COMMITTEE ON CAPITAL MARKETS REGULATION

RATIONALIZING ENFORCEMENT IN THE U.S. FINANCIAL SYSTEM – 2026 UPDATE

MARCH 2026

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Executive Summary

In June 2018, the Staff of the Committee on Capital Markets Regulation (the "**Committee Staff**") released a report entitled *Rationalizing Enforcement in the U.S. Financial System* (the "**2018 Report**").[1] The 2018 Report represented the first comprehensive overview and assessment of the public enforcement system for the U.S. financial system, including its structure, how monetary sanctions are set, how enforcement authorities use monetary sanctions, and the importance of holding culpable individuals accountable for illicit conduct. As part of the 2018 Report, Committee Staff compiled data on U.S. enforcement actions, which it has updated annually. The 2018 Report also made nineteen recommendations aimed at enhancing the transparency, efficiency, and rationality of the enforcement system.

The U.S. enforcement system today still suffers from the same fundamental flaws as it did in 2018. In the seven years since the 2018 Report, none of our recommendations have been comprehensively addressed. Notably, enforcement authorities still do not have effective policies regarding how to set monetary penalties, nor do they coordinate effectively with other enforcement authorities. The nearly unfettered discretion resulting from the current approach to enforcement of the U.S. financial system raises concerns about the arbitrariness and proportionality of sanctions, undermining confidence in our public enforcement system. Moreover, despite the ongoing issues with the U.S. enforcement system, total enforcement actions and monetary penalties have been increasing in recent years.

In this Report, *Rationalizing Enforcement in the U.S. Financial System – 2026 Update* (the "**Report**"), the Committee on Capital Markets Regulation (the "**Committee**") provides an updated overview of the system and reissues seventeen of the nineteen original recommendations for rationalizing enforcement in the U.S. financial system.

The Report is divided into four chapters: Chapter 1: Enhancing the Structure of the U.S. Enforcement System – Improving Coordination; Chapter 2: Rationalizing the Setting of Sanctions; Chapter 3: Ensuring Appropriate Use of Monetary Sanctions; and Chapter 4: Promoting Individual Accountability.

Chapter 1 describes the highly-fragmented structure of the U.S. public enforcement system and the potential for overlapping enforcement actions by multiple agencies resulting from the same underlying misconduct. We also describe the lack of laws and policies mandating coordination, with the DOJ's anti-"piling on" policy being a notable exception. The chapter sets forth recommendations to formalize and standardize coordination policies. While the 2018 Report also recommended legislation to limit the ability of agencies to engage in forum shopping, we do not renew this recommendation as recent U.S. Supreme Court decisions have had the practical effect of limiting this practice.

Chapter 2 sets forth the laws, rules and policies that guide the setting of monetary sanctions

[1] COMM. CAP. MKT. REGUL., *Rationalizing Enforcement in the U.S. Financial System* (Jun., 2018), https://capmktsreg.org/wp-content/uploads/2022/11/Rationalizing-Enforcement-in-the-US-Financial-System-1.pdf [hereinafter *2018 Report*].

in enforcement actions. We explain that agencies generally have vast discretion in setting sanctions because statutes and policies provide limited practical constraints. We recommend that agencies develop core principles or guideposts to avoid arbitrary, inconsistent and disproportionate penalties. We then describe the byzantine approach many agencies take to publicly disclosing information about enforcement action outcomes (including how each matter was resolved and the types and amounts of sanctions imposed) and present the Committee Staff's own data analysis on monetary sanctions over a 25-year period. The chapter concludes with recommendations for enhancing transparency of enforcement action outcomes.

Chapter 3 describes how monetary sanctions collected in enforcement actions are spent. In particular, the chapter describes the lack of public disclosure and sets forth recommendations to increase transparency and appropriately restrict the use of collected monetary sanctions.

Chapter 4 explores the issue of individual accountability. We find that while the government has significant legal and investigative tools to identify and hold culpable individuals and firms accountable, it can face more significant challenges with respect to individuals. We set forth recommendations that we believe will better enable enforcement authorities and firms to work together to identify culpable individuals and build successful cases against them.

Introduction

An effective enforcement system that prevents and punishes wrongdoing can increase investor confidence in capital markets and in financial institutions and can increase investor participation in capital markets, thus promoting economic growth and job creation.[2] Consumers that are confident that they will be treated fairly by financial institutions will be more comfortable and willing to purchase financial products and services. That, in turn, can expand their access to other goods and services. Financial service companies that are confident that they are subject to a fair and predictable enforcement regime are also better able to provide a greater selection of products and services to the marketplace.

An effective enforcement system accomplishes two principal objectives: (1) it deters prohibited behavior through punishment of individuals and firms that have engaged in unlawful conduct; and (2) it halts ongoing misconduct and remediates harm caused by that misconduct.

Regulators,[3] academics,[4] and courts[5] generally agree that credible deterrence is crucial in any enforcement regime. Deterrence is most effective when "would-be wrongdoers perceive that the risks of engaging in misconduct outweigh the rewards and when non-compliant attitudes and behaviors are discouraged."[6] Deterrence can be achieved through different types of punishment, including fines, jail time, disgorgement of ill-gotten gains, and industry bans or suspensions.

A second goal of an effective enforcement system is remediation. If prohibited behavior has occurred or continues to occur, enforcement actions allow for remedial measures to halt the violation and, in some cases, compensate victims for the harm they have suffered. In this respect, effective remedial measures are generally "designed to limit the capacity of respondents to injure investors."[7] Remediation is also achieved through measures that generally focus on restoring victims to their pre-violation state.[8] Effective and resolute remedial measures complement a

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[2] *See, e.g.*, Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009); Douglas Cumming, April Knill & Nela Richardson, *Firm Size and the Impact of Securities Regulation*, 43 J. COMP. ECON. 417 (2015).

[3] *See* Mary Jo White, Chair, U.S. SEC. & EXCH. COMM'N, *Speech at the Council of Institutional Investors Fall Conference: Deploying the Full Enforcement Arsenal* (Sept. 26, 2013); David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 TEX. L. REV. 1849, 1849–60 (2012); Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 366 (2008).

[4] *See* Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAWYER 679, 683–84 (2012); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 UNIV. PENN. L. REV. 2173, 2178–80 (2010); Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 828 (2006).

[5] *See* Decker v. SEC, 631 F.2d 1380, 1384 (10th Cir. 1980).

[6] INT'L ORG. OF SEC. COMM'NS, *Credible Deterrence in the Enforcement of Securities Regulation* at 6 (2015), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.pdf; *see also* INT'L ORG. OF SEC. COMM'NS, *Credible Deterrence in the Enforcement of Securities Regulation* at 6 (2023), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD758.pdf [hereinafter *IOSCO Report*].

[7] Becker, *supra* note 3, at 1852–54.

[8] *See* IOSCO Report, *supra* note 6, at 48.

credible deterrence strategy.[9]

Chapter 1: The Structure of the U.S. Enforcement System – Improving Coordination

The U.S. public enforcement system is highly fragmented. Enforcement powers are delegated to numerous federal and state government agencies, which are referred to throughout this Report as "**enforcement authorities**." This decentralized structure creates the potential for multiple enforcement authorities to conduct investigations, bring enforcement actions, and impose sanctions for the same underlying misconduct. Absent effective coordination and cooperation, the fragmented enforcement system can produce a duplicative and unfair process. Chapter 1 covers these matters in three parts.

i. Fragmented Structure of the U.S. Public Enforcement System

Part I explains how enforcement at the federal level is spread out among: capital markets regulators (Securities and Exchange Commission ("**SEC**") and Commodity Futures Trading Commission ("**CFTC**")); a consumer protection regulator (Consumer Financial Protection Bureau ("**CFPB**")); banking regulators (Federal Deposit Insurance Corporation ("**FDIC**"), the Federal Reserve ("**Fed**"), National Credit Union Administration ("**NCUA**"), and the Office of the Comptroller of the Currency ("**OCC**")); regulators that oversee laws governing trade restrictions, money laundering and terrorist financing (Financial Enforcement Network ("**FinCEN**") and Office of Foreign Assets Control ("**OFAC**")); and the Department of Justice ("**DOJ**").[10]

In all, there are ten key federal enforcement authorities that have enforcement jurisdiction over various laws pertinent to the capital markets and broader financial system. But the U.S. public enforcement system is further fragmented because the U.S. has a federalist system in which states also have their own laws and enforcement powers. The State of New York, a large state at the center of the financial markets, serves as an example of how states can have a significant role in enforcement. The Report also explores how authorities outside the U.S. government, specifically self-regulatory organizations ("**SRO**s") (i.e., member-based organizations such as the Financial Industry Regulatory Authority that regulates broker-dealers ("**FINRA**")) and foreign regulators, also regulate and sanction misconduct, which adds even more complexity to the system.

ii. Multiple Enforcement Activities for the Same Misconduct

Part II classifies the types of situations in which multiple enforcement authorities could bring enforcement actions resulting from the same underlying misconduct because of the fragmentation of enforcement jurisdiction and provides examples of each. Specifically, there are three types of matters in which enforcement jurisdiction can be exercised simultaneously by U.S.

[9] *Id.* at 38-39, 49.

[10] Other federal authorities may also be involved in enforcement matters relevant to financial markets on a less regular basis, and are not a focus of this Report, such as the Department of Labor or the Federal Energy Regulatory Commission.

public enforcement authorities: (1) criminal and civil cases; (2) federal and state cases; and (3) federal civil cases enforcing different laws applicable to the same misconduct.

The ability of multiple enforcement authorities to conduct investigations or bring enforcement actions for the same underlying activities creates a number of potential issues: (1) the risk that enforcement authorities will not coordinate investigations or requests for information, which results in greater than necessary costs to both enforcement targets and the government; (2) the uncertainty that enforcement targets can face about whether they have responded to all requests for information or if all possible enforcement actions have been resolved; and (3) the potential for duplicative and thus disproportionate sanctions that could result from enforcement authorities all independently assessing their own sanctions without considering the total amount of sanctions an enforcement target will pay.

iii. Coordination of Enforcement Activities Among U.S. Enforcement Authorities

Part III demonstrates that enforcement authorities lack a standardized and transparent system to coordinate investigations, as well as enforcement actions, settlements and sanctions. Indeed, few statutes require enforcement authorities to coordinate with one another, and to the extent statutorily mandated coordination exists, the statutes are narrowly tailored and limited in scope. Additionally, individual agency policies suggest that to the extent enforcement authorities coordinate their activities, they appear to do so largely on an ad hoc or case-by-case basis. While the Committee recognizes that an ad hoc approach may result in effective cooperation and coordination in a particular case, we believe a formal and standardized approach would better ensure consistency across all cases.

Therefore, the Committee provides recommendations aimed at formalizing and standardizing the coordination process to ameliorate issues that have the potential to arise from the fragmented enforcement structure:

- **Recommendation 1:** Each enforcement authority should develop formal, written policies, subject to public notice and comment, that detail how the enforcement authority will coordinate with other enforcement authorities in conducting investigations, requesting access to documents and witnesses, and negotiating settlements.

- **Recommendation 2:** Federal enforcement authorities should collaborate with one another on the development of their coordination policies.

- **Recommendation 3:** Enforcement authorities should consider the sanctions that other enforcement authorities, including foreign enforcement authorities, have imposed or are about to impose when setting sanctions in their own enforcement actions. Enforcement authorities should explain how they have taken sanctions by other enforcement authorities into consideration.

Chapter 2: Rationalizing the Setting of Sanctions

A critical aspect of any enforcement regime is the sanctions that are imposed when an enforcement agency successfully litigates a case or settles with an enforcement target. Effective sanctions can deter future misconduct, punish wrongdoing, and signal the egregiousness of an act to the public. Sanctions that are proportionate to the wrong committed, including the harm caused to victims, are important in ensuring public confidence in the enforcement authorities as balanced arbiters of justice. Proportionate sanctions are also important to avoid situations in which well-intentioned actors avoid lawful and productive financial activities for fear of being wrongly targeted and subject to arbitrary and disproportionate sanctions.

Chapter 2 sets forth the types of sanctions enforcement authorities can impose, and focuses primarily on monetary sanctions, which play an especially important role in the enforcement of the laws and rules governing the financial system and capital markets. We find that the existing processes for the setting of sanctions leaves too much discretion with enforcement authorities and lacks transparency.

Statutes provide little direction for setting sanctions and whatever restrictions they impose are often meaningless because they impose penalty maximums on a "per violation" basis. The determination of how many violations have occurred is subject to excessive discretion. Beyond statutory limits, enforcement authorities take widely disparate approaches to providing guidance to their enforcement attorneys about determining or calculating an appropriate monetary sanction amount. Some provide no guidance at all and take a purely case-by-case approach. Others have policies, but those policies do not meaningfully constrain the discretion of enforcement authorities.

The nearly unfettered discretion resulting from the current approach raises concerns about the arbitrariness and proportionality of sanctions. These concerns are exacerbated by the fact that financial institutions, as a practical matter, often do not believe that they have the ability to litigate enforcement actions. In criminal matters, a conviction after trial could result in the failure of the firm, like in the Arthur Andersen matter. In civil matters, institutions often do not want to be in an enforcement action against their supervisory regulators. As a result, cases are rarely litigated and therefore judges and courts often cannot be relied upon as a check on agency discretion.

We recommend that enforcement authorities adopt guideposts that apply in all cases to avoid veering too far off course and imposing arbitrary and disproportionate penalties. Chapter 2 addresses the setting of sanctions in three parts.

i. Remedies Available to Enforcement Authorities

Part I describes the remedies that enforcement authorities have at their disposal to sanction and remediate misconduct. It includes a taxonomy of both the monetary and non-monetary sanctions that agencies can use. Monetary sanctions include civil and criminal monetary penalties, disgorgement and restitution, and consumer relief. Non-monetary sanctions include cease-and-desist orders and injunctions; bars, suspensions, and removals; requirements to take actions such as making governance changes; and revocations of registrations, charters, or insurance. These non-monetary sanctions can be useful tools to stop an ongoing violation and make it difficult for

someone to harm consumers or investors in the future by removing them from an industry or institution.

ii. Laws, Rules, and Guidelines Governing Setting of Monetary Sanctions

Part II examines the approaches that enforcement authorities take to determine monetary sanction amounts. While restitution and disgorgement can be calculated by determining the injuries caused to victims or the profit made by the wrongdoer, consumer relief payments and monetary penalties are subject to a wide array of approaches.

In general, the statutes that empower enforcement authorities to seek and impose penalties provide minimal guidance about determining the appropriate penalty in a given case. However, certain enforcement authorities have voluntarily issued public guidance clarifying their approach. We therefore categorize enforcement authorities as generally falling into one of two categories: (1) those with little or no agency guidance on how monetary penalties are to be determined; and (2) those with written and formal policies—incorporating the use of penalty matrices—that provide more robust guidance about how penalty amounts are to be calculated. However, in practice, we find that both categories of enforcement authorities effectively retain complete discretion in setting penalty amounts.

The absence of formal policies that standardize penalty setting practices creates the risk of arbitrary and disproportionate penalties. Disproportionate penalties are those that go beyond what is needed to: remediate any harm caused; ensure that the wrongdoer does not profit from its misconduct; and impose a sufficient punishment that deters future misconduct.

Arbitrary and disproportionate penalties are concerning for several reasons. First, they serve no additional deterrent or remedial purpose. Second, well-intentioned actors may avoid lawful and productive financial activities from fear of being wrongly targeted by enforcement authorities and subjected to disproportionate penalties.

Third, arbitrary and disproportionate penalties undermine confidence in the enforcement system that can reduce compliance rates, because firms are more likely to respect and comply with a system that they perceive as fair and legitimate. A fair system is also more likely to promote feedback and interaction between regulators and market participants that can facilitate compliance.

Fourth, unbridled agency discretion also creates the risk that enforcement targets who have engaged in similar conduct could be treated differently. That would undercut principles of equal treatment under the law and that government actions should be rational and fair.

Enforcement authorities, including the Fed, OCC, and FDIC, have adopted more concrete policies that apply penalty guidelines and matrices on a case-by-case basis. While these guidelines can provide a common starting point in settlement negotiations about what the important factors are, and a way for both government officials and enforcement targets to ground negotiations, they have not effectively restrained agency discretion. First, these enforcement authorities' guidelines are non-binding and do not apply in all cases, particularly in cases with the largest sanctions.

Second, the guidelines and matrices can be applied to reach a predetermined or desired outcome. In particular, enforcement authorities retain the discretion to determine the *number* of wrongful acts committed by an enforcement target, which can significantly impact the overall penalty.

The DOJ is unique. DOJ criminal cases that result in convictions or guilty pleas are subject to the U.S. Sentencing Guidelines that determine penalty amounts based on pre-determined rules and must be considered by judges before imposing sentences. However, the Sentencing Guidelines do not apply to DOJ civil matters, including matters under the False Claims Act ("**FCA**") or the Financial Institutions Reform, Recovery, and Enforcement Act ("**FIRREA**"). Furthermore, even in the criminal context the Sentencing Guidelines do not always apply because the DOJ often negotiates resolution of criminal matters without a guilty plea or conviction through extrajudicial agreements known as nonprosecution and deferred prosecution agreements (referred to as "**NPAs**" and "**DPAs**"). The DOJ is not legally bound by the U.S. Sentencing Guidelines in those matters. However, the DOJ has taken substantial steps in recent years to increase transparency and better guide prosecutors' discretion in selecting the form of resolution and amount of monetary sanctions to impose, particularly through the adoption and refinement of the DOJ's Corporate Enforcement and Voluntary Self-Disclosure Policy (the "**CEP**") applicable to all corporate criminal matters, except antitrust offenses.

We conclude that the public cannot have confidence that penalties are being set in a rational, consistent and appropriate manner when enforcement authorities are using so many differing approaches, and the risk of arbitrary and disproportionate penalties remains very real. Our concerns are exacerbated by the fact that, as a practical matter, institutions often do not believe that they have the ability to litigate enforcement actions and have a court independently determine penalty amounts. That is because criminal convictions resulting from a trial could threaten the survival of a firm and, in civil matters, institutions often prefer to settle to maintain better relations with regulatory supervisors. Government discretion should be subject to appropriate constraints, and therefore, the Committee offers several policy recommendations that seek to implement a more rational and transparent approach to penalty setting:

- **Recommendation 4:** Enforcement authorities should adopt publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties. The Financial Stability Oversight Council ("**FSOC**") should establish these principles or guideposts and they should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. Enforcement authorities should explain how the guideposts were applied in each enforcement action.

- **Recommendation 5:** The DOJ should establish publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties in DOJ civil matters under FIRREA and the FCA. They should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on

historical precedents for consistency. The DOJ should explain how the guideposts were applied in each enforcement action.

iii. Data on Monetary Sanctions

Part III sets forth the general shortcomings in publicly available information regarding U.S. enforcement actions and their outcomes. Specifically, while major enforcement authorities like the SEC and CFTC have publicly accessible databases of enforcement actions, they are not structured in a way that allow the public, academics, or others to readily identify and analyze the sanctions imposed against defendants in specific cases.

We believe that such information is critical to understand trends in enforcement. The Committee Staff has conducted a data analysis of the monetary sanctions imposed on individuals and firms participating in financial markets over a roughly 25-year period. The Committee Staff's data show upward trends in the total aggregate monetary sanctions imposed in enforcement actions and the size of the mean and median monetary sanctions imposed on enforcement targets during the period. However, due to the lack of formal and standardized policies and procedures for the setting of monetary penalties, the drivers of the increase in monetary sanctions are unclear. Policies or guideposts could provide confidence to the public that increases in the sanctions imposed in the typical (median) or average (mean) case are actually driven by changes in behavior, including more egregious conduct or harm to investors, rather than a simple ratcheting up of sanctions for similar acts.

To improve the public's access to information about the outcomes in specific enforcement actions, we make a recommendation to enhance transparency:

- **Recommendation 6:** Each enforcement authority should establish an easily accessible, searchable, centralized database of its enforcement actions.

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

Chapter 3 explores how monetary sanctions obtained in enforcement actions are used by enforcement authorities so that the public and policymakers can judge whether monetary sanctions are being used to advance the public interest, including to remediate harm caused to victims.

We find that programs exist to compensate victims of wrongdoing, fund government efforts to collect on unpaid judgments, and incentivize individuals with knowledge of wrongdoing to come forward with information. However, in many cases, transparency about how funds are being used is lacking and there is a potential for funds to be used for activities unrelated to enforcement or the aims of enforcement. These issues are explored in four parts.

i. Constitutional and Statutory Provisions Requiring that Collected Monies be Deposited with Treasury

Part I describes the core constitutional and statutory framework governing the allocation of monetary penalties recovered by federal enforcement authorities. These laws provide that

monetary penalties paid to the federal government should generally be deposited with the U.S. Treasury for Congress to appropriate.[11]

However, before any monies can be deposited in the U.S. Treasury, they must first be collected, and we find that enforcement authorities often do not recover the monetary sanctions owed to them, and provide limited disclosure regarding their collection efforts. That deprives the government of money that belongs to taxpayers and undermines the deterrent and remedial effects of monetary sanctions. To increase transparency about the success *in collecting* monetary sanctions, we make the following recommendation:

- **Recommendation 7:** Enforcement authorities should provide an annual accounting that discloses the amount of monetary sanctions assessed through orders, judgments, and settlements, and the amount of such monetary sanctions collected. Enforcement authorities should also publicly disclose their policies regarding how they seek to collect such monetary sanctions.

ii. Congressionally Approved Statutory Programs for the Use of Penalties

Part II explores instances where Congress has used its appropriations authority to earmark penalties collected by certain agencies for specific uses. In these cases, the funds are used as directed and not deposited with Treasury.

These programs include: (a) investor and consumer relief funds, such as the SEC Fair Funds authority—which allows the SEC to create a distribution fund (i.e., "Fair Fund") to distribute civil monetary penalties to victims of securities law violations—and the CFPB Civil Penalty Fund to compensate consumers harmed by unlawful conduct; (b) whistleblower programs, most notably those conducted by the SEC and CFTC, to compensate whistleblowers who helped advance an enforcement action; and (c) the Three Percent Fund at the DOJ, which was created to fund DOJ debt-collection activities.

These programs serve valuable functions. The investor and consumer relief funds are used to remediate harm caused by wrongdoing; the whistleblower funds can be used to incentivize people with information about misconduct to come forward so that enforcement authorities can uncover, stop, and punish unlawful activities; and the DOJ Three Percent Fund can incentivize the DOJ to aggressively pursue monies that are owed to the government so that judgments, orders and settlements are enforced.

