing, citing as legal authority 15 U.S.C.A. 78o(l).

Other proposed and final rulemaking areas include:

- Proposed rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities. In "Disclosure of Payments by Resource Extraction Issuers," the Commission may decide to review the rules under Section 1504 of the Dodd-Frank Act "to determine if additional amendments might be appropriate";
- Market structure modernization within equity markets, treasury markets, and other fixed income markets;
- Disclosures related to human capital, including workforce diversity and corporate board diversity, and cybersecurity risk;
- Greater transparency around stock buybacks, short sale disclosure, securities-based swaps ownership, and the stock loan market;
- Investment fund rules, including money market funds, private funds, and ESG funds;
- 10b5-1 affirmative defense provisions;
- What the agency called "unfinished work directed by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010," including securities-based swaps and related rules, incentive-based compensation arrangements, and conflicts of interest in securitizations;
- Enhancing shareholder democracy;
- Proposed rule amendments related to special purpose acquisition companies; and
- Mandated electronic filings and transfer agents.

SEC Removes Duhnke From PCAOB

The SEC on June 4 announced that it removed William D. Duhnke III as Chairman of the Public Company Accounting Oversight Board ("PCAOB"). The Commission designated Duane M. DesParte as Acting Chair.[2]

Established by the Sarbanes-Oxley Act of 2002, the PCAOB oversees audits of the financial statements of public companies and brokers and dealers through registration, standard setting, inspection, and disciplinary programs. Under Sarbanes-Oxley, the SEC selects members and the Chairperson of the Board.

"The PCAOB has an opportunity to live up to Congress's vision in the Sarbanes-Oxley Act," said SEC Chair Gary Gensler. "I look forward to working with my fellow commissioners, Acting Chair DesParte, and the staff of the PCAOB to set it on a path to better protect investors by ensuring that public company audits are informative, accurate, and independent." DesParte was appointed to the PCAOB by the SEC in December 2017. He joined the Board after retiring from Exelon Corporation, where he'd been corporate controller and served in other financial roles for 15 years.

Duhnke, a former senior Republican congressional aide, had been appointed in December 2017. His tenure was controversial, marked by staff departures and complaints that Duhnke created "a sense of fear," according to a whistleblower complaint reported in the *Wall Street Journal*,[3] which added that Duhnke was reportedly being investigated by the SEC for potential rules violations in his handling of internal complaints. And as per Thomson Reuters, a lawsuit recently was filed by a former PCAOB senior officer charging the agency and Duhnke with unlawful termination on the basis of race.[4]

The SEC also announced it intends to seek candidates for all five board positions on the PCAOB. The Commission directed its Office of the Chief Accountant to begin the process for soliciting new applications, with additional information about the process to be provided by July.

This prompted a response by Commissioners Hester Peirce and Elad Rosman,[5] who announced "serious concerns about the hasty and truncated decision-making process underlying this action. Although the Commission has the authority to remove PCAOB members from their posts without cause, in all of our actions, we should act with fair process, fully-informed deliberation, and equanimity, none of which characterized the Commission's actions here. Instead the Commission has proceeded in an unprecedented manner that is unmoored from any practical standard that could be meaningfully applied in the future . . . These actions set a troubling precedent for the Commission's ongoing oversight of the PCAOB and for the appointment process, including with respect to attracting well-qualified people who want to serve. A future in which PCAOB members are replaced with every change in administration would run counter to the Sarbanes Oxley Act's establishment of staggered terms for Board members, inject instability at the PCAOB, and undermine the PCAOB's important mission by suggesting that it is subject to the vicissitudes of politics."

SEC Charges ICO Issuer/CEO With Fraud, Unregistered Securities Offering

The SEC on June 22 announced settled charges against Loci Inc. and its CEO John Wise for allegedly making materially false and misleading statements in connection with an unregistered offer and sale of digital asset securities.[6]

Wise formed Loci in Reston, Virginia in 2016. According to the SEC's order, Loci provided an intellectual property search service for inventors and others users through its software platform called InnVenn. From August 2017 through January 2018, Loci and Wise raised $7.6 million from investors by offering and selling digital tokens called "LOCIcoin." In promoting its ICO, Loci and Wise allegedly made numerous materially false statements to investors and potential investors, including purportedly false statements about the company's revenues, number of employees, and InnVenn's user base. The SEC's order finds that Wise misused $38,163 in investor proceeds to pay his personal expenses and also that although LOCIcoins constituted securities, Loci's offering was not registered with the SEC and no exemption from registration applied.