However, it is difficult to evaluate whether the programs are working as intended because they lack transparency. Generally, the enforcement authorities do not disclose the amount of

[11] The states have differing practices. Some states require through constitutional or statutory provisions that collected penalties must be deposited into the state's general fund to be appropriated by the state legislature. *See* U.S. CHAMBER COM., *Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds* at 34-41 (2015), https://instituteforlegalreform.com/research/enforcement-slush-funds-funding-federal-and-state-agencies-with-enforcement-proceeds/. Other states, however, allow the state attorney general to determine how to disburse penalties or to use penalties to fund other enforcement activities.

money allocated to Congressionally approved enforcement programs. The SEC, for example, does not disclose the annual amount of money deposited into a specific Fair Fund (or across all Fair Funds) or distributed out of a Fair Fund (or distributed from all Fair Funds). Therefore, we make the following recommendations:

- **Recommendation 8:** Each federal enforcement authority should provide an annual accounting of how monetary sanctions imposed in their enforcement actions are used. The accounting should include: (1) the amount of monetary sanctions that the enforcement authority collected and deposited with the Treasury; and (2) the amount of monetary sanctions that the enforcement authority directed to Congressionally authorized programs (itemized by program).

- **Recommendation 9:** The SEC should publicly disclose annually the amount of funds distributed through its Fair Funds authority and the amount of money in Fair Funds that remains available for distribution (on both an aggregate and individual fund basis).

Moreover, the CFPB and Congress have not conducted a public analysis of whether the Civil Penalty Fund is working as intended to identify and compensate injured consumers. In addition, we have concerns about whether the DOJ Three Percent Fund has exceeded its original scope and intended purpose as it is now largely used by the DOJ as a general source of funds rather than to track down delinquent debt owed to the government. Moreover, the DOJ is not required to and does not produce annual reports about what money it has deposited into or distributed from the Three Percent Fund. To address these concerns, we make the following recommendations:

- **Recommendation 10:** The CFPB should conduct a retrospective analysis of the Civil Penalty Fund that evaluates whether: (1) the Civil Penalty Fund is effectively compensating injured consumers; (2) victims are being adequately identified; and (3) there should be a cap on the total amount of money that can remain in the Civil Penalty Fund (with the balance distributed to the Treasury) to encourage efficient distribution of funds to injured consumers, rather than allowing the CFPB to retain the funds indefinitely.

- **Recommendation 11:** The DOJ Three Percent Fund should be reformed so that: (1) the DOJ can only use money from the Three Percent Fund on activities to collect existing delinquent debts; and (2) the DOJ provides a public annual accounting of the amount of money deposited into the Three Percent Fund, the amount of money distributed from the Three Percent Fund, and how money distributed out of the Three Percent Fund was spent.

iii. Extraordinary Restitution

Part III then examines how enforcement authorities, particularly the DOJ, can structure settlement agreements to direct funds to consumers and certain pre-approved third parties who were not necessarily victims. These allocations are not subject to Congress's appropriation authority. This practice is often referred to as "extraordinary" restitution, because the recipients are not necessarily injured parties. An analysis of ten large cases against financial institutions arising out of the financial crisis shows that in those matters, extraordinary restitution accounted for approximately 50% of the settlement amount and ranged from 0% to 80% in particular cases.

The use of extraordinary restitution could be valuable if structured appropriately. Currently, however, the use of extraordinary restitution in civil matters is generally *not* subject to restrictions or guidelines. As a result, there is a risk that payments could be directed to political allies of enforcement officials or that money given to third-party organizations could be used for political activities or purposes rather than providing assistance to people affected directly or indirectly by the misconduct. Political activities include activities like running issue advocacy ads, electioneering, and lobbying.

DOJ policy regarding the use of extraordinary restitution has significantly fluctuated in recent years. Most recently, in February 2025, the DOJ took steps to limit the use of extraordinary restitution as a remedy in DOJ settlement agreements. We support the DOJ's restrictions on extraordinary restitution due to its risk of misuse. However, DOJ policy could potentially be revised by a subsequent Attorney General. Moreover, other enforcement authorities have not adopted guidelines on the use of extraordinary restitution. While currently uncommon, the potential exists for these authorities to use the remedy more widely in the future. At a minimum, any future use of extraordinary restitution should be subject to restrictions to prevent major concerns about misuse and to enhance transparency about how extraordinary restitution is spent. We therefore recommend that:

- **Recommendation 12:** Third parties that receive settlement funds from extraordinary restitution should be prohibited from using those funds to engage in political activities. Federal enforcement authorities should adopt policies and guidelines to effectively implement the ban.

- **Recommendation 13:** Each federal enforcement authority should provide an annual accounting of the amount of settlement funds paid out as extraordinary restitution.

iv. States' Use of Monetary Sanctions

Part IV concludes by describing the discretion the state attorneys general have in allocating settlement funds. In some states, attorneys general have broad legal authority to disperse settlement funds and in others, where the law is unclear, attorneys general have attempted to structure settlement agreements to delineate how the funds will be spent. Those authorities raise similar concerns about the political use of settlement funds. Moreover, the use of settlement funds by states, whether directed by state legislatures, or officials like attorneys general, is highly opaque. A case study of the allocation of $2.5 billion among forty-nine states from the 2012 National Mortgage Settlement, using data from the National Conference of State Legislatures ("**NCSL**"), shows how difficult it is to track the use of state settlement funds. The NCSL derived their data from press releases and public records, and from interviews and conversations with various state officials. Despite these efforts, funds could not be tracked at all by the NCSL for eight states, and for many of the others, it was unclear how significant percentages of the settlement funds were used.

To address these concerns:

- **Recommendation 14:** The states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds from using those funds to engage in political activities.

Chapter 4: Promoting Individual Accountability

The final chapter of the Report focuses on the topic of individual accountability, which many have said is the most effective way to deter misconduct. Individual accountability is particularly effective because when culpable individuals are held accountable they directly bear and internalize the cost of punishment, whereas when firms are penalized, the costs are largely borne by shareholders who played no part in the wrongdoing.

At the outset, it is critical to understand that enforcement actions against firms do not prevent enforcement agencies from also targeting individuals.

In this Chapter, we first explore the importance of holding individuals *and* firms accountable. We then describe the government's tools and powers to hold both culpable individuals and firms liable for misconduct and describe the existing policies for identifying and penalizing individuals. Next, we explain that there are certain challenges unique to individual accountability that can make it more difficult for enforcement authorities to punish individuals as opposed to firms. Finally, we present recommendations to further promote the laudable aim of identifying and holding guilty individuals accountable for their actions that avoid the problems that we identify in other potential proposals. These issues are explored in four parts.

i. The Importance and Establishment of Individual and Firm Accountability

Individual liability is critical because civil and/or criminal liability against an individual imposes a direct cost on the person who engaged in wrongdoing. In addition, in criminal matters, the criminal penalty of imprisonment can be applied to individuals but not firms, thus providing a greater deterrent effect. Firm liability is also important because the threat of firm liability incentivizes firms to take steps to prevent employee wrongdoing, monitor employees' compliance with the law, and adopt internal accountability structures and systems. In some instances, a firm may also be in the best position to compensate injured consumers or investors.

One major difference between individual and firm liability is that while individuals can generally only be held liable for their own actions, knowledge, and intent, firm liability is dependent and based on the conduct attributed to its employees in two ways. First, firms are vicariously, or strictly, liable for the conduct of their employees in the course of their employment. Therefore, if a particular employee can be held liable for wrongdoing, so can the firm. Second, and critically, under an unsettled theory of liability known as collective scienter, the actions, knowledge, and intent of employees can be ***aggregated*** and imputed to the firm, meaning that the

firm can be held liable for a legal violation due to the collective actions of its employees, even when no individual employee has violated a law.

For example, a firm could be held liable for violating certain disclosure requirements for selling securities even if there is no single individual at that firm that directly violated such standards. Under an aggregation theory, all that is required for firm liability is that there are individuals that *collectively* violated the standard. Thus, if one individual at a firm knows that the disclosure materials for a security are untrue and another individual at that firm actually markets and sells the security (without such knowledge), then an enforcement authority could aggregate the one individual's knowledge with the others act of marketing and selling the security and take the position that the *firm* was in violation of securities law. This is true even though neither individual is in violation of securities law. In fact, this was a theory apparently employed by the U.S. government in several major crisis-era mortgage cases, and could offer a partial explanation for why in many cases firms agreed to accept liability for wrongdoing but no individuals were held liable. This corporate liability theory, however, stands on unsettled and contested legal ground, as several federal circuit courts have declined to endorse – or have sharply limited – the aggregation of scienter across employees to establish corporate scienter. Accordingly, we urge enforcement authorities to consider this precedent.

ii. The Government's Tools and the Challenges of Holding Individuals Accountable

Part II examines the investigative tools and powers that enforcement authorities have to identify and pursue suspected wrongdoers. We generally find that enforcement authorities have significant investigative tools available to them to identify bad actors and punish them whether they are individuals or firms.

With respect to investigative tools, for example, the DOJ, in criminal matters, can convene a grand jury, issue subpoenas for documents, records, property, electronic communications, and other information, compel witnesses to testify, and obtain warrants to search buildings and electronic devices, use confidential informants or cooperating witnesses, and conduct wiretap operations. Indeed, the DOJ has been aggressive in seeking warrants to conduct wiretaps and has extensively used technological investigative tools in insider trading cases against individuals. The DOJ's investigative tools are generally the same if it is pursuing an individual or firm.

However, there are some challenges that enforcement authorities face when trying to establish cases against individuals relative to firms. First, it can be easier to prove a case against a firm because, as discussed previously, the activities, knowledge, and intent of one of its employees can be attributed to the firm. Second, certain non-legal factors may make it more difficult to hold individuals accountable. In particular, enforcement authorities face limits on their resources, and firms are more likely than individuals to settle and therefore permit the government to avoid facing a costly trial. Indeed, firms can be rationally motivated to settle matters that they do not believe result from actual wrongdoing to: minimize the distraction of management; avoid the reputational harm that could result from a prolonged trial; and quickly determine the financial cost of the matter for business planning purposes, especially given the unpredictable outcome of a litigated

enforcement action. Firms may also be more likely to settle because in criminal matters, financial institutions rarely if ever survive contested criminal convictions and in civil matters institutions wish to avoid litigating with their supervisory regulators. For these reasons, enforcement officials may find it more attractive to pursue a matter against a firm, settle, and move on to other matters. In addition, enforcement authorities are subject to political pressure from Congress and the public to produce results that can justify the funding that they receive, which can influence enforcement priorities.

iii. U.S. Enforcement Authorities' Emphasis on Individual Accountability

Part III describes the policies and public statements of government authorities regarding individual liability showing that enforcement authorities appear to understand the importance of individual accountability and have recently placed an added priority on it. This is important given the legal and non-legal factors that may make firm-level cases more attractive to enforcement authorities.

The DOJ, in particular, has modified its policies over time to leverage the threat of corporate liability to build cases against individuals. Beginning in the late 1990s, the DOJ made its first public statement that corporate liability was not a substitute for individual liability. The DOJ's policies sought to incentivize corporations to cooperate with investigators and internally discipline wrongdoers. By doing so, corporations could face lighter penalties, and the effect would be a greater likelihood that the DOJ could uncover wrongdoing by specific individuals. Later the DOJ revised its policies to require DOJ lawyers to consider whether the prosecution of individuals would obviate the need to pursue a corporation, which again sought to incentivize a corporation to help identify the responsible individuals. In 2015, the DOJ made individual accountability its top priority by requiring that investigators focus on individuals at the inception of an investigation and establish plans for resolving cases against individuals before a case against a firm can be resolved. The current administration has continued to stress the primacy of prosecuting individuals.

Recent data indicate that enforcement actions against individuals are an important priority for enforcement authorities. Among capital markets and banking regulators collectively, the proportion of enforcement actions targeting individuals rose steadily beginning in 2010, peaking in 2022, though it has declined slightly in the past two fiscal years. However, the DOJ does not publicly disclose useful information about the percentage of white collar criminal cases brought against firms as opposed to individuals. We therefore recommend that:

- **Recommendation 15:** The DOJ should publish annual statistics analyzing trends of criminal actions against individual financial professionals. Useful data would disclose the annual number of cases brought and average and median penalties imposed in categories of white-collar crimes committed by officers and directors of firms and gatekeepers such as lawyers and accountants.

iv. Promoting Individual Accountability

Given the importance of individual accountability to a credible enforcement system and the challenges authorities may face in executing their stated desires to hold culpable individuals accountable, we believe that it is appropriate to consider if there are ways to allow the government to bring more effective cases against culpable individuals.

We begin by exploring whether the legal standard for imposing liability on individuals should be lowered from intentional wrongdoing to a negligence or strict liability regime. We consider proposals that the U.S. adopt a liability regime similar to the U.K. Senior Manager's Regime, which imposes personal liability on high-level officers and directors who act *negligently* in ensuring legal compliance within their firms. We are concerned that such an expansion of liability would encourage excessive government second-guessing of business decisions and could be an impediment to recruiting qualified officers and directors.

Rather, we believe it is important to recognize the importance of efforts to develop and implement compliance programs that prevent individual wrongdoing and catch it when it does occur. Well-designed and implemented programs can increase compliance and result in faster detection, reporting, and remediation of bad behavior. We propose that Congress establish an affirmative compliance defense for firms that adopt adequate compliance programs, fully disclose individual wrongdoing, and cooperate with government investigations of individuals. We believe such a policy should help prevent misconduct and increase the probability of the government being able to build a strong case against culpable individuals and conserve limited enforcement resources.

We also believe it is important that firms, investors, and consumers be able to identify individuals who have been punished for wrongdoing in the past, so they can avoid doing business with such persons if they so choose. Presently, a single database with the names and details of financial professionals that have been held liable for criminal or civil sanctions for financial wrongdoing does not exist.[12]

We set forth two recommendations to enhance individual accountability:

- **Recommendation 16:** An affirmative compliance and cooperation defense should be established in the United States to further promote effective compliance programs and harness their strengths to help identify and prevent individual misconduct. A successful application of the defense should require that the firm establish that the compliance procedures meet a baseline of reasonableness; and the firm promptly, transparently, and wholly disclosed known violations and all non-privileged relevant information uncovered during an internal investigation or review.

[12] We are aware that those formally charged or convicted of a crime have a "rap sheet" that can be accessed as part of a background check. However, a "rap sheet" does not include civil enforcement matters. Moreover, a public database would make access to such information easier for those, like consumers, who may not run a formal background check on someone.

- **Recommendation 17:** Enforcement authorities should coordinate to compile a single, publicly-available resource that aggregates information on final judgments or orders imposing criminal or civil sanctions against financial professionals and present it in a user-friendly format.

Chapter 1: Enhancing the Structure of the U.S. Enforcement System – Improving Coordination

Chapter 1: Enhancing the Structure of the U.S. Enforcement System – Improving Coordination

The U.S. public enforcement system is highly fragmented. Enforcement powers are delegated to numerous federal agencies and state government agencies, which are referred to throughout this Report as **"enforcement authorities."** This decentralized structure creates the potential for investigations, enforcement actions, and sanctions by multiple enforcement authorities for the same underlying misconduct. The involvement of multiple enforcement authorities has the potential to result in inefficiency, uncertainty, and duplicative penalties if enforcement activities are not adequately coordinated. We find that coordination occurs largely on a case-by-case or ad hoc basis and believe that a more formal and standardized approach would better ensure adequate and effective coordination.

Part I of this chapter discusses how enforcement at the federal level is spread out among capital markets regulators, a consumer protection regulator, banking regulators, and the Department of Justice ("**DOJ**"). Part I also describes the role that states play in the U.S. enforcement system, using New York as an example. To provide a complete picture of the enforcement system, it also explores how authorities outside the U.S. government, specifically self-regulatory organizations ("**SRO**s") and foreign government authorities, also regulate and sanction misconduct, which adds even more complexity to the system.

Part II classifies the types of situations in which multiple enforcement authorities could bring enforcement actions resulting from the same underlying misconduct because of the fragmentation of enforcement jurisdiction and gives examples of each. It then discusses concerns that could potentially arise when multiple enforcement authorities are pursuing the same enforcement target.

Part III demonstrates that enforcement authorities lack a standardized and transparent system to coordinate investigations and enforcement actions. Few statutes require enforcement authorities to coordinate with one another, and to the extent they do, the statutes are narrowly tailored and limited in scope. Publicly available individual agency policies suggest that to the extent enforcement authorities coordinate their activities, they appear to do so largely on an ad hoc or case-by-case basis. Part III sets forth recommendations aimed at formalizing and standardizing the coordination process to ameliorate issues that have the potential to arise from the fragmented enforcement structure.

Part IV concludes the chapter by providing an update on an issue of procedural fairness – namely, the ability of the Securities and Exchange Commission ("**SEC**"), Commodity Futures Trading Commission ("**CFTC**"), and Consumer Financial Protection Bureau ("**CFPB**") to unilaterally choose whether to bring an enforcement proceeding in federal court or before an administrative law judge. The 2018 Report explained that this creates both real and perceived issues of procedural fairness and recommended that defendants should have the right to remove a case to federal court in non-settled matters. However, recent U.S. Supreme Court decisions have reduced agency use of administrative forums in contested matters. This Report therefore will not focus on forum selection and administrative courts.

I. Fragmented Structure of the U.S. Enforcement System

To begin our overview of the structure of the U.S. enforcement system, it is helpful to visualize the dispersion of enforcement responsibilities among various enforcement authorities with jurisdiction over laws governing U.S. capital markets and the financial system. **Table 1** provides a high-level summary of the jurisdiction of enforcement authorities. The table sets forth examples of (a) the major areas of law that each agency oversees and enforces and (b) the types of individuals and entities that could be subject to each agency's enforcement jurisdiction.

Table 1: Summary of Enforcement System Structure

Enforcement Authority	Examples of the Areas of Law Enforced	Examples of the Types of Individuals and Entities Subject to Enforcement
Federal Securities Regulators		
Securities and Exchange Commission ("**SEC**")	Offerings of securities; disclosure by publicly held companies; trading in securities; functioning of national securities markets; independence of public company auditors; activities of investment companies and investment advisers	Publicly held companies; corporate insiders such as officers and directors; open- and closed-end mutual funds; broker-dealers; investment advisers; auditing firms; securities exchanges; anyone trading a security
Commodity Futures Trading Commission ("**CFTC**")	Commodities futures and options markets and over-the-counter derivatives	Futures commission merchants; floor traders; commodity pool operators; commodity trading advisers; swap dealers; anyone trading a commodities future or option
Federal Consumer Financial Protection Regulator		
Consumer Financial Protection Bureau ("**CFPB**")	Offering, sale and providing of consumer financial products like mortgages, credit cards, payday loans, credit scores; truth in lending and savings; debt collection practices; credit reporting practices	Banks; payday lenders; mortgage brokers; credit reporting agencies; prepaid card merchants; debt collectors; credit card companies; commercial companies providing consumer financing
Federal Regulators of Trade Restrictions, Money Laundering, and Terrorist Financing		
Office of Foreign Assets Control ("**OFAC**") (part of Treasury)	U.S. trade restrictions and sanctions against persons, firms, and countries	Anyone engaged in commercial activities or transfer of assets with a person, country or company subject to trade restrictions

Enforcement Authority	Examples of the Areas of Law Enforced	Examples of the Types of Individuals and Entities Subject to Enforcement
Financial Crimes Enforcement Network ("**FinCEN**") (part of Treasury)	Money laundering and terrorist financing	Banks; broker-dealers; asset managers; any person or business receiving coins or currency of more than $10,000
Federal Banking Regulators		
Office of the Comptroller of the Currency ("**OCC**") (part of Treasury with semi-independence)	Organization of nationally chartered banks and savings associations; capital requirements, safety and soundness rules, and self-dealing restrictions applicable to such institutions	Federally chartered banks and savings associations and their officers, directors, employees, and controlling shareholders
Federal Reserve ("**Fed**")	Capital requirements of bank holding companies and state-chartered member banks; self-dealing restrictions, laws governing mergers and acquisitions, and safety and soundness rules applicable to such institutions	Bank holding companies (including those with assets greater than $100 billion, which may be subject to enhanced prudential and supervisory standards); state-chartered banks that elect to be member banks of the Federal Reserve System; officers, directors, employees, and controlling shareholders of such institutions
Federal Deposit Insurance Corporation ("**FDIC**")	Capital requirements of federally insured depository institutions; safety and soundness rules, self-dealing restrictions, and laws governing mergers and acquisitions applicable to such institutions	Depository institutions with federally insured deposits; officers, directors, and controlling shareholders of such institutions
National Credit Union Administration ("**NCUA**")	Organization and governance of federally chartered credit unions; capital requirements; safety and soundness rules, self-dealing restrictions, and laws governing mergers and	Federally chartered credit unions and credit unions with federally insured deposits; officers, directors, and controlling shareholders of such institutions

Enforcement Authority	Examples of the Areas of Law Enforced	Examples of the Types of Individuals and Entities Subject to Enforcement
	acquisitions applicable to such institutions	
Federal Criminal Regulator		
Department of Justice ("**DOJ**")	All federal criminal laws, including wire fraud, bank fraud, conspiracy, racketeering, market manipulation, insider trading; civil laws governing false claims to the federal government; civil laws governing misconduct that affects financial institutions	Any person and any entity
State Regulators		
State governments	Consumer protection laws; state banking and insurance laws; anti-fraud and false advertising laws	Any person or entity selling, offering or providing financial consumer products or services; banks; broker-dealers; lenders; mortgage brokers; asset managers; financial planners

As **Table 1** demonstrates, there are ten key federal agencies that police the U.S. capital markets and financial system,[1] as well as enforcement authorities from each of the 50 states. The following section sets forth the responsibilities and jurisdictions of these enforcement authorities.

A. Division of Federal Enforcement Powers Among Federal Enforcement Authorities

At the federal level, enforcement jurisdiction is determined based on two factors: (1) whether the case being brought is civil or criminal; and (2) if it is civil, then the enforcement authorities to which Congress has delegated enforcement powers.

The primary differences between criminal enforcement and civil enforcement are that: (1) criminal convictions can lead to imprisonment for individuals;[2] (2) in criminal cases, prosecutors

[1] Other federal authorities may also be involved in enforcement matters relevant to financial markets on a less regular basis, and are not a focus of this Report, such as the Department of Labor or the Federal Energy Regulatory Commission.