"Loci and its CEO misled investors regarding critical aspects of Loci's business," said Kristina Littman, Chief of the SEC Enforcement Division's Cyber Unit. "Investors in digital asset securities are entitled to truthful information and fulsome disclosures so they can make informed investment decisions."[7]

As per the SEC, Wise and Loci allegedly violated the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder and Section 17(a) of the Securities Act of 1933, and the registration provisions of Sections 5(a) and 5(c) of the Securities Act. Without admitting or denying the SEC's findings, Loci and Wise agreed to a cease-and-desist order. They agreed to destroy their remaining tokens, request the removal of the tokens from trading platforms, publish the SEC's order on Loci's social media channels, and refrain from participating in future digital asset securities offerings. The SEC also imposed a $7.6 million civil penalty against Loci, and an officer and director bar as to Wise.

SEC Charges Issuer With Cybersecurity Disclosure Controls Failures

The SEC announced settled charges against real estate settlement services company First American Financial Corporation for disclosure controls and procedures violations that were related to a cybersecurity vulnerability exposing sensitive customer information.[8]

In the past year, the SEC has levied multi-million dollar fines for internal controls failures against several companies, including GE and Morningstar. But the order charging First American with violating Rule 13a-15(a) of the Securities Exchange Act for failing to maintain disclosure controls and procedures marked the first time the SEC has brought these charges in relation to cybersecurity disclosures.

According to the SEC's order, on the morning of May 24, 2019, a cybersecurity journalist notified First American of a vulnerability with its application for sharing document images that exposed over 800 million images that dated back to 2003, including images containing sensitive personal data such as Social Security numbers and financial information. In response, according to the order, First American issued a press statement on that same evening and furnished a Form 8-K to the Commission on May 28, 2019.

However, according to the order, First American's senior executives responsible for these public statements had not been apprised of certain information relevant to their assessment of the company's disclosure response to the vulnerability and of the magnitude of the resulting risk. In particular, the SEC claimed that First American's senior executives were not informed that the company's information security personnel had identified the vulnerability several months before but had failed to remediate it in accordance with the company's policies. The order finds that First American failed to maintain disclosure controls and procedures that were designed to ensure that all available, relevant information concerning the vulnerability was analyzed for disclosure in the company's public reports filed with the SEC.

Without admitting or denying the SEC's findings, First American agreed to a cease-and-desist order and to pay a $487,616 penalty.

SEC Awards Over $28 Million to Whistleblower for Tip

On May 19, the SEC announced an award of more than $28 million[9] to a whistleblower whose tip led the SEC and the DOJ to start investigations and reach a combined $281 million Foreign Corrupt Practices Act settlement with a U.S.-based manufacturer of electronic systems for aircraft.

As of its announcement, it was the 10th-largest award in the SEC whistleblower program's history and the fourth-known award for a tip that led to a corporate FCPA resolution.

While the SEC didn't name the company nor identify the whistleblower, as per its policy, lawyers representing the whistleblower reportedly said the award was related to settlements with the SEC and DOJ involving Panasonic Avionics Corp., a U.S.-based unit of the Japanese electronics company Panasonic. As per news reports, the tipster notified the SEC about alleged wrongdoing at the company in Asia and Europe, prompting regulators to open an investigation, according to the whistleblower's lawyers.[10] In 2018, Panasonic reportedly resolved all FCPA-related charges in an SEC settlement that included $143 million in disgorgement and interest and a deferred prosecution agreement with the DOJ that included a separate $138 million penalty.

Under the SEC program, whistleblowers are entitled to between 10% and 30% of monetary penalties when their tips result in a successful enforcement action and when the penalties total more than $1 million. As per the *Wall Street Journal*, the whistleblower in this case received 10% of the monetary penalties collected from both the SEC and the DOJ actions.[11]

The SEC said in 2018[12] that Panasonic Avionics had offered a consulting position to a government official at a state-owned airline as a means of procuring business from the airline: Panasonic Avionics was reportedly negotiating agreements with the airline valued at more than $700 million, the SEC alleged. "PAC ultimately retained the official and paid approximately $875,000 for a position that required little to no work, using an unrelated third-party vendor to conceal the payments," the SEC said at the time.