[2] *See generally* U.S. SENTENCING COMM'N, *Guidelines Manual* (2025), https://www.ussc.gov/guidelines/2025-guidelines-manual.

must meet a higher burden of proof; and (3) criminal statutes often require the government to prove a higher level of intent.

With respect to the burden of proof, in a criminal case, the government must prove its case beyond a reasonable doubt.[3] In contrast, civil enforcement actions are subject to a lower burden of proof, usually requiring the government to prove its case only by a preponderance of the evidence (i.e., more likely than not).[4] Criminal violations also frequently require the government to establish a higher level of *intent* than civil violations. For example, the Securities Exchange Act of 1934, as amended, including by the Sarbanes-Oxley Act (the "**Exchange Act"**), allows the SEC to seek civil monetary penalties for certain violations of its provisions regardless of intent.[5] By contrast, for criminal penalties to be imposed, the violation of the Exchange Act must be willful.[6]

The DOJ has the sole federal authority to bring criminal actions, as Congress has delegated criminal litigation authority exclusively to the DOJ.[7] In civil cases, Congress has granted civil enforcement powers to a plethora of enforcement authorities based on the law being enforced. For instance, the Securities Act of 1933 ("**Securities Act**") grants the SEC the sole authority to bring a civil enforcement action to stop potential violations of the Securities Act and impose civil penalties.[8] For a *criminal* violation of the same statutory provisions, however, it is the DOJ that brings criminal charges.[9]

We proceed by describing the jurisdiction of federal enforcement authorities to bring civil cases in the areas of capital markets, consumer financial protection, banking, and international transactions and money flows. We then discuss the DOJ's enforcement jurisdiction, including its criminal enforcement authority and two key civil statutes that it enforces.

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[3] *In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional standard of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[4] *See, e.g.*, Steadman v. SEC, 350 U.S. 91, 104 (1981) (SEC proceedings subject to preponderance of the evidence standard); Haltmier v. CFTC, 554 F.2d 556, 560 (2d Cir. 1977) (CFTC burden of proof is preponderance of the evidence); 12 U.S.C. § 1833a(f) (FIRREA statute explicitly establishing the preponderance of the evidence standard as the burden of proof); 31 U.S.C § 3731(c) (FCA burden of proof is preponderance of the evidence). Congress can choose to impose a higher burden of proof in civil matters if it so desires.

[5] 15 U.S.C. § 78u(d).

[6] *Id.* § 78ff(a).

[7] 28 U.S.C. §§ 516,519.

[8] 15 U.S.C. §§ 77h, 77t.

[9] Simultaneous or parallel civil and criminal enforcement actions are not uncommon and have been ruled to be lawful by the U.S. Supreme Court. *See* United States v. Kordel, 397 U.S. 1, 10 (1970). The securities laws only grant the SEC authority to bring a case to seek the civil remedies provided for under the securities laws. *See, e.g.*, 15 U.S.C. § 77t(d) ("Whenever it shall appear to the *Commission* that any person has violated any provision of this subchapter, the rules or regulations thereunder . . ., the *Commission* may bring an action . . . .") (emphasis added).

1. Capital Markets Enforcement Authorities

The SEC and CFTC are the regulators and enforcement authorities responsible for enforcing laws to protect investors and ensure the fair and efficient functioning of capital markets and commodities markets.

i. The SEC

The SEC is an independent agency that was established in 1934, which administers and enforces federal securities laws to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[10] In the fiscal year ended September 30, 2024,[11] the SEC brought over 550 enforcement actions and obtained orders for civil monetary penalties and disgorgement of ill-gotten gains of more than $8.2 billion.[12] In that year the SEC had an enforcement staff of approximately 1,400.[13] In 2025 enforcement staff has been reduced by nearly 20% and some additional staff have been reassigned to other functions.[14] A more recent official headcount had not yet been released at the time this Report was published. The SEC regulates equity markets with market capitalization of over $69.5 trillion,[15] mutual funds and exchange traded funds with over $38 trillion in assets under management,[16] and over 3,200 broker-dealer firms and 600,000 of their representatives.[17]

The SEC primarily oversees and enforces four different statutory schemes governing the securities markets, as they have been amended over the years. These are the Securities Act of 1933,[18] the Exchange Act of 1934,[19] the Investment Company Act of 1940 ("**Investment Company Act**"),[20] and the Investment Advisers Act of 1940 ("**Advisers Act**").[21]

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[10] John C. Coffee, Jr., Hillary Sale & M. Todd Henderson, SECURITIES REGULATION: CASES AND MATERIALS at 58 (13th ed. 2015).

[11] At the time of publication of this Report, data on enforcement actions and penalties was not uniformly available across entities for the fiscal or calendar year 2025. The Report therefore presents this enforcement data for the fiscal or calendar year 2024 for consistency.

[12] U.S. SEC. & EXCH. COMM'N, *SEC Announces Enforcement Results for Fiscal Year 2024* (Dec. 17, 2024), https://www.sec.gov/newsroom/press-releases/2024-186.

[13] U.S. SEC. & EXCH. COMM'N, *Fiscal Year 2026 Congressional Budget Justification* at 7 (2025), https://www.sec.gov/files/fy-2026-congressional-budget-justification.pdf.

[14] David A. Sakowitz et al., *SEC Buyout Program and Other Initiatives Lead to Drop in Enforcement and General Counsel Staff*, WINSTON & STRAWN LLP (Jul. 9, 2025), https://www.winston.com/en/blogs-and-podcasts/capital-markets-and-securities-law-watch/sec-buyout-program-and-other-initiatives-lead-to-drop-in-enforcement-and-general-counsel-staff

[15] Data retrieved from WORLD FED'N EXCHS., *Statistics Portals* (Oct. 2025), https://www.world-exchanges.org/.

[16] INV. CO. FACT BOOK, *A Review of Trends and Activities in the Investment Company Industry* at 23 (2025), https://www.icifactbook.org/pdf/2025-factbook.pdf .

[17] SIFMA Rsch., *2025 Capital Markets Fact Book* at 101 (Jul. 2025), https://www.sifma.org/wp-content/uploads/2024/07/2025-SIFMA-Capital-Markets-Factbook.pdf.

[18] 15 U.S.C. §§ 77a *et seq.*

[19] *Id.* §§ 78a *et seq.*

[20] *Id.* §§ 80a-1 *et seq.*

[21] *Id.* §§ 80b-1 *et seq.*

These statutory schemes grant the SEC vast regulatory and enforcement power over the offer and sale of securities,[22] the ongoing reporting obligations of publicly held companies,[23] the registration and activities of broker-dealers,[24] the functioning of the securities exchanges,[25] the qualifications and conduct of public company auditing firms,[26] the registration, governance and operation of investment companies such as open-end and closed-end mutual funds,[27] and the registration, practices and compensation of investment advisers (i.e., money managers, investment consultants and financial planners[28]), among many other things.[29]

ii. The CFTC

The CFTC is an independent agency that was established in 1974 and administers the Commodity Exchange Act of 1974, ("**CEA**") which regulates commodities, futures, options and over-the-counter derivatives.[30] The mission of the CFTC is to "promote the integrity, resilience, and vibrancy of the U.S. derivatives markets."[31]

According to the CFTC, the agency regulates markets of over 2,500 actively traded futures and options contracts, over $530 billion in customer funds, nearly 2,700 commodity trading advisors and commodity pool operators, and the over $352 trillion notional U.S. swaps market.[32] In fiscal 2024, the CFTC brought 58 enforcement actions and imposed a record-high of $17.1 billion in monetary sanctions.[33] The CFTC has an enforcement staff of approximately 160, but it is planning to shrink that number substantially, to fewer than 120, by the end of 2026.[34]

The CFTC pursues its mission by administering the CEA through overseeing and enforcing: (a) registration requirements for industry firms such as commission merchants, floor

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[22] *See, e.g.*, *id.* §§ 77e, 77g, 77aa, 77j.
[23] *Id.* § 78(m).
[24] *See, e.g.*, *id.* § 78o.
[25] *Id.*§ 78f.
[26] *Id.* §§ 7213-7216.
[27] *Id.* §§ 80a-1 *et seq.*
[28] *Id.* §§ 80b-1 *et seq.*; STAFF INV. ADVISER REGUL. OFF., DIV. OF INV. MGMT., U.S. SEC. & EXCH. COMM'N, *Regulation of Investment Advisers by the U.S. Securities and Exchange Commission* at 1 (Mar. 2013), https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.
[29] *See generally* Coffee, Jr., Sale & Henderson, *supra* note 10.
[30] Rena S. Miller, *The Commodity Futures Trading Commission: Background and Current Issues* at 1, CONG. RSCH. SERV. (Jun. 24, 2013), https://www.congress.gov/crs_external_products/R/PDF/R43117/R43117.3.pdf; 7 U.S.C. §§ 1 *et seq.*
[31] COMMODITY FUTURES TRADING COMM'N, *The Commission*, https://www.cftc.gov/About/AboutTheCommission (last visited Mar. 16, 2026).
[32] COMMODITY FUTURES TRADING COMM'N, *President Budget Fiscal Year 2026* at 27, 32-34 (May 2025), https://www.cftc.gov/sites/default/files/CFTC_FY2026_Presidents_Budget.pdf.
[33] COMMODITY FUTURES TRADING COMM'N, *CFTC Releases FY 2024 Enforcement Results* (Dec. 4, 2024), https://www.cftc.gov/PressRoom/PressReleases/9011-24.
[34] COMMODITY FUTURES TRADING COMM'N, *supra* note *32*, at 5 (2025), https://www.cftc.gov/sites/default/files/CFTC_FY2026_Presidents_Budget.pdf

traders, commodity pool operators, swap dealers, and commodity trading advisers;[35] (b) trading requirements;[36] (c) anti-fraud and anti-manipulation prohibitions;[37] and (d) other rules governing market integrity.[38]

2. Consumer Financial Protection – The CFPB

The CFPB was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("**Dodd-Frank Act**") as an independent bureau within the Federal Reserve System.[39] Its mission is to "implement and . . . enforce Federal consumer financial law,"[40] to protect consumers from "unfair, deceptive, or abusive acts and practices and from discrimination,"[41] and to ensure "that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent and competitive."[42]

The CFPB's enforcement authority applies to two categories of laws: (1) laws created by the Dodd-Frank Act regarding unfair and deceptive practices by those offering, selling or providing consumer financial products;[43] and (2) existing federal laws governing protection of

[35] 7 U.S.C. §§ 6d(a), 6e, 6m. A futures commission merchant is an individual or entity that engages in soliciting or accepting orders for the purchase or sale of a commodity future delivery, security future product, a swap, a commodity option and certain other transactions. *Id.* § 1a(28). A floor trader is a person who in or around a trading pit or post, purchases or sells solely for his own account any commodity future delivery, security future product or swap. *Id.* § 1a(23). A commodity pool operator is engaged in the business in the nature of a commodity pool, investment trust or syndicate who, in connection with that business solicits, accepts, or receives from others, funds, securities or property for the purpose of trading in commodity interest. *Id.* § 1a(11). A commodity trading advisor is someone who for compensation engages in the business of advising others as to the value or advisability of trading in, among other things, a contract of sale of a commodity for future delivery, securities future product, or swap, or commodity option. *Id.* § 1a(12).

[36] *Id.* § 2(a)(1)(D) (requiring that security futures products be sold on or subject to the rules of a board of trade and that the board of trade meet certain requirements, including that trading in the security futures product not be readily susceptible to manipulation and that the exchange has procedures in place to detect manipulation and insider trading); *Id.* § 7 (requiring that for a board of trade to be designated as a contract market it must meet certain core principles, including: establishing, monitoring and enforcing compliance with rules of the contract market; preventing manipulation, price distortion and disruptions of the delivery of cash-settlement process through market surveillance, compliance and enforcement practices; establishing and enforcing speculative position limits or positions).

[37] *See, e.g.*, *id.* §§ 6b(a), (e).

[38] *See id.* § 6c (prohibiting, among other things, wash sales, fictitious sales and any transaction that is used to cause any price to be reported that is not a true and bona fide price). *See also* Miller, *supra* note 30, at 1.

[39] 12 U.S.C. § 5491.

[40] *Id.* § 5511(a). The Federal consumer financial law means Title X of the Dodd–Frank Act, together with the enumerated consumer laws defined in 12 U.S.C. § 5481(12) — including the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), and the Equal Credit Opportunity Act (ECOA) —as well as any regulations and authorities transferred to the Bureau under Subtitles F and H of Title X. Those subtitles shifted consumer-protection rulemaking, supervisory, and enforcement functions from other financial regulators, including the Fed, OCC, and FDIC to the CFPB.

[41] *Id.* § 5511(b)(2).

[42] *Id.* § 5511(a).

[43] The CFPB generally has the authority to regulate individuals and entities that engage in offering or providing a "consumer financial product or service." *Id.* § 5481(6). The law defines a consumer financial product or service as

consumers of financial products and services that Dodd-Frank consolidated under the CFPB's authority.[44] For example, the CFPB enforces laws regulating the credit card industry, which has over $1.2 trillion in balances.[45] The agency also oversees the approximately $8.6 billion payday lending industry.[46] The CFPB has reported that it has provided approximately $20 billion in relief to consumers resulting from its enforcement activities.[47] In fiscal year 2024 the CFPB had an enforcement staff of approximately 765.[48]

At the time of publication, the CFPB has significantly scaled back its operations due to uncertainty over the legality of its funding.[49] Because the status of the CFPB remains unclear, this Report will continue to address CFPB practice as it existed before the reduction of operations.

3. Banking and Credit Union Regulators (OCC, Fed, FDIC, and NCUA)

The OCC, Fed, FDIC, and NCUA (collectively, the "**banking regulators**") oversee and enforce laws pertaining to the banking operations of depository institutions and their affiliates, such as commercial banks, bank holding companies, savings associations, thrifts and credit unions.

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one "offered or provided for use by consumers primarily for personal, family, or household purposes." *Id.* § 5481(5). Those financial products and services include, among other things, extending credit and loan services; real estate settlement services and appraisals of real estate and personal property; taking deposits, transmitting or exchanging funds or acting as a custodian of funds; selling or issuing prepaid cards or other payment instruments over which the seller has substantial control; providing check cashing, check collection or check guaranty services; providing payment or financial data processing products or services to a consumer; financial advisory services; consumer credit reporting services; and debt collection related to any consumer financial product or service. *Id.* § 5481(15). With respect to those persons, the CFPB is tasked with enforcing the law that makes it unlawful for them to commit or engage in "an unfair, deceptive, or abusive act or practice." *Id.* §§ 5531(a), 5536. While Congress provided definitions of what constitute unfair practices and abusive practices, the statute does not define what a deceptive practice is, thus leaving the CFPB with substantial discretion. *Id.* § 5531(c), (d).

[44] The Dodd-Frank Act consolidated oversight and enforcement of previously existing federal statutes and rules aimed at protecting consumers from an array of federal agencies, including the Fed, the OCC, the FDIC, the Office of Thrift Supervision, the National Credit Union Administration ("**NCUA**") the Federal Trade Commission ("**FTC**") and the Department of Housing and Urban Development ("**HUD**"). *Id.* § 5581. The laws consolidated under the CFPB's jurisdiction included the Truth in Lending Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Truth in Savings Act, the Real Estate Settlement Procedures Act, among others. *See id.* §§ 5481(12), 5581.

[45] FED. RESERVE BANK NEW YORK, *Household Debt and Credit Report* (Q4, 2025), https://www.newyorkfed.org/microeconomics/hhdc.

[46] CENTER RESPONSIBLE LENDING, *Down the Drain: Payday Lenders Take $2.4 Billion in Fees From Borrowers in One Year* (Feb. 6, 2025), https://www.responsiblelending.org/research-publication/down-drain-payday-lenders-take-24-billion-fees-borrowers-one-year.

[47] CONSUMER FIN. PROT. BUREAU, *Enforcement by the Numbers*, https://www.consumerfinance.gov/enforcement/enforcement-by-the-numbers/ (last updated Jan. 30, 2025).

[48] CONSUMER FIN. PROT. BUREAU, *Annual Performance Plan and Report, and Budget Overview* at 11 (Feb. 2024), http://files.consumerfinance.gov/f/documents/201705_cfpb_report_strategic-plan-budget-and-performance-plan_FY2017.pdfhttps://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy24.pdf.

[49] Douglas Gillison, *US Consumer Watchdog Says It Is Legally Blocked from Accessing Funds*, REUTERS (Nov. 11, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/us-consumer-watchdog-says-it-is-legally-blocked-accessing-funds-2025-11-11/.

The banking regulators' primary function is to ensure the safety and soundness of the banking institutions that they oversee. Each banking regulator is therefore empowered to conduct comprehensive examinations, including examination of the financial health of each bank and soundness of operations, its compliance with applicable laws, the security of its infrastructure and the bank's risk management system.[50] They also enforce self-dealing restrictions,[51] regulate who can serve as a director, officer or influential shareholder of federally insured banks,[52] and have authority to penalize any federally insured bank or credit union for any violation of law.[53] While the SEC, CFTC, and CFPB have divisions or offices of enforcement clearly delineated in their organizational structure, the banking regulators do not have stand-alone enforcement divisions.[54] And unlike the SEC, CFTC, and CFPB, the banking regulators do not publicly disclose the number of staff devoted exclusively to enforcement activities.[55]

i. The OCC

A bank or savings association can be organized under the laws of a state or the federal government. The OCC oversees and enforces banking laws and rules governing a bank or savings

[50] 12 U.S.C. §§ 481 (OCC authority to examine federally chartered banks), 325 (Fed power to examine member banks), 1820 (FDIC authority for examination of federally insured banks). *See also* Luigi De Ghenghi et al., *United States*, in THE BANKING REG. REV. 868, 872 (4th ed., 2013) (discussing the contents of a bank examination); BD. OF GOVERNORS OF THE FED. RES. SYS., *Supervisory Policy and Guidance Topics*, https://www.federalreserve.gov/bankinforeg/topics/exam_n_supervision.htm (discussing Fed's examination topics).

[51] *See* 12 U.S.C. §§ 371c, 371c-1, 375a, 375b, 1468(a)–(b), 504, 1828(j), 1828(z).

[52] *See, e.g.*, *id.* § 1818(e).

[53] *Id.* §§ 1818, 1786.

[54] *See* DIV. OF ENF'T, U.S. SEC. & EXCH. COMM'N, *About the Division*, https://www.sec.gov/enforce (last visited Mar. 16, 2026); DIV. OF ENF'T, COMMODITY FUTURES TRADING COMM'N, *About the Division* http://www.cftc.gov/lawregulation/enforcement/index.htm (last visited Mar. 16, 2026); CONSUMER FIN. PROT. BUREAU, *Investigatory Authority*, https://www.consumerfinance.gov/enforcement/investigatory-authority/ (last visited Mar. 16, 2025); OFF. COMPTROLLER CURRENCY, *Chief Counsel's Office*, https://www.occ.treas.gov/about/who-we-are/organizations/chief-counsels-office/index-chief-counsels-office.html (last visited Mar. 16, 2026); FED. DEPOSIT INS. CORP., *Organization Directory*, https://www.fdic.gov/about/organization-directory-headquarters (last updated Mar. 16, 2026); BD. GOVERNORS FED. RESERVE SYS., *Board Organization Charts*, https://www.federalreserve.gov/aboutthefed/organization-charts.htm (last updated Jan. 2, 2026). More specifically, OCC's enforcement authority sits within the Chief Counsel's Office and the Chief Counsel works with the Comptroller of the Currency who heads the OCC. At the FDIC, enforcement falls within the Supervision, Legislation & Enforcement Branch of the Legal Division, which reports to the FDIC Chair (through the General Counsel), one of five board members who run the FDIC, as well as within Compliance and CRA Examinations and Enforcement Branch of the Division of Depositor and Consumer Protection, which also reports to the FDIC Chair. Finally, at the Fed, enforcement offices rest within the Legal Division, the Division of Management, and the Division of Consumer and Community Affairs, with the head of each Division reporting to the seven-member Board of Governors that manages the Fed.

[55] BD. GOVERNORS FED. RESERVE SYS., *2024 Annual Report*, https://www.federalreserve.gov/publications/annual-report.htm (last updated Nov. 21, 2025); OFF. COMPTROLLER CURRENCY, *Congressional Budget Justification and Annual Performance Plan and Report FY 2025*, https://home.treasury.gov/system/files/266/21.-OCC-FY-2025-CJ.pdf ; FED. DEPOSIT INS. CORP., *2024 Annual Report*, https://www.fdic.gov/financial-reports/2024-annual-report (last updated Mar. 20, 2025).

association that chooses to be chartered at the federal level.[56] The OCC is the primary regulator of over 1,000 institutions with $16.7 trillion in assets.[57] In 2025 the OCC brought 90 enforcement actions and imposed monetary penalties of approximately $450 million.[58] In the fiscal year ended September 30, 2025 the OCC reduced its employee headcount by nearly 500, to 3,138 employees.[59] The majority of the staff reductions were bank examiners.[60]

ii. The Fed

The Fed is responsible for enforcing federal law and regulations pertaining to bank holding companies, which are companies that have control over any bank.[61] Under the Dodd-Frank Act, the Fed also has regulatory oversight responsibilities for nonbank systemically important financial institutions.[62] The Fed also oversees, regulates, and brings enforcement actions against state chartered banks that elect to become members of the Federal Reserve System.[63] The Fed is the primary regulator of state chartered member banks with assets of over $4. trillion and bank holding companies with assets of more than $27 trillion.[64] In 2024 the Fed imposed monetary sanctions of approximately $0.2 billion. The Fed intends to reduce its staff by approximately 10% over the next couple of years.[65]

iii. The FDIC

The FDIC has oversight and enforcement jurisdiction over banking institutions that have customer deposits insured by the FDIC. If the institution is not already regulated by the OCC or Fed, then the FDIC serves as the sole federal banking regulator of the institution.[66] However, for institutions already subject to OCC or Fed oversight, the OCC and Fed generally enforce the safety and soundness requirements imposed by the depository insurance laws that the FDIC otherwise

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[56] 12 U.S.C. §§ 1-16, 21-216d (national banks regulated and overseen by the OCC), 1461–70 (federal savings associations regulated and overseen by the OCC).

[57] OFF. COMPTROLLER CURRENCY, *Key Data & Statistics*, https://www.occ.treas.gov/about/what-we-do/key-data-and-statistics/index-occ-and-federal-banking-system-at-a-glance.html (last visited Mar. 16, 2026).