Given such financial rewards as the Panasonic whistleblower received, it's no surprise that whistleblower claims to the SEC are on the rise. During the SEC's fiscal year 2020, whistleblower claims rose by roughly 33% year over year. Analysts credit some of the increase being due to more plaintiffs' lawyers offering to represent whistleblowers in the hopes of receiving a success fee.

Further, there may well be more opportunities for potential FCPA enforcement actions, given that the Biden administration has made anti-corruption a key enforcement priority, citing it as being a national security interest and directing federal enforcers and agencies to recommend strategies to enhance the FCPA.

ENDNOTES:

[1] *See* https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&CURRENTPUB=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=7CE97CC2D49C9B6B70868F7B2752E582C86F1945A4A46F34426C18AF1ABE101E611318F64B67159C3A36E7556BD0FB872C8F.

[2] https://www.sec.gov/news/press-release/2021-93.

[3] Dave Michaels and Jean Eaglesham, "SEC Investigates Ex-Head of Auditing Industry Regulator," *Wall Street Journal*, June 18, 2021.

[4] https://tax.thomsonreuters.com/news/former-senior-officer-sues-pcaob-for-wrongful-termination/.

[5] https://www.sec.gov/news/public-statement/peirce-roisman-pcaob-2021-06-04.

[6] https://www.sec.gov/news/press-release/2021-108.

[7] https://www.sec.gov/news/press-release/2021-108.

[8] https://www.sec.gov/news/press-release/2021-102.

[9] https://www.sec.gov/news/press-release/2021-86.

[10] Chris Prentice, "U.S. regulator awards $28 million to tipster on Panasonic probe," Reuters, May 19, 2021.

[11] Menqui Sun, "Panasonic Unit Case Spurs Award," *Wall Street Journal*, May 20, 2021.

[12] https://www.sec.gov/news/press-release/2018-73.

FROM THE EDITOR

An Ambitious Agenda and Its Discontents

After months of speculation about the priorities of the Biden-era Securities and Exchange Commission, last month was suddenly chock full of specifics. The SEC released an agenda full of proposed rules in a variety of hot topics, from ESG to gamification of stock trading. As Chairman Gary Gensler said in a recent speech (excerpted elsewhere in this issue) "it covers a lot of ground: investment fund rules, insider trading, shareholder democracy, special purpose acquisition companies, and much more." Three of its main areas of concentration are in the realms of public company disclosure, market structure, and transparency initiatives.

In terms of disclosure, it's increasingly apparent that climate-change-related disclosures are going to be of great importance this year, not only to the SEC but to the White House. In late June, President Biden met with Gensler, Treasury Secretary Janet Yellen, and other financial regulators to discuss potential climate change-related regulations. While the SEC has broad authority to require disclosures by companies selling securities, how it will elicit specific information concerning climate change is another story—one that corporate lobbyists are already preparing to challenge.

Another potential market shake-up is if the SEC decides to speed up the deadline for investors to disclose when they acquire a greater-than-5% ownership in a company. At present, investors generally have 10 days to disclose a stake in a company above the 5% threshold. But Gensler has termed this half-century-old rule as being an analog-age relic, more suitable for a time when market players filed SEC disclosures on paper forms.

"Those rules might've been appropriate for the 1970s, but I have my doubts about whether they continue to make sense given the rapidity of current markets and technologies," Gensler said (virtually) at a recent conference in London.

The SEC is also having its share of public discord. Twice in June, the Republican Commissioners Hester Peirce and Elad Roisman released statements disagreeing with an SEC action (in this case, the SEC's decision to replace the entire Public Company Accounting Oversight Board; see this month's SEC Update) and challenging the direction of the SEC agenda: "The Agenda [is] reopening large swathes of work that was just completed without new evidence to warrant reopening is not normal practice. Past Commissions have generally refrained from engaging in a game of seesaw with our rulebook. The inclusion of these rules in the Agenda undermines the Commission's reputation as a steady regulatory hand." It's not much of a prediction to say we should expect a great deal more in this vein in 2021.

Chris O'Leary

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