[58] *Id.*

[59] *Id.*

[60] OFF. COMPTROLLER CURRENCY, *2025 Annual report* at 5, https://www.occ.gov/publications-and-resources/publications/annual-report/files/2025-annual-report.pdf (3,138 employees in FY2025 of whom 66% were bank examiners); OFF. COMPTROLLER CURRENCY, *2024 Annual report* at 5, https://www.occ.treas.gov/publications-and-resources/publications/annual-report/files/2024-annual-report.html (3,630 employees in FY2024 of whom 64.9% were bank examiners).

[61] 12 U.S.C. §§ 1841–52.

[62] 12 U.S.C. §§ 5323, 5365.

[63] 12 U.S.C. §§ 321–339a.

[64] BD. GOVERNORS FED. RESERVE SYS., *supra* note 55.

[65] Pete Schroeder, *US Federal Reserve Aims to Trim Staff by 10% in Coming Years*, REUTERS (May 16, 2025) https://www.reuters.com/business/world-at-work/us-federal-reserve-aims-trim-staff-by-10-coming-years-2025-05-16/.

[66] FED. DEPOSIT INS. CORP., *What We Do*, https://www.fdic.gov/strategic-plans/fdic-2022-2026-strategic-plan-supervision-program (last updated Jan. 28, 2026).

administers.[67] The FDIC regulates federally insured institutions with assets of approximately $25 trillion.[68] In 2024 the FDIC brought over 100 enforcement actions and imposed monetary penalties of approximately $27 million. Between 2025 and 2026 the FDIC is planning to reduce its staff by approximately 20%.[69]

iv. The NCUA

Credit unions are member-owned cooperative associations that take deposits and provide credit.[70] However, credit unions are not subject to oversight by the OCC, FDIC or Fed, instead they are regulated by the NCUA.

The NCUA can have regulatory authority over a credit union in two ways. First, the NCUA has authority to regulate federally chartered credit unions.[71] Second, if a state-chartered credit union has federally insured member deposits, then the NCUA has regulatory authority over that credit union.[72] The NCUA regulatory regime includes supervision and examination,[73] self-dealing restrictions,[74] safety and soundness reviews,[75] and oversight of credit union officers and directors.[76] The NCUA regulates over 4,300 credit unions with $2.4 trillion in assets.[77] In 2025, NCUA reduced its staff by approximately 20%.[78]

4. Trade Restrictions, Money Laundering, and Terrorist Financing – FinCEN and OFAC

Another important aspect of the U.S. financial system is the regulation of international transactions and the flow of capital across national borders. The Treasury Department has been tasked with implementing, administering and enforcing the U.S. anti-money and counterterrorism financing laws, as well as the laws governing U.S. sanctions, trade restrictions, and embargoes against foreign persons and countries. It does so through two bureaus in the department, FinCEN and OFAC.

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[67] 12 U.S.C. §§ 1811–35a. Though the FDIC does retain some enforcement powers. For example, the FDIC can terminate the insurance of an institution for engaging in unsafe or unsound practices, and issue a cease-and-desist order for false or misleading advertising about the insured status of an institution. *Id.* §§ 1818(a)(2), (c)(4).

[68] FED. DEPOSIT INS. CORP., *Statistics at a Glance* (Jun. 30, 2025), https://www.fdic.gov/bank/statistical/stats/2018mar/industry.pdf.

[69] CAPITOL ACCT., *FDIC Chief Defends Staff Cuts, as Banking Overseers Trim Budgets* (Dec. 16, 2025), https://www.capitolaccountdc.com/p/fdic-chief-defends-staff-cuts-as.

[70] 12 U.S.C. § 1752; NAT'L CREDIT UNION ADMIN., *What Is A Credit Union* (Nov. 5, 2024), https://mycreditunion.gov/brochure-publications/brochure/what-credit-union.

[71] 12 U.S.C. §§ 1752–75.

[72] *Id.* §§ 1781–90e.

[73] *Id.* § 1756

[74] *Id.* § 1757a.

[75] *Id.* §§ 1782(a)(6), 1784.

[76] *Id.* §§ 1785, 1786.

[77] NAT'L CREDIT UNION ADMIN., *Quarterly Credit Union Data Summary* (2025 Q3), https://ncua.gov/files/publications/analysis/quarterly-data-summary-2025-Q3.pdf.

[78] NAT'L CREDIT UNION ADMIN., *2026-2027 Staff Draft Report* at 6 (Sept. 2025), https://ncua.gov/files/publications/budget/budget-justification-proposed-2026-2027.pdf.

i. FinCEN

The Financial Crimes Enforcement Network, commonly referred to as FinCEN, was established in 1990 as a bureau within the Treasury whose Director is appointed by the Secretary of the Treasury.[79] The Secretary of the Treasury has delegated authority to FinCEN to implement, administer and enforce the Bank Secrecy Act ("**BSA**").[80] The BSA imposes two major sets of requirements on individuals and entities subject to its provisions aimed at preventing and detecting money laundering. First, the BSA imposes reporting requirements related to certain transactions involving the transfer of money, currency or coins across international boundaries.[81] Second, it requires financial institutions to establish anti-money laundering programs.[82]

FinCEN enforces the BSA's statutory provisions and rules and receives, annually, reports pursuant to BSA from more than 300,000 registered financial institutions.[83] FinCEN has imposed more than $100 million in aggregate penalties in a calendar year eleven times since 2010.[84]

ii. OFAC

The second office of the Treasury that enforces laws relevant to the capital markets and the financial system is the Office of Foreign Assets Control ("**OFAC**"). OFAC "administers and enforces economic and trade sanctions programs" against targeted foreign jurisdictions and regimes, and groups of individuals, such as terrorists and international narcotics traffickers.[85] OFAC was created in 1950 when President Truman imposed sanctions on Chinese and North Korean assets subject to U.S. jurisdiction.[86]

OFAC oversees the enforcement of trade restrictions and sanctions related to Russia, Somalia, North Korea, Libya, Iran, Cuba, Belarus, Venezuela and other nations.[87] In addition, it enforces sanctions on groups of individuals involved in terrorism and malicious cyber-related

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[79] 31 U.S.C. § 310; FIN. CRIMES ENF'T NETWORK, *What We Do*, https://www.FinCEN.gov/what-we-do (last visited Mar. 16, 2026).

[80] U.S. DEP'T OF THE TREASURY, *Treasury Order 180-01* (Jul. 1, 2014; Reaffirmed Jan. 14, 2020), https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-180-01.

[81] *See, e.g.*, 31 U.S.C. §§ 5313, 31 CFR § 1010.311 (requiring U.S. financial institutions involved in a transaction involving the payment of more than $10,000 to file a report with FinCEN), 5316 (requiring reporting when currency of more than $10,000 is physically shipped into or out of the United States), 5318 (g) (requiring financial institutions to report suspicious transactions), 5331 (requiring any individual or entity engaged in a trade or business to report receipt of more than $10,000 in a single or related transactions).

[82] *See, e.g.*, *id.* § 5318 (h).

[83] FIN. CRIMES ENF'T NETWORK, *Year in Review for Fiscal Year 2024* at 3, https://www.fincen.gov/system/files/2025-08/FinCEN-Infographic-Public-2025-508.pdf.

[84] COMM. CAP. MKT. REGUL., *Enforcement Data for Calendar 2024* at Appendix 2 (JUL. 15, 2025), https://capmktsreg.org/wp-content/uploads/2025/08/CCMR-Enforcement-Data-2024-7.15.24.pdf.

[85] OFF. FOREIGN ASSETS CONTROL, *OFAC FAQs: General Questions*, https://ofac.treasury.gov/faqs/1 (last visited Mar. 16, 2026).

[86] OFF. FOREIGN ASSETS CONTROL, *About OFAC,* https://ofac.treasury.gov/about-ofac (last visited Mar. 16, 2026).

[87] OFF. FOREIGN ASSETS CONTROL, *Sanctions Programs and Country Information*, https://ofac.treasury.gov/sanctions-programs-and-country-information (last visited Mar. 16, 2026).

activities, including those that contribute to a significant threat to the economic health or financial stability of the U.S., as well as economic and industrial espionage.[88] OFAC imposes penalties for violations of sanctions, with total penalties in recent years ranging from $21 million in calendar year 2016 to over $1.2 billion in calendar year 2019. The calendar 2024 total was approximately $50 million.[89]

5. *DOJ Enforcement*

The DOJ is the *only* federal enforcement authority that has criminal enforcement powers. The DOJ also retains civil enforcement authority over laws that have not been delegated to another agency. Two civil statutes that the DOJ enforces are of particular importance in the context of the U.S. financial system: (1) the False Claims Act and (2) the Financial Institutions Reform, Recovery and Enforcement Act of 1989. We first discuss the DOJ's exclusive federal criminal enforcement power and then explore DOJ's civil enforcement authority.

i. DOJ Criminal Enforcement

Participants in the U.S. capital markets and financial system who commit criminal violations of federal law are subject to criminal proceedings that are exclusively brought by the DOJ.[90] Indeed, the DOJ's website has listed financial fraud as one of its enforcement priorities.[91] That includes corporate fraud, such as the falsification of financial information (e.g., false accounting entries or misrepresentation of financial condition) and self-dealing by corporate insiders (e.g., insider trading and misuse of corporate property).[92] It also includes securities and commodities fraud, including Ponzi and pyramid schemes, embezzlement of clients' money and market manipulation.[93] **Table 2** provides summary statistics about the DOJ's criminal fraud section.[94]

Table 2: Summary Statistics on DOJ Criminal Fraud Section

Summary Statistic (2024)	Number
Prosecutors	137
Charges Against Individuals	234
Corporate Criminal Enforcement Actions	13
Criminal Fines Obtained	$1.36 billion

[88] OFF. FOREIGN ASSETS CONTROL, *Program Tag Definitions for OFAC Sanctions List*, https://ofac.treasury.gov/specially-designated-nationals-list-sdn-list/program-tag-definitions-for-ofac-sanctions-lists (last visited Mar. 16, 2026); OFF. FOREIGN ASSETS CONTROL, *OFAC FAQs: Cyber Related Sanctions* https://ofac.treasury.gov/faqs/topic/1546 (last visited Mar. 16, 2026); 50 U.S.C. § 1708.

[89] COMM. CAP. MKT. REGUL., *supra* note 84, at Appendix 2.

[90] 28 U.S.C. § 516 (DOJ granted authority to bring criminal cases).

[91] U.S. DEP'T JUST., *Our Work*, https://www.justice.gov/our-work (last visited Mar. 16, 2026).

[92] FED. BUREAU INVESTIGATION, *White-Collar Crime*, https://www.fbi.gov/investigate/white-collar-crime (last visited Mar. 16, 2026).

[93] *Id.*

[94] U.S. DEP'T JUST., Fraud Section: Year in Review 2024 (Jan. 2025), https://www.justice.gov/criminal/media/1385111/dl.

ii. DOJ Civil Enforcement Powers Under FIRREA and FCA

The DOJ retains exclusive authority to enforce laws where enforcement is not delegated to the other agencies. In the aftermath of the 2007-2008 financial crisis, the DOJ began aggressively enforcing two statutes giving rise to civil claims: The False Claims Act ("**FCA**")[95] and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("**FIRREA**").[96] We describe each statute below, then provide information about the DOJ's FCA and FIRREA enforcement activity.

a. The FCA

The FCA, first adopted during the Civil War in 1863 and known as "Lincoln's Law," is the federal government's primary tool to seek redress for fraud committed against the federal government, its agencies, and their programs.[97] The FCA imposes liability on any individual or entity that, among other things knowingly makes a false or fraudulent claim for payment or approval from the government.[98] The Attorney General, and thus the DOJ, is authorized by the statute to enforce the FCA's liability provisions.[99]

b. FIRREA Civil Penalties Provision

FIRREA was passed in the late 1980s in response to the savings and loan crisis.[100] The purpose of FIRREA was "to reform, recapitalize, and consolidate the Federal deposit insurance system, [and] to enhance the regulatory and enforcement powers of Federal financial institutions regulatory agencies."[101] One of Congress's specific aims was to combat fraud and insider abuse at financial institutions in the wake of the savings and loan crisis.[102]

FIRREA authorizes the DOJ to bring a case in federal court against any individual or entity that violates one or more of 14 enumerated criminal statutes ("**predicate offenses**").[103] If the DOJ

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[95] 31 U.S.C. §§ 3729–33.

[96] 12 U.S.C. § 1833a.

[97] Megan E. Italiano, *An Implied Defense: Self-Disclosure Offers a Defense to the Expanded False Claims Liability after Universal Health Services v. Escobar,* 60(5) WILLIAM & MARY L. REV. 1943, at 1947 (2019).

[98] 31 U.S.C. § 3729(a).

[99] *Id.* § 3730(a). The FCA also allows private parties who are aware of false claims having been made against the federal government to bring a suit in the name of the government, which the government may either intervene and proceed with or decline to intervene and allow the private person to conduct the action. *Id.* § 3730(b). Because the focus of the Report is on enforcement actions by the government itself, we do not delve into the details of such private party actions.

[100] Douglas W. Baruch, Jennifer M. Wollenberg & Matthew E. Joseph, *FIRREA Enforcement Trends*, 31(12) BANKING & FINANCIAL SERVICES 131 (Dec. 2015), http://www.lexology.com/library/detail.aspx?g=d3c50eb8-dde6-4b58-ae22-2c8c421628bf.

[101] Pub. L. 101-73, 103 Stat. 183 (1989).

[102] U.S. CHAMBER INST. FOR LEGAL REFORM, *The FIRREA Revival: Dredging Up Solutions to the Financial Crisis* at 2 (Oct. 2014), https://instituteforlegalreform.com/wp-content/uploads/media/firrea.pdf. *See* 12 U.S.C. § 1833a(e) (authorizing the DoJ to bring civil actions for civil penalties under FIRREA).

[103] 12 U.S.C. § 1833a (c),(e).

can prove in court by a preponderance of the evidence that the defendant violated one of those criminal statutes, then civil monetary penalties can be assessed.[104]

These offenses include: bribing a bank official;[105] embezzlement of funds entrusted to a banking institution;[106] embezzlement of funds entrusted to an insurance institution;[107] receiving money from the government through a fraudulent transaction with or by a banking institution[108] or credit institution;[109] knowingly making or inviting reliance on a false statement or document to influence the FDIC;[110] knowingly making false statements on loan applications to influence federal agencies or federal insured financial institutions;[111] bank fraud;[112] and knowingly making a false statement to obtain a loan or favorable modification of a loan.[113]

Five other predicate offenses can establish civil FIRREA liability but only if they "affect[] a federally insured financial institution."[114] These offenses include: knowingly and willfully making a false claim to the government;[115] knowingly and willfully making a false statement in any matter within the jurisdiction of the federal government;[116] defrauding federal financial conservators;[117] mail fraud;[118] and wire fraud.[119]

The DOJ has taken an expansive view of what it means to "affect[] a federally insured financial institution."[120] In cases brought during 2013, the DOJ argued that when a financial institution *itself* commits one of the five predicate offenses, it can be held liable under FIRREA. The DOJ takes this position because such conduct does, by definition, "affect" a financial institution. This is known as the "self-affecting" theory. The district courts that have decided the issue have each agreed with the government's viewpoint and rejected arguments by defendants that a financial institution must be the *victim* of the misconduct.[121] The broad application of FIRREA through the "self-affecting" theory makes FIRREA a powerful and versatile statute.

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[104] *Id.* § 1833a(f).
[105] 18 U.S.C. § 215.
[106] *Id.* § 656.
[107] *Id.* § 657.
[108] *Id.* § 1005.
[109] *Id.* § 1006.
[110] *Id.* § 1007.
[111] *Id.* § 1014.
[112] *Id.* § 1344.
[113] 15 U.S.C. § 645(a).
[114] 12 U.S.C. § 1833a(c)(2).
[115] 18 U.S.C. § 287.
[116] *Id.* § 1001.
[117] *Id.* § 1032.
[118] *Id.* § 1341.
[119] *Id.* § 1343.
[120] 12 U.S.C. § 1833a(c)(2).
[121] United States v. Wells Fargo Bank, 972 F. Supp. 2d 593 (S.D.N.Y. 2013); United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598 (S.D.N.Y. 2013); United States v. Bank of New York Mellon, 941 F. Supp. 2d 438 (S.D.N.Y. 2013); United States v. Bogucki, 316 F. Supp. 3d 1177 (N.D. Cal. 2018).

c. DOJ Enforcement of FCA and FIRREA

In the wake of the financial crisis, the DOJ aggressively expanded its use of the FCA and FIRREA. Although the intensity of enforcement—particularly under FIRREA for crisis-era mortgage conduct—has receded in recent years, both statutes remain important enforcement tools available to the DOJ in regulating financial markets.

The DOJ recovered over $26 billion through settlements and judgments under the FCA, including over $5 billion attributable to housing and mortgage fraud alone, , from 2009 through 2015.[122] In 2024, the DOJ recovered more than $.2.9 billion under the FCA, including a record $2.4 billion arising from lawsuits brought under the statute's qui tam (whistleblower) provisions.[123] FIRREA's civil penalties provision was rarely used prior to the 2007-2008 financial crisis.[124] Since 2009, however, the DOJ used FIRREA as part of a $7 billion settlement with Citigroup, $16.65 billion settlement with Bank of America, and a $13 billion settlement with J.P. Morgan.[125] Although the DOJ does not disclose total recovery amounts predicated on FIRREA claims, the FIRREA claims accounted for $11 billion of the $36.65 billion total settlement value in those three large cases.[126] More recently, in 2023, the DOJ reached an approximately $1.5 billion settlement with UBS to resolve FIRREA claims alleging misrepresentations in the sale of residential mortgage-backed securities.[127]

In certain high-profile cases, the DOJ has brought claims under both FCA and FIRREA, including the $25 billion National Mortgage Settlement (summarized in **Appendix B**) with the

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[122] U.S. DEP'T OF JUST., *Press Release: Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015* (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015 (We have been unable to find similar data for any period before the financial crisis).

[123] U.S. DEP'T OF JUST., *Press Release: False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024* (Jan. 15, 2025), https://www.justice.gov/archives/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-year-2024.

[124] Antonio F. Dias & Courtney Lyons Snyder, *FIRREA Civil Money Penalties: The Government's Newfound Weapon Against Financial Fraud*, JONES DAY (May 2013), http://www.jonesday.com/firrea-civil-money-penalties-the-governments-newfound-weapon-against-financial-fraud/.

[125] *See* U.S. DEP'T OF JUST., *Press Release: Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages* (Nov. 19, 2013), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement; U.S. DEP'T OF JUST., *Press Release: Federal and State Partners Secure Record $7 Billion Global Settlement with Citibank for Misleading Investors About Securities Containing Toxic Mortgages* (Jul. 14, 2014), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement; U.S. DEP'T OF JUST., *Press Release: Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis* (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

[126] See sources cited, *supra* note 125.

[127] U.S. DEP'T OF JUST., *Press Release: UBS Agrees to Pay $1.435 Billion to Resolve Claims that It Made Misrepresentations in the Sale of Residential Mortgage-Backed Securities* (Aug. 14, 2023), https://www.justice.gov/usao-edny/pr/ubs-agrees-pay-1435-billion-resolve-claims-it-made-misrepresentations-sale-residential.

five largest mortgage service providers.[128] The FCA and FIRREA also served as grounds for federal civil claims resolved by the DOJ that were part of a $16.65 billion mortgage settlement with Bank of America (described in **Appendix B**).[129]

d. Other Federal Regulators

For completeness, we also must mention that in addition to the aforementioned federal enforcement authorities, other federal enforcement authorities more tangential to the financial markets and financial industry can also play a role in enforcement matters. For example, the Federal Trade Commission could be involved in matters involving anti-competitive behavior, or the Federal Energy Regulatory Commission could be involved in matters involving market activities affecting energy markets. Those agencies' focus is outside the core enforcement authorities for the U.S. financial system, and so are not a further focus of the Report.

B. State Enforcement

The U.S. has a federalist system of government with powers held both by the federal government and state governments. As a result, activities already subject to federal oversight, regulation, and enforcement can also be governed and regulated by state enforcement authorities, particularly state attorneys general.[130] The existence of state enforcement authorities further complicates the structure of the U.S. public enforcement system. An exhaustive summary of the authorities of all of the states is beyond the scope of this Report. Instead, we describe the enforcement authorities in New York. We focus on New York because it is at the center of U.S. capital markets and the financial system.[131]

1. New York Enforcement Regime

The enforcement of New York state laws governing capital markets and the financial system primarily fall within one of two offices – the New York Attorney General's office, and the New York Department of Financial Services.

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[128] WASH. OFF. ATT'Y GEN., *Record $25 Billion National Mortgage Servicing Settlement Finalized by Court Order* (Apr. 5, 2012), https://www.atg.wa.gov/news/news-releases/record-25-billion-national-mortgage-servicing-settlement-finalized-court-order.

[129] U.S. DEP'T OF JUST., *Press Release: Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis* (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading. The FIRREA claims accounted for $5 billion worth of the settlement. The FCA claims accounted for over $1 billion of the settlement.

[130] *See, e.g.*, N.J. OFF. ATT'Y GEN., *About the AG's Office*, https://www.njoag.gov/about/ (last visited Mar. 16, 2026) (New Jersey attorney general is state's chief law enforcement officer); FLA. OFF. ATT'Y GEN., *Role and Function of the Attorney General*, https://www.myfloridalegal.com/overview/role-and-function-of-the-attorney-general (last visited Mar. 16, 2026) (Florida attorney general is state's chief legal officer and is tasked with protecting consumers from fraud).

[131] This is not to suggest that other states have been inactive. Indeed, the opposite is true, as many states have participated in enforcement activities.

i. New York Attorney General

The New York Attorney General has a number of statutory tools to regulate and enforce laws governing financial institutions and participants in the capital markets. The primary sources of enforcement authority are the Martin Act, New York's Executive Law and New York's consumer fraud statutes.

a. The Martin Act – Securities and Commodities Transactions

The Martin Act, adopted in 1921,[132] provides the Attorney General with the authority to investigate fraud, deception, false promises, or misrepresentation in connection with securities or commodities transactions,[133] and to bring civil lawsuits to enforce the Martin Act's provisions.[134] It served as the basis for Attorney General Spitzer's investigation of research analyst practices discussed later in this section.[135]

The Attorney General is empowered to enforce the Martin Act through civil lawsuits and criminal actions. The primary civil tool provided by the Martin Act is the ability to obtain a court order enjoining an individual or entity from violating the Martin Act.[136] In a civil lawsuit, the Attorney General is also authorized to seek a court order requiring a defendant to pay compensation to victims and to return any money or property obtained fraudulently.[137]

The Attorney General also can pursue criminal charges for violations of the Martin Act.[138] The major difference between the civil and criminal provisions is that, for felony violations (which can carry a prison term of up to four years),[139] the defendant must have *intentionally* committed the offense and have *received* property as a result of the intentional fraudulent conduct.[140] In other words, in criminal cases, the state must prove intent, but it does not need to in civil cases brought under the Martin Act.

b. New York Executive Law – Fraud Prevention Through Civil Enforcement Actions

The New York Attorney General is empowered under New York's Executive Law to investigate and bring enforcement actions against "persistent fraud or illegality in the carrying on,

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[132] Frank C. Razzano, *The Martin Act: An Overview*, 1(1) J. Bus. & Tech. L. 125 (2006), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1010&context=jbtl.
[133] N.Y. Gen. Bus. Law § 352.
[134] *Id.* § 353.
[135] *See* Harold K. Gordon, *The Investigative Authority of the New York Attorney General Is Not Without Its Limits*, JONES DAY (Feb. 2016), http://www.jonesday.com/the-investigative-authority-of-the-new-york-attorney-general-is-not-without-its-limits-02-04-2016/#_edn26.
[136] N.Y. Gen. Bus. Law § 353.
[137] *Id.* § 353.
[138] *Id.* §§ 352(c), 358.
[139] *Id.* §§ 352(c)(5)-(6) [Classifies certain intentional fraudulent securities practices as class E felonies]; N.Y. Penal Law § 70.00(2)(e) [Provides that the maximum term of imprisonment for a class E felony is four years].
[140] N.Y. Gen. Bus. Law § 352c(5), (6).

conduct, or transaction of business,"[141] which is broader than the Martin Act's focus on securities and commodities transactions. The Attorney General is authorized to bring a civil case to obtain (1) a court-issued injunction to cease unlawful activity and (2) compensation of victims.[142] The statute does not provide for civil fines.

c. Enforcement of Consumer Protection Laws

New York laws also make it unlawful for any individual or entity to engage in "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" in New York.[143] The consumer protection laws also make it unlawful to engage in false advertising in conducting any business, trade or commerce or providing a service in New York.[144] The consumer protection laws have been applied to "virtually all economic activity."[145] The laws are enforceable by the New York Attorney General in civil actions.[146]

d. Examples of Enforcement Actions by the New York Attorney General

For nearly three decades, New York Attorneys General have used their expansive powers to bring significant and well-publicized financial sector enforcement actions. For example, in the early 2000s, New York Attorney General Elliot Spitzer spearheaded investigations into the practices of analysts at Wall Street investment banks. He asserted that they were not providing investors with independent analyses of public company stocks, but instead were issuing favorable ratings and reports, to help their firms generate business from those companies.[147]

The first settlement Spitzer reached in connection with these investigations was with Merrill Lynch in May 2002.[148] About one year later, the SEC, Attorney General Spitzer and other state regulators settled claims of "undue influence of investment banking interests on securities research at brokerage firms"[149] with ten investment banking firms. The ten banks agreed to pay civil monetary penalties of $487.5 million and disgorge $387.5 million in ill-gotten gains.[150] The settlements also imposed structural reforms regulating the activity of investment banks and their

[141] N.Y. Exec. Law § 63(12).
[142] *Id*.
[143] N.Y. Gen. Bus. Law § 349(a).
[144] *Id*. § 350.
[145] Karlin v. IVF Am., Inc., 93 N.Y.2d 282, 290 (N.Y. Ct. App. 1999).
[146] N.Y. Gen. Bus. Law §§ 349, 350-d.
[147] *See generally* John Cassidy, *The Investigation: How Eliot Spitzer Humbled Wall Street*, THE NEW YORKER (Mar. 31, 2003), http://www.newyorker.com/magazine/2003/04/07/the-investigation.
[148] *Id.*
[149] U.S. SEC. & EXCH. COMM'N, Press Release: Ten of Nation's Top Investment Firms Settle Enforcement Actions Involving Conflicts of Interest Between Research and Investment Banking (Apr. 28, 2003), https://www.sec.gov/news/press/2003-54.htm.
[150] *Id.*

research analysts. Indeed, the Committee noted in its 2006 report that such state enforcement actions can affect practices nationwide.[151]

Former Attorney General Schneiderman was also heavily involved in enforcement actions arising out of the 2007-2008 financial crisis. He served as co-chair of a residential mortgage-backed securities working group organized by the DOJ, which "focused on investigating potential false or misleading statements, deception or other misconduct by market participants in the creation, packaging and sale of mortgage-backed securities."[152] The working group reached settlements with 18 major financial institutions between 2012 and 2023, collecting civil penalties totaling more than $36 billion.[153]

Under current Attorney General Letitia James, New York has continued to deploy its state-law enforcement authorities in prominent matters involving both capital-markets-adjacent conduct and consumer financial practices. In the digital asset and investment products space, her office reached a $2 billion settlement with Genesis relating to the fraudulent Gemini Earn program,[154] followed by a $50 million settlement with Gemini itself.[155] The Attorney General has also pursued enforcement actions arising out of alleged misconduct in crypto markets, including a $200 million resolution with Galaxy Digital related to its involvement with LUNA.[156] In parallel, the office has brought large consumer-finance cases, including a more than $1 billion settlement with merchant cash-advance lender Yellowstone Capital, which resolved allegations that the firm used purported receivables agreements to evade New York's usury laws and imposed unlawful terms and collection practices on small businesses.[157]

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[151] COMM. CAP. MKT. REGUL, *Interim Report of the Committee on Capital Markets Regulation* at 67-68 (Nov. 2006), https://capmktsreg.org/wp-content/uploads/2022/11/Interim-Report-of-the-Committee-on-Capital-Markets-Regulation-1.pdf.

[152] U.S. DEP'T OF JUST., *Press Release: Residential Mortgage-Backed Securities (RMBS) Working Group Announces New Resources to Investigate RMBS Misconduct* (May 24, 2012), https://www.justice.gov/opa/pr/residential-mortgage-backed-securities-rmbs-working-group-announces-new-resources-investigate.

[153] U.S. DEP'T OF JUST., *Pres Release: UBS Agrees to Pay $1.435 Billion to Resolve Claims That It Made Misrepresentations in the Sale of Residential Mortgage-Backed Securities* (Aug. 14, 2023), https://www.justice.gov/usao-edny/pr/ubs-agrees-pay-1435-billion-resolve-claims-it-made-misrepresentations-sale-residential

[154] N.Y. OFF. ATT'Y GEN, *Press Release: Attorney General James Secures Settlement Worth $2 Billion from Crypto Firm Genesis Global Capital for Defrauded Victims* (May 20, 2024), https://ag.ny.gov/press-release/2024/attorney-general-james-secures-settlement-worth-2-billion-crypto-firm-genesis

[155] N.Y. OFF. ATT'Y GEN, *Press Release: Attorney General James Recovers $50 Million from Crypto Firm Gemini for Defrauded Investors* (Jun. 20, 2024), https://ag.ny.gov/press-release/2024/attorney-general-james-recovers-50-million-crypto-firm-gemini-defrauded.

[156] DEBEVOISE & PLIMPTON, *Galaxy Settles with NYAG as State Crypto Enforcement Ramps Up* (Apr. 7, 2025), https://www.debevoise.com/insights/publications/2025/04/galaxy-settles-with-nyag-as-state-crypto-enforce.

[157] N.Y. OFF. ATT'Y GEN, *Press Release: Attorney General James Announces $1 Billion Settlement with Predatory Lender Yellowstone Capital for Harming Small Businesses* (Jan. 22, 2025), https://ag.ny.gov/press-release/2025/attorney-general-james-announces-1-billion-settlement-predatory-lender

ii. New York Department of Financial Services

In New York, the Superintendent of the Department of Financial Services ("**DFS**") is charged with (1) overseeing and enforcing state banking and insurance laws and (2) protecting consumers of financial products and services.[158] Part of the DFS's mission is to prevent fraud or intentional, material misrepresentations in connection with the provision of financial products or services.[159] In addition, the DFS is authorized to enforce state and federal laws governing debt collection practices and fair lending requirements.[160] The DFS has the authority to bring civil actions to enforce these laws, including by assessing fines.[161]

C. Enforcement by Non-U.S. Government Actors

The focus of this Report is on the U.S. public enforcement system – that is, enforcement by federal and state government entities. However, industry-oriented self-policing organizations are involved in regulating market activities and transactions frequently cross international borders, we therefore believe that it is important to highlight the role that self-regulatory organizations ("**SROs**") and foreign government enforcement authorities play in financial sector enforcement.

1. Self-Regulatory Organizations

SROs are membership-based organizations that develop and enforce rules that regulate market participants within a specific industry, which are recognized and highly regulated by the federal government. Specifically, the existence of these organizations is authorized by Congress through statutes such as the Exchange Act and CEA, and SROs are required to register with the SEC or CFTC.[162] While SROs are formed by private industry participants,[163] and develop their own rules that members of the SRO must follow, the regulatory agency with jurisdiction over it (i.e., the SEC or CFTC) is required to review and approve SROs' proposed rules to ensure that they meet the statutory requirements.[164] Generally, the authorizing statutes require that the SRO

[158] N.Y. Fin. Serv. Law § 301. "Financial products and services" is defined broadly to include any financial product or service provided by a person regulated under the banking or insurance laws or that is offered or sold to consumers. N.Y. Fin. Serv. Law § 104. The term "consumer" is not defined by the statute.
[159] *Id.* § 408(a).
[160] *Id.*
[161] *Id.* § 305; *Id.* § 408(a).
[162] *See, e.g.*, 15 U.S.C. §§ 78f (national securities exchanges), 78o-3 (registered securities associations), 78q-1 (clearing agency); 7 U.S.C. §§ 7 (boards of trade), 21 (futures associations).
[163] *See, e.g.*, NAT'L FUTURES ASS'N, *NFA History*, https://www.nfa.futures.org/about/nfa-history.html (last visited Mar. 16, 2026) (noting that the NFA was formed when the chairman of the Chicago Mercantile Exchange persuaded other industry leaders to form it as an SRO under the CEA).
[164] *See, e.g.*, 15 U.S.C. § 78s(b) (requiring SEC approval of rules and rule changes for SROs subject to SEC oversight); 7 U.S.C. §§ 7 (requiring boards of trade to apply to CFTC for approval), 21 (requiring futures associations to apply to CFTC for approval).

exercise disciplinary power over its members to enforce its rules, and thus engage in self-policing.[165]

SROs are especially prevalent in the securities and commodities industries and include organizations such as the Financial Industry Regulatory Authority ("**FINRA**"); the New York Stock Exchange ("**NYSE**"); the National Futures Association ("**NFA**"); boards of trade such as the Chicago Mercantile Exchange ("**CME**"); and the Municipal Securities Rulemaking Board ("**MSRB**"). SROs can supplement regulation and enforcement by government enforcement authorities due to their familiarity with and proximity to their members and the markets that they police.

i. FINRA – Broker-Dealer SRO

FINRA is an independent non-profit organization registered pursuant to Section 15A of the Exchange Act[166] that regulates the activities of over 3,200 securities firms and 630,000 broker-dealers.[167] FINRA's mission is to protect investors and safeguard the integrity of the capital markets.[168]

FINRA was created in 2007 as an independent entity resulting from the merger of the National Association of Securities Dealers ("**NASD**") and the NYSE's regulatory apparatus that had previously overseen broker-dealers.[169] While FINRA consolidated the regulation of broker-dealers under one SRO, the listing exchanges (e.g., NYSE and NASDAQ) retained responsibility for regulating trading on their own markets and issuing and enforcing rules governing listed companies.[170] The exchanges formerly outsourced market surveillance and other functions to FINRA, but the NYSE and NASDAQ have moved certain of these functions back in-house.[171]

The Exchange Act requires that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, facilitate

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[165] *See, e.g.*, 7 U.S.C. §§ 21(b)(8), 7(d)(13); 15 U.S.C. §§ 78q-1(b)(3)(G), 78o-3(b)(7), 78f(b)(6). One exception to the above is the MSRB, which was established by law, but which is not allowed to enforce its own rules. 15 U.S.C. § 78o-4.

[166] 15 U.S.C. § 78o-3.

[167] FIN. INDUS. REGUL. AUTH., *2025 FINRA Industry Snapshot* (Sept. 2025), https://www.finra.org/sites/default/files/2025-07/2025-Industry-Snapshot.pdf

[168] FIN. INDUS. REGUL. AUTH., *About FINRA*, http://www.finra.org/about (last visited Mar. 16, 2026).

[169] U.S. SEC. & EXCH. COMM'N, *SEC Gives Regulatory Approval for NASD and NYSE Consolidation* (Jul. 27, 2007), https://www.sec.gov/news/press/2007/2007-151.htm. The listing exchanges retained regulation over conduct on the exchanges themselves.

[170] Hester Peirce, *The Financial Industry Regulatory Authority: Not Self-Regulation After All,* MERCATUS WORKING PAPER (Jan. 2015), https://www.mercatus.org/system/files/Peirce-FINRA.pdf.

[171] N.Y. STOCK EXCH., *NYSE Regulation to Perform Market Surveillance, Investigation and Enforcement Program for NYSE Group Exchanges* (Oct. 6, 2014), https://ir.theice.com/press/news-details/2014/NYSE-Regulation-to-Perform-Market-Surveillance-Investigation-and-Enforcement-Program-for-NYSE-Group-Exchanges/default.aspx; U.S. SEC. & EXCH. COMM'N, *Order Approving a Proposed Rule Change to Assume Operational Responsibility for Certain Surveillance Activity Currently Performed by FINRA under the Exchange's Authority and Supervision* (Sept. 3, 2013), https://www.sec.gov/files/rules/sro/nasdaq/2013/34-70569.pdf.

transactions in securities, and protect investors and the public interest, among other things.[172] As a result, FINRA's rules govern everything from banning manipulative, deceptive and fraudulent schemes by its members in connection with transactions in securities,[173] regulating transactions with broker-dealer customers,[174] and regulating underwriter compensation in securities offerings.[175]

FINRA is empowered under the Exchange Act and its rules to enforce the regulations governing its members,[176] including by imposing one or more of the following sanctions on its members: censure, fine, suspension of membership, expulsion of membership, cease-and-desist order, or any other "fitting sanction."[177] In 2024, FINRA brought 544 enforcement actions and imposed over $65 million in monetary sanctions.[178]

ii. NYSE – Listing Exchange SRO

Securities listing exchanges are also SROs. Exchanges make and enforce rules governing (1) the listing of company shares on the exchange; and (2) trading and other behavior by broker-dealer members of the exchange.[179] An summary of the authorities of all listing exchanges is beyond the scope of this Report. Instead, provide information on the NYSE as an illustrative example.

The ultimate aim of the NYSE rules is to promote just and equitable principles of trade, to encourage free and open markets and to protect investors and the public interest.[180]

NYSE listing rules regulate the companies that choose to list their shares on the exchange. Companies listed on the NYSE, for instance, are subject to corporate governance rules, including board and board committee independence requirements, regulations pertaining to shareholder meetings, and governance requirements (e.g., requirements that listed companies have codes of conduct for their executive officers and conduct annual board self-evaluations), among many other rules.[181] The companies listed on the NYSE had a market cap of over $32 trillion as of November 2025.[182]

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[172] 15 U.S.C. § 78o-3(b)(6).
[173] FINRA, Rule 2020.
[174] FINRA, Rule 2111.
[175] FINRA, Rule 5110.
[176] FINRA, Rule 8310 *et seq.* Technically the Exchange Act requires that FINRA's rules include enforcement provisions. Exchange Act § 15A(b)(7).
[177] FINRA, Rule 8310(a).
[178] COMM. CAP. MKT. REGUL., *supra* note 84, at Fig.7.
[179] *See generally* N.Y. STOCK EXCH., *Listed Company Manual*, https://nyseguide.srorules.com/listed-company-manual (last visited Mar. 16, 2026); N.Y. STOCK EXCH., *NYSE Rules*, https://www.nyse.com/regulation/rules (last visited Mar. 16, 2026).
[180] N.Y. STOCK EXCH., *NYSE Regulation*, https://www.nyse.com/regulation (last visited Mar. 16, 2026).
[181] N.Y. STOCK EXCH., Rules 300 *et seq.*; 401.00 *et seq.*; 303A.09; 303A.10.
[182] WORLD FED'N EXCHS., *supra* note 15.

The NYSE can punish listed companies for violating its listing rules by suspending or terminating the company's listing on the exchange.[183] This is the NYSE's sole remedy for non-compliance with its listing rules.[184]

The NYSE also issues and enforces rules that regulate broker-dealer member conduct and admission,[185] the operation of the exchange,[186] advertising and communications of broker-dealer members with the public,[187] and dispute resolution between members,[188] among other things.

NYSE's rules permit it to sanction broker-dealer members and those affiliated with its members for violations of its rules.[189] The remedies available to the NYSE include censuring a broker-dealer member, imposing a fine, suspending a member's membership, expelling a member, suspending or barring a person or entity from associating with a member organization, or imposing "any other fitting sanction."[190] In 2024, the NYSE brought 23 disciplinary actions and imposed approximately $9.2 million in fines.[191]

iii. The NFA – Futures Association SRO

The NFA is an industry-wide SRO for the U.S. derivatives industry, which states that its mission is to "safeguard the integrity of derivatives markets, protect investors, and ensure members meet their regulatory responsibilities."[192] The NFA is currently the only registered futures association and performs functions in the derivatives markets similar to those that FINRA performs in the securities markets.[193]

Participants in the commodities markets, such as futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators, and swap dealers must all become members of the NFA.[194] The NFA's membership consists of approximately 2,800 firms and 37,000 persons associated with those firms.[195]

The NFA establishes admission standards and has adopted rules covering members' business conduct, such as sales practices, recordkeeping, disclosure of fees and minimum capital

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[183] N.Y. STOCK EXCH., Rules 801–05.
[184] *Id*.
[185] *See generally* N.Y. STOCK EXCH., Rules 2010–7470; N.Y. STOCK EXCH., Rules 300–24.
[186] *See generally* N.Y. STOCK EXCH., Rule 45-299C.
[187] N.Y. STOCK EXCH., Rules 471–74B.
[188] N.Y. STOCK EXCH., Rules 600A–39.
[189] N.Y. STOCK EXCH., Rule 8300.
[190] N.Y. STOCK EXCH., Rule 8310.
[191] Data was derived from an analysis of disciplinary actions provided on the NYSE's website. N.Y. STOCK. EXCH., *NYSE Disciplinary Actions*, https://www.nyse.com/regulation/disciplinary-actions (last visited Mar. 16, 2026).
[192] NAT'L FUTURES ASS'N, *About NFA*, https://www.nfa.futures.org/about/index.html (last visited Mar. 16, 2026).
[193] Melanie L. Fein, SECURITIES ACTIVITIES OF BANKS 3–103 (4th ed. 2017); COMMODITY FUTURES TRADING COMM'N, *Revised Registration Form 7-R*, 84(47) FED. REG. (Mar. 11, 2019), https://www.cftc.gov/LawRegulation/FederalRegister/final-rules/2019-04297.html.
[194] Fein, *supra* note 193; 17 CFR § 170.15; 17 CFR § 170.17; 17 CFR § 170.16.
[195] NAT'L FUTURES ASS'N, *Membership and Directories*, https://www.nfa.futures.org/registration-membership/membership-and-directories.html (last updated Feb. 28, 2026).

requirements.[196] The NFA has the authority to take disciplinary actions against firms and individuals that violate its rules.[197] In 2024, it brought 15 disciplinary actions against its members and imposed fines of over $1.3 million.[198]

iv. The CME – Commodities Contract Market SRO

The CME is a market for trading derivatives, contracts to buy or sell commodities, and swap contracts. Like securities listing exchanges, contract markets are SROs that make and enforce rules governing trading on the market and conduct of their members. For example, the CME seeks to prevent trade practice violations such as trading ahead of customer orders,[199] disruptive practices,[200] wash trades[201] and prearranged, pre-negotiated and noncompetitive trades.[202] The CME also imposes position limits and forbids market manipulation.[203] The CME rules, as required by the CEA, grant the CME authority to discipline its members for rule violations.[204] In 2024, the CME brought 17 disciplinary actions against its members and imposed monetary sanctions of over $1.7 million.[205]

v. The MSRB – Municipal Securities SRO

The MSRB is a member-based SRO that seeks to "protects and strengthens the municipal bond market, enabling access to capital, economic growth, and societal progress in tens of thousands of communities across the country."[206]

The MSRB's mandate is to regulate, through the adoption of rules, the activities of (1) broker-dealers and banks that buy, sell, and underwrite municipal securities and (2) municipal advisors, which are firms that provide advice to state and local governments and other

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[196] NAT'L FUTURES ASS'N, *How NFA Fights Fraud and Abuse*, https://web.archive.org/web/20170228095207/https://www.nfa.futures.org/NFA-about-nfa/who-we-are/how-NFA-fights-fraud-and-abuse.HTML (last visited Mar. 16, 2026). *See also* NAT'L FUTURES ASS'N, *NFA Rulebook*, https://www.nfa.futures.org/nfamanual/NFAManual.aspx (last visited Mar. 16, 2026).

[197] NAT'L FUTURES ASS'N, Rule 3-14.

[198] Data was derived from disciplinary actions provided on the NFA's website. NAT'L FUTURES ASS'N, *Enforcement and Registration Actions*, https://www.nfa.futures.org/news/newsactionslist.asp (last visited Mar. 16, 2026).

[199] CME Rule 531.

[200] CME Rule 575.

[201] CME Rule 534.

[202] CME Rule 539.

[203] CME GROUP, *Market Surveillance*, http://www.cmegroup.com/market-regulation/market-surveillance.html (last visited Mar. 16, 2026).

[204] 7 U.S.C. § 7(d)(2) (requiring that a board of trade, such as the CME, establish, monitor and enforce compliance with its rules); § 7(d)(13) (requiring an SRO to adopt and enforce disciplinary procedures); CME Rule 402.

[205] Data was derived from disciplinary actions provided on the CME's website. CME GROUP, *Notices*, https://www.cmegroup.com/notices.html (last visited Mar. 16, 2026).

[206] MUN. SEC. RULEMAKING BD., *What's New at the MSRB*, https://www.msrb.org/ (last visited Mar. 16, 2026). The MSRB was not only authorized but was also established by Congress through a 1975 amendment to the Exchange Act at the urging of industry members who believed rigorous industry standards could not be maintained in a rapidly growing marketplace without a formal system of regulation. MUN. SEC. RULEMAKING BD., *The Role and Jurisdiction of the MSRB* (2022), http://www.msrb.org/msrb1/pdfs/Role-and-Jurisdiction-of-MSRB.pdf.

municipalities about the issuance of bonds and other municipal financial products.[207] Each municipal securities broker (i.e., a broker engaged in the business of effecting transactions in municipal securities for the account of others[208]), municipal securities dealer (i.e., a person engaged in the business of buying and selling municipal securities for his own account[209]), and municipal advisor must register with the MSRB.[210] Over 900 broker-dealers and 400 municipal advisors are registered with the MSRB.[211]

Unlike other SROs, the MSRB does not have the authority to enforce its own rules. Rather, the Exchange Act limits the MSRB's involvement in enforcement to providing guidance and assistance to regulators that enforce its rules.[212] Instead, the SEC enforces the MSRB's rules, and if the registrant is subject to the enforcement authority of the federal banking regulators, they too can enforce violation of MSRB rules.[213] The SEC does not disclose the number of enforcement actions it brings per year for violations of MSRB rules.

2. Foreign Governments

Governments outside the U.S. also exercise enforcement powers over U.S. individuals and firms that engage in misconduct subject to the jurisdiction of those countries.

An illustrative example is the United Kingdom ("**U.K.**"), which is a major hub of financial activity involving U.S. entities. Conduct within the U.K. is governed by the laws and regulatory agencies of the U.K. As a result, a U.S. firm or individual that violates a U.K. law while doing business in the U.K. could be subject to an enforcement action by a U.K. regulator. Similarly, conduct or activities that occur in both the U.S. and U.K. could be subject to enforcement actions in both countries.

The U.K.'s enforcement of laws governing capital markets and the financial system is primarily carried out by two regulators: the Prudential Regulatory Authority ("**PRA**") and the Financial Conduct Authority.

The PRA, which operates as part of the Bank of England, is the U.K.'s prudential regulator for around 1,300 banks, building societies, credit unions, insurers, and major investment firms,

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[207] MUN. SEC. RULEMAKING BD., *MSRB Vision, Mission and Values*, https://www.msrb.org/MSRB-News/MSRB-Vision-Mission-and-Values (last visited Mar. 16, 2026). MSRB rules include rules related to the disclosure of material information to customers (MSRB Rule G-47), prohibitions on dishonest and unfair practices (MSRB Rule G-17), and seeking the most favorable terms reasonably available for customers' transactions (MSRB Rule G-18).

[208] 15 U.S.C. § 78c(a)(31).

[209] *Id.* § 78c(a)(30).

[210] MSRB Rule A-12.

[211] *See* MUN. SEC. RULEMAKING BD., *Broker-Dealers and Bank Dealers Registered with the MSRB*, http://www.msrb.org/BDRegistrants.aspx (last visited Mar.16, 2026); MUN. SEC. RULEMAKING BD., *MSRB-Registered Municipal Advisor Firms with Series-50 Qualified Representatives*, http://msrb.org/MARegistrants.aspx (last visited Mar. 16, 2026).

[212] 15 U.S.C § 78o-4(b)(4).

[213] *Id.* § 78o-4 (c).

with a focus on promoting firms' safety and soundness."[214] The Financial Conduct Authority is an independent regulatory body that is responsible for the regulation of retail and wholesale financial markets and the infrastructure that supports those markets.[215]

The PRA has a number of formal powers it can exercise to enforce the laws and rules it has jurisdiction over. For example, the PRA can object to merger and acquisition activity if a regulated institution is not in compliance with laws, restrict the activities an individual can engage in, suspend or censure an individual or firm, and impose civil fines.[216] The PRA oversees around 1,300 institutions.[217]

The Financial Conduct Authority regulates the conduct of the financial markets in the U.K. to ensure that financial services are "honest and competitive"[218] Its authority includes ensuring market integrity, promoting competition, and protecting consumers.[219] The agency oversees over 41,000 financial services firms.[220] It combines functions comparable to those exercised in the U.S. by the SEC, CFTC, and CFPB, within a single conduct regulator. The Financial Conduct Authority has criminal, civil, and regulatory enforcement authority, and though separate from the Bank of England, it is statutorily required to cooperate with the PRA.[221] Cooperation is mandated because Financial Conduct Authority actions could affect the stability of the U.K. financial system and because entities can be subject to the jurisdiction of both regulators. The Financial Conduct Authority is also responsible for regulating firms that are not regulated by the PRA, such as asset managers.[222]

The Financial Conduct Authority can bring criminal charges, and impose civil penalties such as suspending or prohibiting a firm or individual from engaging in regulated activities, revoking a firm's authorization, freezing a firm's assets with a court order, seeking injunctions and compensation of victims, and imposing fines.[223] In 2022, the Financial Conduct Authority imposed fines of over £215 million, as well as more than £176 million in 2024. In 2023, however, total

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[214] BANK ENG., *What is the Prudential Regulation Authority (PRA)*, https://www.bankofengland.co.uk/explainers/what-is-the-prudential-regulation-authority-pra (last updated Feb. 11, 2026).

[215] *See* Louise Hodges, *UK Financial Regulatory Landscape: A Quick Guide to The New Financial Conduct Authority, Prudential Regulation Authority & Financial Policy Committee*, KINGSLEY NAPLEY LLP (Apr. 2, 2013), https://www.lexology.com/library/detail.aspx?g=603b0696-94fd-4951-989c-dd291942450e.

[216] BANK ENG., *Which Firms Does the PRA Regulate*, https://www.bankofengland.co.uk/prudential-regulation/authorisations/which-firms-does-the-pra-regulate (last visited Mar. 16, 2026).

[217] BANK ENG., *supra* note 214.

[218] FIN. CONDUCT AUTH., *About the FCA*, https://www.fca.org.uk/about/the-fca (last updated Mar. 6, 2026).

[219] FIN. CONDUCT AUTH., *Enhancing market integrity*, https://www.fca.org.uk/about/enhancing-market-integrity (last updated Mar. 25, 2025); FIN. CONDUCT AUTH., *Promoting competition*, https://www.fca.org.uk/about/promoting-competition (last updated Mar. 25, 2025); FIN. CONDUCT AUTH., *Protecting consumers*, https://www.fca.org.uk/about/protecting-consumers (last updated Jan. 20, 2026).

[220] FIN. CONDUCT AUTH., *supra* note 218.

[221] Financial Services and Markets Act 2000, Part 1A, Chapter 3, Section 3Q.

[222] *See generally*, FIN. CONDUCT AUTH., *Enforcement*, https://www.fca.org.uk/publication/corporate/our-approach-enforcement.pdf. (last visited Aug. 14, 2025).

[223] FIN. CONDUCT AUTH., *Enforcement Information Guide* (Aug. 2025), https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf.

fines were only slightly over £53 million.[224] These are penalties imposed in all of its enforcement actions in those years.

In addition to these two regulatory agencies, the Serious Fraud Office ("**SFO**") is a specialist prosecuting authority that works with other government authorities to investigate and prosecute serious and complex fraud, bribery and corruption cases.[225]

[224] FIN. CONDUCT AUTH., *2022 Fines*, https://www.fca.org.uk/news/news-stories/2022-fines (last visited Mar. 16, 2026); FIN. CONDUCT AUTH., *2023 Fines*, https://www.fca.org.uk/news/news-stories/2023-fines (last visited Mar. 16, 2026); FIN. CONDUCT AUTH., *2024 Fines*, https://www.fca.org.uk/news/news-stories/2024-fines (last visited Mar. 16, 2026). https://www.fca.org.uk/news/news-stories/2014-fineshttps://www.fca.org.uk/news/news-stories/2015-fineshttps://www.fca.org.uk/news/news-stories/2016-finesDollar amounts represent Pounds converted into U.S. dollars using the exchange rate on [to be converted immediately before publishing the report].

[225] SERIOUS FRAUD OFF., *About us*, https://www.sfo.gov.uk/about-us/ (last visited Mar. 16, 2026).

II. Possible Overlapping Enforcement Activities for the Same Misconduct

This complex and fragmented enforcement landscape can create opportunities for one act of misconduct to result in investigations and enforcement actions by multiple enforcement authorities. While the conduct may violate different laws or rules overseen by different enforcement authorities, the enforcement activities of the different authorities "overlap" in that they are, in effect, investigating and penalizing the same underlying conduct or actions.

This Part proceeds in two sections. First, we explain three ways that multiple enforcement authorities could bring overlapping enforcement actions for the same underlying activities by the enforcement target and provide a few examples. Second, we discuss potential problems that may arise when multiple enforcement authorities are involved in overlapping enforcement activity against a target.

A. Ways that Overlapping Enforcement Actions May Occur

There are three types of matters in which enforcement jurisdiction can be exercised simultaneously by U.S. public enforcement authorities: (1) criminal and civil cases; (2) federal and state cases; and (3) federal civil cases enforcing different laws for the same underlying conduct. These are not mutually exclusive and one, all, or any combination of the three can be present in a given case.

1. Overlapping Criminal and Civil Cases

Violations of many statutory provisions are criminal offenses in addition to being subject to civil enforcement. Therefore, the DOJ can bring a criminal action for a violation of the *same provision* for which a regulatory agency may impose a civil penalty. For example, the Securities Act, Exchange Act, Investment Advisers Act and Investment Company Act each provide that a willful violation of any provision of that law can be prosecuted as a criminal violation.[226] If someone commits insider trading, for example, he can be subject to both an SEC civil action and a DOJ criminal action. Indeed, in a high-profile matter in 2022, the SEC and DOJ brought parallel civil and criminal actions relating to securities fraud by certain private funds of Allianz Global Investments.[227]

Civil and criminal enforcement actions may also occur together when an act of misconduct violates both a statutory provision enforced by a civil enforcement authority and a *different* substantive criminal provision enforced by the DOJ. For example, a public company executive

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[226] 15 U.S.C. § 77x (Securities Act); 15 U.S.C. § 78ff(a) (Exchange Act); 15 U.S.C. § 80a-48 (Investment Companies Act); 15 U.S.C. § 80b-17 (Investment Advisers Act).

[227] U.S. SEC. & EXCH. COMM'N, *Press Release: SEC Charges Allianz Global Investors and Three Former Senior Portfolio Managers with Multibillion Dollar Securities Fraud* (May 17, 2022), https://www.sec.gov/newsroom/press-releases/2022-84; U.S. DEP'T OF JUST., *Press Release: Three Portfolio Managers and Allianz Global Investors U.S. Charged in Connection with Multibillion-Dollar Fraud Scheme* (May 17, 2022), https://www.justice.gov/archives/opa/pr/three-portfolio-managers-and-allianz-global-investors-us-charged-connection-multibillion.

who made misleading statements in a scheme to deceive investors might face both civil SEC liability under Section 10(b) of the Exchange Act[228] and DOJ criminal wire fraud charges.[229]

An example of overlapping enforcement actions by both civil and criminal enforcement authorities are the enforcement actions against multiple financial institutions for allegedly manipulating foreign exchange ("**FX**") benchmark rates. A series of investigations yielded allegations by the DOJ that Barclays, Citicorp, JP Morgan, RBS, and UBS, had manipulated FX benchmark rates either independently or in collusion, had disclosed confidential customer order information and trading positions, and had altered trading positions at the expense of clients.[230] The DOJ imposed criminal fines on these banks of more than $2.5 billion in May 2015. The financial institutions also faced civil fines by other U.S. enforcement authorities. The table below summarizes the monetary sanctions that these institutions faced from the CFTC, OCC, DOJ and Fed.

Table 3: Settlement Payments from FX Benchmark Rigging Cases

Agency	Barclays	Citicorp	JP Morgan	RBS	UBS
CFTC[231]	$400 million	$310 million	$310 million	$290 million	$290 million
OCC[232]	-	$350 million	$350 million	-	-
DOJ (criminal)[233]	$650 million	$925 million	$550 million	$395 million	$203 million
Fed[234]	$342 million	$342 million	$342 million	$274 million	$342 million
Total	$1.392 billion	$1.927 billion	$1.552 billion	$959 million	$835 million

More recently, the DOJ has been active in pursuing criminal penalties for violations of the Bank Secrecy Act and anti-money laundering laws, including with respect to digital asset firms. For instance, in 2023 FinCEN, as primary administrator of the BSA, entered into a consent order with cryptocurrency exchange Binance to settle alleged BSA violations, ordering Binance to pay

[228] 15 U.S.C. § 78f(b).
[229] 18 U.S.C. § 1343.
[230] *See* Trefis Team, *Five Banks Settle Forex Manipulation Charges For $3.4 Billion*, FORBES (Nov. 12, 2014), http://www.forbes.com/sites/greatspeculations/2014/11/12/five-banks-settle-forex-manipulation-charges-for-3-4-billion/#58ac18164567.
[231] COMMODITY FUTURES TRADING COMM'N, *Press Release: Barclays to Pay $400 Million Penalty to Settle CFTC Charges of Attempted Manipulation and False Reporting of Foreign Exchange Benchmark Rates* (May 20, 2015), https://www.cftc.gov/PressRoom/PressReleases/7181-15.
[232] OFF. COMPTROLLER CURRENCY, *Press Release: OCC Fines Three Banks $950 Million for FX Trading Improprieties* (Nov. 12, 2014), https://www.occ.treas.gov/news-issuances/news-releases/2014/nr-occ-2014-157.html.
[233] U.S. DEP'T OF JUST., *Press Release: Five Major Banks Agree to Parent-Level Guilty Pleas* (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.
[234] BD. GOVERNORS FED. RESERVE SYS., *Press Release: Federal Reserve announces fines totaling more than $1.8 billion against six major banking organizations for their unsafe and unsound practices in the foreign exchange (FX) markets* (May 20, 2015), https://www.federalreserve.gov/newsevents/press/enforcement/20150520a.htm.

a civil monetary penalty of $3.4 billion.[235] In a contemporaneous plea agreement with the DOJ, Binance pleaded guilty to certain criminal violations, including with respect to BSA requirements, and agreed to pay a criminal fine of $1.8 billion.[236] The CFTC concurrently enforced its own rules requiring BSA compliance, entering into a consent order with Binance in December 2023 which imposed a civil penalty of $1.35 billion.[237]

2. Overlapping Federal and State Cases

If an act of misconduct violates both federal and state law, then overlapping enforcement actions by both federal and state authorities may result. For example, a depository institution that opens customer accounts without customer knowledge or authorization may violate state consumer protection laws, as well as federal safety and soundness banking laws and federal consumer protection laws,[238] which could result in enforcement actions by federal and state enforcement authorities for the same underlying conduct.

There are a few prominent examples of this type of situation. An example is the Barclays LIBOR matter. In that matter, enforcement actions were taken against Barclays in connection with the rigging of two global benchmark interest rates, the London Interbank Offered Rate ("**LIBOR**") and the Euro Interbank Offered Rate ("**Euribor**") from 2005 through 2009.[239] Traders in New York and London allegedly worked to submit inaccurate rates to make Barclays' trading books more profitable.[240] Barclays settled a civil matter with the CFTC and a criminal matter with the DOJ on June 27, 2012 by agreeing to, among other things, pay penalties of $200 million and $160 million to the CFTC and DOJ,

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[235] FIN. CRIMES ENF'T NETWORK, *Consent Order Number 2023-04* (Nov. 21, 2023), https://www.fincen.gov/system/files/enforcement_action/2023-11-21/FinCEN_Consent_Order_2023-04_FINAL508.pdf

[236] Plea Agreement, United States v. Binance Holdings Ltd., No. 23-178RAJ (W.D. Wash. 2023), https://www.justice.gov/archives/opa/media/1326901/dl?inline.

[237] COMMODITY FUTURES TRADING COMM'N, *Consent Order for Permanent Injunction No: 1: 23-cv-01887I* (Nov. 20, 2023), https://www.cftc.gov/media/9981. OFAC also assessed penalties of nearly $1 billion relating to sanctions violations. U.S. DEP'T OF JUST., *Press Release: U.S. Treasury Announces Largest Settlements in History with World's Largest Virtual Currency Exchange Binance for Violations of U.S. Anti-Money Laundering and Sanctions Laws* (Nov. 21, 2023), https://home.treasury.gov/news/press-releases/jy1925.

[238] *See, e.g.*, OFF. COMPTROLLER CURRENCY, *Press Release: OCC Assesses Penalty Against Wells Fargo, Orders Restitution for Unsafe or Unsound Sales Practices* (Sept. 8, 2016), https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-106.html (noting that the OCC, CFPB and local authorities were sanctioning Wells Fargo for unauthorized opening of customer accounts).

[239] COMMODITY FUTURES TRADING COMM'N, In re Barclays PLC, et al. (CFTC Docket No. 12-25), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf.

[240] *Id.* at 3.

respectively.[241] In addition, 40 states also pursued penalties against Barclays[242] based on legal claims grounded in the same course of conduct for which Barclays had settled concurrent DOJ and CFTC enforcement actions four years earlier. The states and Barclays reached a joint settlement resulting in the payment of $100 million to the states in exchange for the states not pursuing any civil claims, including under state antitrust laws, unfair and deceptive practices laws, and state fraud statutes.[243]

3. Overlapping Federal Civil Cases

Misconduct can also violate different laws within the jurisdiction of different federal enforcement authorities with civil enforcement powers. For example, if officers at a publicly traded financial institution know about systematic violation of consumer protection laws and fail to disclose that to investors, the company and officers could face enforcement actions by the CFPB for violations of federal consumer protection laws, banking regulators for unsafe and unsound practices, and the SEC for failure to disclose material information to investors.

Examples of federal civil matters by multiple enforcement authorities arising from the same conduct include the 2016 and 2020 Wells Fargo settlements with the CFPB, OCC, Fed, SEC, and DOJ which imposed penalties against Wells Fargo in connection with findings that employees had opened unauthorized customer accounts as a result of demanding sales targets and incentives put in place by senior management.[244]

In 2016 the CFPB fined Wells Fargo $100 million, which at the time was the CFPB's largest civil monetary penalty ever assessed.[245] In addition to the fine, the CFPB ordered Wells Fargo to pay full refunds to affected consumers, an estimated $2.5 million, and to take measures

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[241] *Id.* at 29-30; U.S. DEP'T OF JUST., *Press Release: Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and agrees to Pay $160 Million Penalty* (Jun. 27, 2012), https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and.

[242] Participating States included Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

[243] D.C. OFF. ATT'Y GEN., *Press Release: Attorney General Racine Announces $100 Million Multistate Settlement with Barclays for Manipulating Interest Rate* (Aug. 8, 2016), https://oag.dc.gov/release/attorney-general-racine-announces-100-million.

[244] OFF. COMPTROLLER CURRENCY, *Press Release: Office of the Comptroller of the Currency, OCC Assesses Penalty Against Wells Fargo, Orders Restitution for Unsafe or Unsound Sales Practices* (Sept. 8, 2016), https://www.occ.treas.gov/news-issuances/news-releases/2016/nr-occ-2016-106.html (noting that the OCC, CFPB and local authorities were sanctioning Wells Fargo for unauthorized opening of customer accounts); CONSUMER FIN. PROT. BUREAU, *Press Release: Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts* (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/

[245] CONSUMER FIN. PROT. BUREAU, *supra* note 244.

to ensure future compliance.[246] The OCC found that Wells Fargo had engaged in unsafe or unsound sales practices arising from the same conduct.[247] The $35 million civil fine reflected the "bank's failure to develop and implement an effective enterprise risk management program to detect and prevent the unsafe or unsound sales practices, and the scope and duration of the practices."[248] The Fed also investigated Wells Fargo for compliance breakdowns at the bank holding company level that pertained, at least in part, to the unauthorized account opening matter. Over 16 months after the OCC and CFPB actions, the Fed entered a consent order with Wells Fargo requiring the board to implement governance and risk management changes and restricting the bank's ability to grow until satisfactory changes were adopted, implemented, and verified by a third-party reviewer.[249] In 2020, in relation to the same underlying conduct, the SEC fined Wells Fargo $500 million and the DOJ imposed a civil penalty of $3 billion.[250]

B. Potential Concerns with Overlapping Enforcement Actions by Multiple Enforcement Authorities

When underlying misconduct violates laws or rules enforced by different enforcement authorities, each of those authorities may decide to independently investigate the misconduct. As a result, a person or firm may be required to respond to multiple requests for the same documents, make employees or other persons available for multiple interviews, and provide access to different enforcement authorities at different times to physical locations or files. Such duplicative activities are inefficient for both government agencies that could otherwise pool resources to streamline the investigative process, and for the targets of the potential enforcement action who must respond to redundant requests.

A second concern is that absent coordination and cooperation, enforcement targets can be subject to great uncertainty when there is a risk of overlapping enforcement actions. From a target's perspective, a source of anxiety is uncertainty surrounding whether enforcement activity pertaining to a specific course of conduct has been completely resolved. In negotiating settlement terms, a target of an enforcement action may make concessions or agree to certain terms, conditions, or payments, on the basis that the settlement will resolve the matter completely. But if the underlying conduct also potentially violates laws under the jurisdiction of other enforcement authorities and the target lacks assurances that future actions by other enforcement authorities may not be taken in the future, then it makes it more difficult for the target to determine acceptable settlement terms for the current matter or to forecast future liability reserves for accounting purposes.

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[246] *Id.*

[247] OFF. COMPTROLLER CURRENCY, *supra* note 244 (noting that the OCC, CFPB and local authorities were sanctioning Wells Fargo for unauthorized opening of customer accounts); CONSUMER FIN. PROT. BUREAU, *supra* note 244

[248] *Id.*

[249] BD. GOVERNORS FED. RESERVE SYS., In the matter of Wells Fargo & Company, Docket No. 18-007-B-HC, https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a1.pdf (referencing the OCC and CFPB enforcement actions).

[250] U.S. SEC. & EXCH. COMM'N, In the matter of Wells Fargo & Company, File No. 3-19704 (Feb. 21, 2020), https://www.sec.gov/files/litigation/admin/2020/34-88257.pdf; *Settlement Agreement between U.S. Department of Justice and Wells Fargo & Company* (Feb. 20, 2020), https://www.justice.gov/usao-cdca/press-release/file/1251331/dl?inline.

Third, a lack of coordination and cooperation in overlapping enforcement actions could result in penalties that go beyond what is necessary to achieve the policy objectives of deterrence and remediation.[251] This can have counterproductive impacts on activity and the economy and can occur because enforcement authorities are unwilling to consider what a target has paid to other enforcement authorities. It can also occur if enforcement authorities are in competition with one another to be able to obtain a larger settlement in a matter than other enforcement authorities for political purposes. Thus, penalties could be imposed beyond the amount needed to deter future wrongdoing.

[251] *See* Deputy Attorney General Rod Rosenstein, *Remarks to the New York City White Collar Crime Institute*, U.S. DEP'T JUST. (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar (explaining the DOJ coordination policy on corporate sanctions as seeking to avoid duplicative penalties and noting that businesses that face oversight from many regulators face a risk of "repeated punishments that may exceed what is necessary to rectify the harm and deter future violations").

III. Coordination of Enforcement Activities Among U.S. Enforcement Authorities

The U.S. enforcement system's fragmented jurisdictional structure makes coordination among enforcement authorities critical because of the potential issues that can result if coordination is not carried out effectively. However, in the current system there is not a uniform legal mechanism through which investigations or enforcement actions are coordinated. Rather, coordination results from a mixture of sources. Those are: (1) statutory provisions promoting or requiring coordination; (2) coordination by the President of enforcement authorities, including through the establishment of task forces and working groups; and (3) agency driven coordination through voluntarily adopted policies or ad hoc, case-by-case coordination efforts. We describe the current policies and practices of enforcement authorities and then present recommendations for how a more formal and standardized approach could be implemented.

A. Statutorily Mandated Coordination

In limited instances, Congress has mandated that agencies take steps that promote coordination with each other. However, such directives are the exception rather than the rule and are relatively minor in scope. We review them below.

1. Legal Provisions Intended to Enhance Coordination

A primary example of Congressional efforts to promote enforcement coordination are provisions in Dodd-Frank that require the CFPB to engage with the DOJ on enforcement proceedings. Specifically, the law mandates that the CFPB notify the Attorney General of any suit or proceeding to which it is a party, except for proceedings involving the offering or provision of consumer financial products or services.[252] In addition, the law requires the CFPB and the DOJ to enter into an agreement with each other to ensure that parallel investigations and proceedings involving consumer financial protection laws are conducted in a way that avoids conflicts and does not impede the DOJ's ability to prosecute violations of federal criminal laws.[253]

The CFPB and DOJ entered into the statutorily prescribed agreement in January 2012.[254] The Memorandum of Understanding requires the CFPB to notify the DOJ whenever it commences a civil action, including under federal consumer financial laws, or if it is a party to any litigation or proceeding, other than one involving federal consumer financial laws, along with certain other notification requirements.[255]

The agreement also parrots the statute by stating that the CFPB and DOJ will consult and coordinate with each other to avoid conflict in parallel investigations and proceedings. It does not elaborate on how this coordination is to be achieved. The lack of detail raises questions about how the agreement is being implemented in practice and whether it is achieving the statute's aim of coordination. Moreover, it is important to note that a notice requirement like the one applicable to

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[252] 12 U.S.C. § 5564(d)(2)(A).
[253] *Id.* § 5564(d)(2)(B).
[254] *See Memorandum of Understanding between the Consumer Financial Protection Bureau and the United States Department of Justice* (Jan. 20, 2012), http://files.consumerfinance.gov/f/2012/01/CFPB-DOJ-MOU.pdf.
[255] *See id.*

the CFPB and DOJ does not necessarily mean coordination on resolving an enforcement matter or on determining the appropriate aggregate amount of any monetary sanctions imposed.

The Equal Credit Opportunity Act ("**ECOA**"),[256] which prohibits discrimination against credit applicants on the basis of race, color, religion, age, sex or national origin,[257] also requires coordination to a limited extent among the CFPB, banking regulators and the DOJ. The ECOA delegates authority to enforce the law to the CFPB as well as to a depository institution's primary federal banking regulator.[258] Banking regulators and the CFPB are required to refer the suspected violations of the ECOA to the DOJ so the DOJ can decide whether to bring a lawsuit under the DOJ's statutory purview.[259]

There are a few other notable instances where enforcement coordination is required by law. First, the SEC is required to consult with banking regulators before it takes any enforcement action (or any other action such as issuing a comment letter) regarding the manner in which any insured depository institution or depository institution holding company reports loan loss reserves in its financial statements.[260] Second, before the FDIC can revoke the insurance for deposits at federally insured depository institutions, it must provide at least 30 days' notice to the bank's primary federal or state regulator.[261]

2. Narrow Limitations of Statutorily Mandated Coordination

The current Congressional mandates for coordination are hampered by the narrow and limited nature of the mandatory cooperation and notification requirements. Congress has not adopted any overarching national policy requiring cooperation (including in the determination of sanctions) or established a mechanism or institution through which cooperation can be monitored and enforced.

Another significant limitation of Congressionally-mandated coordination is that it is questionable whether Congress can require *state* authorities to coordinate with the federal government. In a line of constitutional law cases, the Supreme Court has held that Congress can neither pass a law requiring state governments to take specific actions nor can Congress use its control over federal spending to coerce state governments to take specified actions.[262] However, Congress can pass laws to pre-empt state laws and it is possible Congress could condition avoidance by states of pre-emption by requiring approval from federal regulators to proceed.[263]

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[256] 15 U.S.C. §§ 1691 *et seq.*
[257] *Id.* § 1691(a).
[258] *Id.* § 1691c(a)(1)-(2), (7), (9).
[259] *Id.* § 1691e(g)-(h).
[260] Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 241, 113 Stat. 1338, 1407 (1999).
[261] 12 U.S.C. § 1818(a)(2).
[262] *See* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898, 933 (1997); South Dakota v. Dole, 483 U.S. 203 (1987); NFIB v. Sebelius, 132 S. Ct. 2566 (2012); Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453 (2018); Haaland v. Brackeen, 599 U.S. 255 (2023).
[263] *See* Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264 (1981). In dicta the Supreme Court reasoned that the federal government could offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.

That approval could in practice be subject to some sort of coordination policy. Absent legislation pre-empting state enforcement efforts outright or requiring federal government approval for a state to undertake enforcement activities, coordination between federal and state enforcement agencies largely has to be based on voluntary arrangements and understandings.

B. Presidential Orders of Coordination

A second mechanism to enhance coordination is a Presidential directive. President George W. Bush issued a directive aimed at enhancing coordination in the wake of the corporate accounting scandals of the early 2000s.[264] President Obama issued one in 2009 that established a task force on financial fraud enforcement.[265] President Biden issued an order for coordinated action with respect to digital asset-related enforcement in 2022.[266] Finally, President Trump issued directives during each of his terms, one in 2018 to enhance cooperation with respect to the prosecution of financial crimes,[267] and one in 2025 to coordinate the enforcement of regulatory crimes.[268] Each directive is described below.

1. Executive Orders

In 2002, amid ongoing accounting scandals at high profile companies like Enron and WorldCom, President Bush signed Executive Order 13271, which established a corporate fraud task force. The task force had two primary objectives. First, it created a working group of DOJ officials to coordinate enforcement activities within the DOJ. Specifically, between the FBI and DOJ's Washington, D.C. office, and various U.S. Attorneys Offices in cases of significant financial crimes. Second, the chairs of the SEC and CFTC, along with the Secretary of the Treasury, Deputy Attorney General, FBI Director, and others, were instructed to make recommendations to the President and Attorney General about how to enhance cooperation among federal and state enforcement authorities.[269] It granted no powers to any agency or official to force, or even simply encourage, cooperation among enforcement authorities.

Upon taking office in 2009, President Obama signed Executive Order 13519, which created a task force led by the DOJ comprised of senior-level officials (selected by the head of the relevant

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[264] PRESIDENT EXEC. OFF., *Establishment of the Corporate Fraud Task Force*, Exec. Order No. 13,271, 67 FED. REG. 46,091 (Jul. 11, 2002), https://www.federalregister.gov/documents/2002/07/11/02-17640/establishment-of-the-corporate-fraud-task-force.

[265] *See* PRESIDENT EXEC. OFF., *Establishment of the Financial Fraud Enforcement Task Force*, Exec. Order No. 13,519, 70 FED. REG. 60,123 (Nov. 19, 2009), https://www.federalregister.gov/documents/2009/11/19/E9-28022/establishment-of-the-financial-fraud-enforcement-task-force.

[266] PRESIDENT EXEC. OFF., *Ensuring Responsible Development of Digital Assets*, Exec. Order No. 14,067, 87 FED. REG. 14,143 (Mar. 14, 2022), https://www.federalregister.gov/documents/2022/03/14/2022-05471/ensuring-responsible-development-of-digital-assets.

[267] PRESIDENT EXEC. OFF., *Establishment of the Task Force on Market Integrity and Consumer Fraud*, Exec. Order No. 13,844, 83 FED. REG. 33,115 (Jul. 16, 2018), https://www.federalregister.gov/documents/2018/07/16/2018-15299/establishment-of-the-task-force-on-market-integrity-and-consumer-fraud.

[268] PRESIDENT EXEC. OFF., *Fighting Overcriminalization in Federal Regulations*, Exec. Order No. 14,294, 90 FED. REG. 20,363 (May 14, 2025), https://www.federalregister.gov/documents/2025/05/14/2025-08681/fighting-overcriminalization-in-federal-regulations

[269] *Id.*

agency or department) from Treasury, the SEC, the CFTC, the Fed, the OCC, the FDIC, FinCEN and the FBI, along with other federal agencies.[270] The mission of the task force was to provide advice to the Attorney General in the investigation and prosecution of: bank, mortgage, loan and lending fraud; securities and commodities fraud; FCA violations; mail and wire fraud; money laundering; other financial crimes; and to coordinate law enforcement operations with representatives of state, local and tribal law enforcement.[271] The task force created a number of enforcement subcommittees, including the residential mortgage-back securities working group and the securities and commodities fraud working group.

The residential mortgage-backed securities working group was an organization of federal and state authorities that shared resources to investigate wrongdoing in the mortgage-backed securities market prior to the financial crisis.[272] The working group, in existence from 2012 to 2023, collected over $36 billion in fines and consumer relief,[273] including from a $16.65 billion settlement with Bank of America, and major settlements with J.P. Morgan, Goldman Sachs, Citibank and Morgan Stanley, among others.[274]

The securities and commodities fraud working group focused on coordination among federal and state authorities to develop and successfully resolve high-priority cases involving securities and commodities fraud (e.g., insider trading, Ponzi schemes, market manipulation).[275] The working group was comprised of the U.S. Attorney for the Southern District of New York, the Directors of Enforcement for the SEC and CFTC, and the Assistant Attorney General for the Criminal Division.[276]

In 2018, President Trump signed Executive Order 13844, directing the DOJ to establish a task force on market integrity and consumer fraud, replacing the task force formed by President Obama. The new task force was directed, among other things, to "make recommendations to the President… to enhance cooperation among agencies in the investigation and prosecution of fraud and other financial crimes."[277] The task force included the DOJ, SEC, CFPB, and FTC and was

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[270] PRESIDENT EXEC. OFF., *Establishment of the Financial Fraud Enforcement Task Force*, Exec. Order No. 13,519, 74 FED. REG. 60,123 (Nov. 19, 2009), https://www.federalregister.gov/documents/2009/11/19/E9-28022/establishment-of-the-financial-fraud-enforcement-task-force.

[271] *Id.*

[272] FIN. FRAUD ENF'T TASK FORCE, *Task Force Organization and Leadership*, http://web.archive.org/web/20161203015212/https://www.stopfraud.gov/tfs.html (last visited Mar. 16, 2026).

[273] U.S. DEP'T JUST., *Press Release: UBS Agrees to Pay $1.435 Billion to Resolve Claims That It Made Misrepresentations in the Sale of Residential Mortgage-Backed Securities* (Aug. 14, 2023), https://www.justice.gov/usao-edny/pr/ubs-agrees-pay-1435-billion-resolve-claims-it-made-misrepresentations-sale-residential.

[274] U.S. DEP'T JUST., *Press Release: Goldman Sachs Agrees to Pay More than $5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities* (Apr. 11, 2016), https://www.justice.gov/archives/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed.

[275] Bonnie Jonas, *Securities and Commodities Fraud Working Group* at 10, U.S. ATT'YS BULLETIN, (Sept. 2010), https://www.justice.gov/sites/default/files/usao/legacy/2010/10/05/usab5805.pdf.

[276] *See* FIN. FRAUD ENF'T TASK FORCE, *2010 First Year Report* (Jun. 15, 2011), https://www.fincen.gov/financial-fraud-enforcement-task-force-ffetf.

[277] PRESIDENT EXEC. OFF., *supra* note 267.

directed to invite representatives from, among others, the Treasury, Fed, CFTC, FDIC, and OCC.[278] The task force does not appear to have issued public recommendations or findings and now appears to be inactive.

In light of technological advances in financial services, including with respect to the growth of the markets for digital assets, President Biden signed Executive Order 14067 in 2022 with the goal of ensuring responsible development of these assets.[279] The directive required the Secretary of the Treasury, in consultation with other department and agency heads, to "develop a coordinated action plan… for mitigating... digital asset-related illicit finance and national security risks" which "shall address the role of law enforcement."[280] The executive order and the policies and guidance issued in accordance therewith were revoked in January 2025 as the incoming administration promulgated its own policies on digital financial technology to replace those of the prior administration.[281]

Finally, in May 2025, President Trump signed Executive Order 14294, aimed at rationalizing the enforcement of regulatory crimes.[282] The directive requires each agency to produce a report of all criminal regulatory offenses enforceable by the agency or the DOJ, and directs the Attorney General to consider whether a particular criminal regulatory offense is included in an agency's public report before initiating an investigation or criminal proceedings.[283] Each agency is further required to publish guidance on the factors it considers in deciding whether to refer alleged criminal regulatory violations to the DOJ.[284]

2. Limitations of Presidentially-Directed Coordination

Presidential directives and task forces are helpful in promoting communication and cooperation among agencies, but their ability to directly influence each authority's enforcement activities is limited. Importantly, they lack a mechanism to resolve disputes or force cooperation among the agencies. None of these coordination mandates granted official authority to veto a proposed enforcement action by one agency or to require one enforcement authority to settle a matter. As such, these directives cannot ensure that all enforcement actions pertaining to an underlying act of misconduct are harmonized or resolved simultaneously.

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[278] U.S. DEP'T JUST., *Press Release: Department of Justice, Bureau of Consumer Financial Protection, U.S. Securities and Exchange Commission, Federal Trade Commission Announce Task Force on Market Integrity and Consumer Fraud* (Jul. 11, 2018), https://www.justice.gov/archives/opa/pr/department-justice-bureau-consumer-financial-protection-us-securities-and-exchange-commission.

[279] PRESIDENT EXEC. OFF., *supra* note 266.

[280] *Id*. at Sec. 7(c).

[281] PRESIDENT EXEC. OFF., *Strengthening American Leadership in Digital Financial Technology*, Exec. Order No. 14,178, 90 FED. REG. 8,647 (Jan. 31, 2025), https://www.federalregister.gov/documents/2025/01/31/2025-02123/strengthening-american-leadership-in-digital-financial-technology.

[282] PRESIDENT EXEC. OFF., *supra* note 268.

[283] *Id*. at Sec. 4

[284] *Id*. at Sec. 7.

C. Individual Agency Policies, Procedures and Practice

Agencies promote coordination and cooperation through internal policies, as well as ad hoc, case-by-case informal coordination with other enforcement authorities on specific enforcement actions. The DOJ and the SEC have the most robust policies concerning coordination with other enforcement authorities. These policies are set forth in the DOJ's Justice Manual and the SEC's Enforcement Manual.[285] This section describes these policies, along with the policies of the banking regulators and the CFPB disclosed in publicly available documents and in public statements.[286]

1. Agency Policies Promoting Coordination

i. The DOJ

The DOJ's internal policy handbook, the Justice Manual, provides that DOJ attorneys should coordinate with other enforcement authorities throughout the enforcement process. The Manual is a reference for U.S. Attorneys, Assistant U.S. Attorneys and attorneys at the DOJ's Washington, D.C. office that contain general policies and procedures relevant to the work that they conduct.[287]

The Manual indicates that the DOJ places priority on the coordination of enforcement actions with other agencies. In 2012, for example, the Attorney General issued a memorandum to all DOJ attorneys that was incorporated into the Justice Manual that instructed that the DOJ's policy is that "criminal prosecutors and [DOJ] civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law," whenever an alleged violation of federal law could give rise to multiple proceedings.[288]

The Attorney General's memorandum sets forth policies that DOJ attorneys should follow at three stages of the enforcement process. First, when the DOJ is in the early evaluation stage of

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[285] *See generally* U.S. DEP'T JUST., *Justice Manual*, https://www.justice.gov/usam/united-states-attorneys-manual (last visited Mar. 16, 2026); U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, *Enforcement Manual* (Feb. 24, 2026), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[286] The CFTC's Division of Enforcement released a public enforcement manual for the first time in 2019, including a section on Cooperative Enforcement. The provisions concerning coordination with other U.S. enforcement authorities cover similar ground as those in the SEC enforcement manual, though at a higher level of detail.
COMMODITY FUTURES TRADING COMM'N, DIV. OF ENF'T, *Enforcement Manual* at § 8.1 (May 20, 2020), https://www.cftc.gov/LawRegulation/EnforcementManual.pdf.

[287] U.S. DEP'T JUST., *U.S. Attorneys' Manual* §1-1.100, https://www.justice.gov/archives/usam/archives/usam-1-1000-introduction (last visited Mar. 16, 2026). It serves as internal guidance and does not provide rights to any third party.

[288] U.S. DEP'T JUST., *Memorandum from the Attorney General on Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings* (Jan. 30, 2012), https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings; U.S. DEP'T JUST., *U.S. Attorneys' Manual* §1-12.000, https://www.justice.gov/usam/usam-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings (last visited Mar. 16, 2026).

a case, DOJ attorneys should consider all potential civil, administrative and criminal remedies and explore those remedies with other government personnel.[289]

Second, during the investigative stage, DOJ attorneys should consider strategies to maximize the government's ability to share information among criminal, civil and administrative teams. For example, grand jury information cannot be shared with civil and administrative teams absent a court order, so criminal prosecutors aware of civil or administrative actions should consider obtaining information outside the grand jury process, so they can share it with the team leading the civil or administrative actions.[290]

Third, DOJ attorneys should consider the effect that resolution of their case will have on other enforcement proceedings, and should effectively and timely communicate with representatives of other agencies so that those agencies can pursue available remedies that may exist because of the resolution of the DOJ action (e.g., suspension of a registered entity or individual).[291]

The Justice Manual further specifies that criminal attorneys should confer with civil attorneys within the DOJ in the event a criminal case is not brought, so they can assess whether a civil enforcement action is appropriate.[292] That guidance, however, does not clearly require the DOJ to communicate a decision not to prosecute to outside agency attorneys.

The Manual also provides that, in deciding whether to bring a criminal case, DOJ attorneys should consider the fact that civil remedies might be imposed for the same misconduct by the DOJ or other enforcement authorities. Specifically, the Principles of Federal Prosecution contained in the Justice Manual states that one consideration prosecutors must weigh is whether there is an adequate non-criminal alternative to prosecution.[293] In making that judgment, prosecutors are instructed to consider all relevant factors, including the sanctions available under the alternative, the likelihood that those sanctions will be imposed and the effect of a non-criminal disposition of the matter on federal law enforcement interests.[294]

Moreover, on May 9, 2018, Deputy Attorney General Rod Rosenstein announced a new DOJ anti-"piling on" policy pertaining to coordination of penalties against corporations when proceedings or investigations by multiple enforcement authorities arise from the same misconduct. This policy has been reflected in the Justice Manual, which was revised to instruct DOJ attorneys that they should consider the sanctions imposed or that will be imposed by other enforcement authorities to achieve an equitable outcome.[295] It also instructs DOJ attorneys to coordinate with those other enforcement authorities "as appropriate."[296] In 2025 the Head of the DOJ's Criminal

[289] U.S. DEP'T JUST., *supra* note 288.
[290] *Id*.
[291] *Id*. For the inclusion of the policies in the U.S. Attorneys' Manual, see U.S. ATTORNEYS' MANUAL § 1-12.000.
[292] U.S. DEP'T JUST., *U.S. Attorneys' Manual* §1-12.000, https://www.justice.gov/usam/usam-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings (last visited Mar. 16, 2026).
[293] *Id*. § 9-27.220.
[294] *Id*. § 9-27.250.
[295] *Id*. § 1.-12.100.
[296] *Id*.

Division issued a memorandum to all Criminal Division personnel instructing that among the factors to be considered in determining whether to coordinate and apportion sanctions is "how the various components of criminal, civil, and regulatory monetary penalties would be used by each authority… and how to apportion those penalties to provide the greatest amount of recovery for victims of the criminal schemes with compensable losses and assistance to victims of crime."[297]

ii. The SEC

The SEC's Enforcement Manual, a reference source for SEC attorneys containing SEC policies and procedures, also emphasizes cooperation and coordination with other enforcement authorities, primarily with criminal law enforcement authorities. First, the SEC policies provide that SEC attorneys may share information related to an investigation or enforcement action with federal, state, local and foreign government authorities, SROs and certain other entities upon request, and at the SEC's discretion.[298]

Additionally, the SEC provides its staff with guidance on cooperating with the DOJ and states in criminal enforcement matters. The SEC's Enforcement Manual states that, in certain circumstances, it is appropriate for the DOJ to ask the SEC to refrain from taking certain actions that could harm a criminal investigation, and vice versa.[299] The Enforcement Manual does not provide additional detail beyond this generic guidance, stating that each matter is unique and instructing staff to discuss specific facts and considerations with their supervisors.[300] The guidance also provides that, while the SEC can cooperate with criminal authorities, the SEC should maintain its independence from the criminal matter.[301]

Finally, the SEC's Enforcement Manual provides its staff guidance on when it is appropriate to refer a matter to the DOJ or to state criminal law enforcement authorities. Specifically, the SEC staff is instructed to take into account, among other factors, the harm or risk of harm caused by the potential offense, the potential gain to the putative defendant, whether the putative defendant was an expert in the industry to which the rule or regulation pertained, the putative defendant's state of mind, any history of recidivism, and whether criminal authority involvement "will provide additional meaningful protection to investors."[302]

The SEC has recently taken additional steps to enhance interagency coordination outside of these policies. In May 2025 the SEC announced the creation of a "National Enforcement Liaison" position to coordinate enforcement efforts with other regulatory agencies and state

[297] U.S. DEP'T JUST., CRIM. DIV., *Memorandum from Head of the Criminal Division on Guidance on Coordinating Corporate Resolution Penalties in Parallel Criminal, Civil, Regulatory, and Administrative Proceedings* (Jun. 5, 2025), https://www.justice.gov/criminal/media/1402751/dl.
[298] 17 CFR § 240.24c-1; U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, *supra* note 285 at § 5.
[299] U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, *supra* note 285 at § 5.2.
[300] *Id*.
[301] *Id*.
[302] *Id*. at § 5.6.1.

officials.[303] In September 2025 the SEC and the CFTC released a joint statement in which the agencies pledged to "recalibrat[e] our posture toward regulatory cooperation."[304] And in March 2026, SEC Chairman Paul Atkins announced that the SEC and CFTC will be entering into a new memorandum of understanding with respect to examinations and enforcement, stating that the "era of duplicative enforcement actions and conflicting remedial obligations for the same conduct is over."[305]

iii. Federal Banking Regulators' Efforts at Coordination

The Fed, FDIC, and OCC also have adopted formal, publicly available policies that encourage cooperation and coordination, albeit only among these three banking regulators themselves. The Fed, FDIC and OCC are subject to a policy first published in 1997 and revised in 2018 under which, "[w]hen a [federal banking agency] determines it will take a formal enforcement action against any federally insured depository institution, depository institution holding company, non-bank affiliate, or institution-affiliated party," it should determine whether another federal banking agencies may have an interest in that enforcement action and "should notify the other [federal banking agenc[y/ies]]…. at the earlier of… written notification to the… party against which the [federal banking agency] is considering an enforcement action or when the appropriate responsible agency official, or group of officials, determines that formal enforcement action is expected to be taken."[306]

The policy also requires federal banking regulators to coordinate enforcement matters if two or more of such agencies are involved in an enforcement action, including coordinating "potential penalties."[307] For example, if the OCC were pursuing an action against a federally chartered bank and the Fed were pursuing an action against its parent holding company, the OCC and the Fed would be expected to coordinate.

However, the policy does not provide any mechanism to *ensure* that the agencies act consistently with one another or take one-another's actions, including sanctions, into account. In the end, each agency is responsible for its own jurisdictional turf and for making its own enforcement decisions, including whether to bring an action, whether to settle, and for how much to settle.

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[303] McGuireWoods, *A New Day at the SEC: Commissioners, Staff Declare Unified Approach to Regulation and Enforcement* (Jun. 18, 2025), https://www.mcguirewoods.com/client-resources/alerts/2025/6/a-new-day-at-the-sec-commissioners-staff-declare-unified-approach-to-regulation-and-enforcement/#_ftn1 .

[304] U.S. Sec. & Exch. Comm'n, *Joint Statement from the Chairman of the SEC and Acting Chairman of the CFTC* (Sept. 5, 2025), https://www.sec.gov/newsroom/speeches-statements/joint-statement-atkins-pham-090525.

[305] Paul S. Atkins, Chairman, *Speech on Fostering Regulatory Harmony between the SEC and CFTC* (Mar. 10, 2026), https://www.sec.gov/newsroom/speeches-statements/atkins-fostering-regulatory-harmony-between-sec-cftc-031026.

[306] Off. Comptroller Currency, Bd. Governors Fed. Reserve Sys. & Fed. Deposit Ins. Corp., *Policy Statement on Interagency Notification of Formal Enforcement Actions*, 83 Fed. Reg. 27,371, at 27,372 (June 12, 2018), https://www.federalregister.gov/documents/2018/06/12/2018-12556/policy-statement-on-interagency-notification-of-formal-enforcement-actions.

[307] *Id*.

iv. The CFPB

Agencies may also have informal practices or policies that encourage cooperation and coordination that are not necessarily documented, at least in any publicly available documents. For example, the CFPB does not have a formal, documented, publicly available coordination policy with banking regulators (apart from NCUA) regarding its enforcement of federal consumer financial laws. However, an Inspector General report has noted that CFPB officials informally coordinate with banking regulators. The CFPB and banking regulators told the Inspector General that they believed it was best to handle enforcement issues on a case-by-case basis.[308]

In 2021, however, the CFPB entered into a Memorandum of Understanding with the NCUA, including with respect to enforcement coordination. Specifically, the Memorandum of Understanding requires the agencies to meet regularly to discuss enforcement actions, "[at] a level of specificity to enable both [a]gencies to identify, to the extent they exist, potential conflicts in interpretation of what constitutes compliance as well as divergent approaches in the appropriate remedy."[309] Further, each agency, in its discretion, must share information relating to its enforcement activities where relevant to the other agency's authority, and must generally notify the other prior to filing an enforcement proceeding against an institution regulated by both agencies.[310]

2. Limitations of Agency Policies on Coordination

Currently, there is no uniform standard or mandate that has been imposed on enforcement authorities to create standardized and transparent coordination policies. In principle, voluntarily adopted agency policies that promote or require coordination can help to mitigate the inefficiencies that can result from a fragmented enforcement system. Even ad hoc case-by-case coordination among teams at different enforcement authorities can help to avoid the potential pitfalls that may arise when multiple enforcement authorities are targeting a person or firm for the same underlying misconduct. However, because enforcement investigations and negotiations are conducted behind the scenes and little meaningful disclosure is made about how enforcement authorities coordinate in specific matters, it is difficult to evaluate the extent to which enforcement authorities make efforts under their voluntarily adopted policies or ad hoc approaches to coordinate, and to evaluate the effectiveness of any such efforts.

Nevertheless, several limitations to the reliance on internal policies and ad hoc coordination exist. First, because agency policies are generally adopted internally (without public participation) and at the agencies' discretion, the agencies retain wide latitude with respect to their implementation and potential revision.

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[308] *See* OFF. INSPECTOR GEN., *Coordination of Responsibilities Among the Consumer Financial Protection Bureau and the Prudential Regulators – Limited Scope Review* (Jun. 2015), https://oig.federalreserve.gov/reports/cfpb-responsibilities-coordination-review-jun2015.pdf.

[309] CONSUMER FIN. PROT. BUREAU & NAT'L CREDIT UNION ADMIN., *Memorandum of Understanding Regarding Enhanced Cooperation and Coordination* (Jan. 14, 2021), https://files.consumerfinance.gov/f/documents/cfpb_ncua-memorandum-of-understanding_2021-01.pdf.

[310] *Id*.

When policies are independently adopted by each enforcement authority or coordination is done on a case-by-case basis, there is also not standardization between enforcement authorities. Policies adopted at an agency level may also vary widely from agency to agency, which directly undermines their effectiveness. Coordination is a two-way street: for example, efforts by the SEC to coordinate with the CFPB on a particular matter will be unsuccessful if the CFPB lacks the capacity or will to fully engage with the SEC in a cooperative fashion. Similarly, the DOJ's policies aimed at improving coordination in resolving enforcement matters against corporations cannot be maximally effective if other enforcement authorities do not reciprocate.

Second, the informal nature of coordination and lack of information about its effectiveness also means that agencies' accountability to the public and to elected officials regarding these policies and their execution of them is limited. That can result in a public perception that enforcement authorities are not effectively cooperating and coordinating even if they are doing so behind the scenes.

D. Recommendations to Formalize and Standardize Coordination

The fragmented structure of the U.S. enforcement system creates potential policy concerns about the fairness of the system. These concerns include inefficient uses of government and private resources; uncertainty for enforcement targets; and the possibility of duplicative sanctions. The Committee, therefore, proposes several recommendations aimed at formalizing and standardizing the coordination process to ameliorate the issues that have the potential to arise from the fragmented enforcement structure.

- **Recommendation 1**: Each enforcement authority should develop formal, written policies, subject to public notice and comment, that detail how the enforcement authority will coordinate with other enforcement authorities in conducting investigations, requesting access to documents and witnesses, and negotiating settlements.

Public policies regarding coordination among agencies would inspire public confidence that enforcement authorities are making serious efforts to coordinate activities. The adoption of such a requirement would also increase the saliency within agencies about the importance of coordination and cooperation. Congress could even impose certain parameters for such policies and thus encourage the standardization of coordination and cooperation policies among enforcement authorities. Indeed, the Financial CHOICE Act of 2017, proposed legislation that passed the U.S. House of Representatives but was not ultimately enacted, would have required coordination of enforcement efforts.[311] We specifically recommend that the development of these policies be done through a public comment and notice process.

[311] Specifically, Section 391 of the Financial CHOICE Act of 2017 would have required the CFPB, CFTC, FDIC, Fed, OCC, SEC, and NCUA to each implement policies and procedures to minimize duplication of efforts, establish joint investigations, and appoint a lead agency in joint investigations. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 391 (2017).

- **Recommendation 2:** Federal enforcement authorities should collaborate with one another on the development of their coordination policies.

Coordination policies will only be maximally effective if the policies are compatible with those at other enforcement authorities. Therefore, during the process of developing policies, the enforcement authorities should be discussing ideas with each other and working to ensure that the individual enforcement authority policies will work together to ensure effective coordination.

- **Recommendation 3:** Enforcement authorities should consider the sanctions that other enforcement authorities, including foreign enforcement authorities, have imposed or are about to impose when setting sanctions in their own enforcement actions. Enforcement authorities should explain how they have taken sanctions by other enforcement authorities into consideration.

As part of a coordination program, enforcement authorities should require that agencies consider sanctions that other agencies, as well as foreign enforcement authorities, have imposed or will be imposing when setting sanctions in their own enforcement actions. Agencies are now *permitted* to weigh the sanctions already imposed by other enforcement authorities but are not legally *required* to do so. Such a requirement could encourage officials to develop legitimate rationales for the imposition of additional penalties if the underlying misconduct has already been sanctioned. As noted, in May 2018 the DOJ adopted the anti-"piling on" policy to coordinate the setting of sanctions against corporations, recognizing the importance of "avoiding unfair duplicative penalties."[312] It is critical that other agencies do so as well because enforcement authorities are often not well positioned to litigate enforcement actions. Litigation is often not a practical option because financial institutions seek to avoid antagonistic relationships with their day-to-day regulatory supervisors and reputational harm that could result from prolonged litigation. Thus, settlements are common and because settlements lack meaningful judicial review, it is possible that settlements will fail to consider the penalties imposed by other enforcement agencies that are not a party to the settlement. It is therefore critical that enforcement authorities work together to determine the total penalty amount for the underlying misconduct and then allocate that amount among the various enforcement authorities with jurisdiction over the matter. That would avoid duplicative penalties for the same underlying misconduct, which, as discussed in Chapter 2, is a principle adopted by the U.S. Sentencing Guidelines.

[312] U.S. DEP'T JUST., *Deputy Attorney General Remarks to the New York City Bar White Collar Crime Institute* (May 9, 2018), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

IV. Forum Selection and Procedural Fairness

The 2018 Report explained that the SEC, CFTC and CFPB generally have the discretion to bring an enforcement action in federal court or in an administrative proceeding.[313] Of the three agencies that have discretion to choose the forum for litigation, only the SEC has truly utilized administrative proceedings for contested matters, while the CFTC and CFPB have almost exclusively used the administrative forum to document pre-arranged settlement agreements.[314] The 2018 Report explained that having an agency act as prosecutor, judge and jury, together with procedural rules that favor the agency, creates concerns that agencies like the SEC could choose administrative proceedings in an attempt to increase their success rates, and recommended that defendants should have the right to remove a case filed in an administrative forum to federal court in non-settled matters.

The 2018 Report highlighted that in recent years, the SEC's general use of administrative proceedings has been challenged on constitutional grounds. These challenges originated from fairness concerns that arise out of the use of the administrative forum by the SEC.[315] Since that time, the Supreme Court has handed down multiple decisions on the constitutionality of SEC administrative proceedings, and additional challenges are anticipated.[316] In *Lucia v. SEC* (2018),

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[313] *See* 15 U.S.C. § 77h-1(f) (Securities Act authorizing SEC to bring enforcement action in administrative forum); *id.* § 77t(b), (d) (Securities Act authorizing SEC to bring enforcement action in federal court); *Id.* § 78u-3(f) (Exchange Act authorizing SEC to bring administrative action); *id.* § 78u(d) (Exchange Act authorizing SEC to bring civil lawsuit to enforce law); *Id.* § 80a-9 (Investment Company Act authorizing SEC to bring administrative action); *Id.* § 80a-41 (Investment Company Act authorizing SEC to bring civil lawsuit to seek sanctions); *Id.* § 80b-9 (Advisers Act authorizing SEC to bring administrative action to seek sanctions); *id.* § 80b-3(e), (f) (Advisers Act authorizing SEC to bring civil lawsuit to seek sanctions); 7 U.S.C. § 13a (authorizing CFTC to seek sanctions against registered entities in administrative proceedings); *Id.* § 13a-1 (authorizing CFTC to seek sanctions through civil lawsuit); 12 U.S.C. §§ 5564–66 (authorizing CFPB to bring enforcement action in either forum).

[314] *2018 Report*, at X; *see also* Nicholas F.B. Smyth, *Despite 1st Administrative Appeal, CFPB Seeks Out Courts*, REED SMITH LLP (Jun. 24, 2015), https://www.lexology.com/library/detail.aspx?g=e632265f-851b-4ef5-86b5-7f046c9243e7; CONSUMER FIN. PROT. BUREAU, *Rules of Practice for Adjudication Proceedings*, 90 FED. REG. 48,737, 48740 (Oct. 29, 2025), https://www.federalregister.gov/documents/2025/10/29/2025-19687/rules-of-practice-for-adjudication-proceedings ("[O]nly two cases have been brought through the administrative adjudication process from start to finish since the process was established in 2012."); COMMODITY FUTURES TRADING COMM'N, *Dissenting Statement of Commissioner Caroline D. Pham Regarding the Filing of Administrative Complaints for Enforcement Actions* (Sept. 29, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement092923 ("[F]or the past 10 years, the Commission has not had any ALJs. Instead, the Commission has normally filed complaints in federal court.").

[315] *See, e.g.,* Mark T. Uyeda & Jaime Marinaro, *Beyond* Jarkesy*: Rethinking the Role of Administrative Law Judges in SEC Administrative Proceedings*, 30 FORDHAM J. CORP. & FIN, L. 1 at 23 (2025) ("The perceived unfairness—and the limited efforts of the Commission to address such failings—contributed to setting the stage for full-blown constitutional challenges on the Commission's administrative proceedings.").

[316] *See, e.g.*, Dean M. Conway, *The SEC's Administrative Law Courts Are at a Crossroad*, CARLTON FIELDS (Apr. 24, 2025), https://www.carltonfields.com/insights/publications/2025/the-secs-administrative-law-courts-are-at-a-crossroads ("With the DOJ and SEC no longer defending the constitutionality of ALJs, it's arguably only a matter of time before a court holds that the appointment of the SEC's ALJs violates the appointments clause."); Uyeda & Marinaro, *supra* note 315, at 34 ("The two remaining issues that have not yet been addressed include: (1) whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication

the Court held that administrative law judges ("**ALJs**") are "inferior officers" subject to constitutional requirements,[317] and that under prior practice, SEC ALJs - who may preside over administrative hearings as delegates of the Commission - had been appointed in an unconstitutional manner.[318] The decision has led to additional litigation regarding the constitutionality of the way ALJ's may be *removed* from their positions. In *SEC v. Jarkesy* (2024), the Court held that the Seventh Amendment protects a defendant's right to seek a jury trial when the SEC seeks civil penalties for securities fraud violations,[319] therefore limiting the SEC's ability to bring such cases administratively. The Court left open the possibility that *Jarkesy* could be extended to cases seeking civil penalties for other types of malfeasance, or to cases seeking other forms of monetary penalties "designed to punish or deter the wrongdoer."[320]

In response to the uncertainties surrounding the constitutionality of administrative adjudication, the SEC has shifted away from using ALJs, with most contested matters now litigated in court.[321] In March 2024 there were only two cases before SEC ALJs, compared to nearly 200 in September 2018.[322] And while some of these enforcement actions have merely been shifted to the full Commission for consideration, these mostly represent cases involving revocation of securities registrations.[323] In accordance with *Jarkesy*, the SEC now files cases seeking civil penalties for securities fraud in court.[324]

Given the SEC's move away from relying on the administrative forum in contested matters—particularly where discretionary monetary penalties are involved—this report will not focus on forum selection and administrative courts.

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instead of filing a district court action violate the nondelegation doctrine; and (2) whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.").

[317] 585 U.S. 237, 244 n.3, 251 (2018); U.S. CONST. art. II, § 2.

[318] 585 U.S. at 241, 251.

[319] 603 U.S. 109, 120-21 (2024).

[320] 603 U.S. at 122-23.

[321] Deborah Meshulam et al., *SEC v. Jarkesy: Supreme Court Eliminates a Significant Agency Enforcement Tool – Broad Implications, Key Takeaways*, DLA PIPER (Jul. 2, 2024), https://www.dlapiper.com/en/insights/publications/2024/07/in-sec-v-jarkesy-supreme-court-eliminates-a-significant-agency-enforcement-tool.

[322] Jerauld E. Brydges & Jonathan R. Jasinski, *The Jarkesy Decision and SEC Enforcement Proceedings*, HARTER SECREST & EMERY LLP (Aug. 28, 2024), https://hselaw.com/news-and-information/legalcurrents/the-jarkesy-decision-and-sec-enforcement-proceedings.

[323] Stone Washington & Izam Karukappadath, *Political Review of Agency Adjudication and Recommendations for Reform*, GEO. WASH. U. (Sept. 17, 2024), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-09/Political_Review_of_Agency_Adjudication_SWashington_Sept2024_0.pdf.

[324] *See, e.g.,* Timothy K. Halloran, *SEC Enforcement in the Second Quarter of 2025*, BRADLEY (Jul. 15, 2025), https://www.eyeonenforcement.com/2025/07/sec-enforcement-in-the-second-quarter-of-2025/

Chapter 2: Rationalizing the Setting of Sanctions

Chapter 2: Rationalizing the Setting of Sanctions

A critical aspect of any enforcement regime is the sanctions that are imposed on wrongdoers. Effective sanctions can deter future misconduct, punish wrongdoing, and signal the egregiousness of an act to the public. This chapter's focus is primarily on monetary sanctions, which play an especially important role in the enforcement of the laws and rules governing the financial system and capital markets. Chapter 2 is organized into three parts.

Part I describes the remedies that enforcement authorities have at their disposal to sanction, punish, and remediate misconduct. It includes a taxonomy of both the monetary and non-monetary sanctions that agencies can use.

Part II examines the inconsistent approaches that regulators take to determining monetary sanction amounts. It shows that many regulators, particularly the SEC, CFTC, and CFPB lack meaningful public policies, guidelines, or matrices to help determine penalty amounts. It explains how the absence of formal policies that standardize penalty setting practices creates the risk of disproportionate and arbitrary penalties. Other enforcement authorities like the Fed, OCC and FDIC have adopted sanction setting policies that are applied on a case-by-case basis, but the policies are not binding, are not applied in all matters, and their application requires significant interpretation that renders them largely meaningless. With regard to criminal matters, the U.S. Sentencing Guidelines do not apply when the DOJ negotiates nonprosecution and deferred prosecution agreements. The unbounded discretion enforcement authorities have in setting penalty amounts is particularly troubling because financial institutions face great pressure to settle enforcement actions. Part II concludes by offering policy recommendations that seek to implement a rational, principles-based, and transparent approach to penalty setting through the use of guideposts.

Part III also presents the Committee Staff's data analysis of the monetary sanctions imposed in enforcement actions by an array of authorities over a roughly 25-year period. The Committee Staff's data show clear upward trends in recent years in the total aggregate monetary sanctions imposed in enforcement actions and the size of the mean and median monetary sanctions imposed on enforcement targets during the period. However, due to the lack of public, formal policies and procedures for the setting of monetary penalties, the drivers of the increase in monetary sanctions is unclear. Part III also sets forth the general shortcomings in publicly available information regarding U.S. enforcement actions and their outcomes. Specifically, while major enforcement authorities like the SEC and CFTC have publicly accessible databases of enforcement actions, they are not structured in a way that allows the public, academics, or others to readily identify and analyze the sanctions imposed against defendants in specific cases. To improve the public's access to information about the outcomes in specific enforcement actions, we recommend that each enforcement authority should establish an easily accessible, searchable, centralized database of all of its ongoing and completed enforcement actions.

I. Remedies Available to Enforcement Authorities

Enforcement authorities have numerous remedial tools available to them to punish and remediate misconduct. These tools fall into two broad categories: (1) monetary sanctions; and (2) non-monetary sanctions. This Part provides further classifications of those broad categories below, describes the purposes of each type of remedy and explains which regulators have such remedies in their enforcement toolkits.

A. Monetary Sanctions

Remedies that result in the payment of monies to the government, victims, or third parties can be classified as "monetary sanctions," and includes: (1) civil and criminal monetary penalties; (2) disgorgement and restitution; and (3) consumer relief payments.

1. Civil and Criminal Monetary Penalties

A civil monetary penalty is a punitive fine imposed by a court or assessed by an agency for a violation of law.[1] All of the federal enforcement agencies addressed in this Report have been granted authority by Congress to impose civil monetary penalties.[2] Civil penalties serve to punish wrongdoing and deter others from committing legal violations. In criminal cases, the DOJ can seek criminal fines that serve a similar purpose.[3]

[1] *See* BLACK'S LAW DICTIONARY 1247 (9th ed. 2009).

[2] The SEC's general authority to seek civil monetary penalties for securities law violations is found in the following statutes: 15 U.S.C. §§ 77h-1(g), 77t(d), 78u(d), 80a-9(d), 80a-41, 80b-9, 80b-3. The CFTC's authority can be found at: 7 U.S.C. §§ 13a, 13a-1. The CFPB's authority can be found at 12 U.S.C. § 5565. FinCEN's authority is at 31 U.S.C. § 5321, 31 U.S.C. § 5336. OFAC's authority is found within the rules of each sanctions regime, for example at 31 CFR §§ 546.701-705 (Sudan sanctions penalties). The banking regulators can assess civil monetary penalties under numerous laws, including the National Bank Act, 12 U.S.C. § 93, laws governing savings associations, 12 U.S.C. § 504, laws governing state-member banks of the Fed, 12 U.S.C. §§ 504, 505, laws governing bank holding companies, 12 U.S.C. § 1847(b), and the Federal Deposit Insurance Act, 12 U.S.C. § 1818(i). While the FCA compensates the government for losses incurred because of a misstatement and could be viewed as a form of restitution, the remedy is more analogous to a penalty due to its punitive nature because the government obtains triple damages.

[3] *See, e.g.*, 15 U.S.C. § 77x (Securities Act providing for a fine of up to $10,000 and prison time of no more than five years for willful violation of the Securities Act); 15 U.S.C. § 78ff (Exchange Act authorizing criminal fines and prison time for willful violations of the law); 15 U.S.C. § 80a-48 (Investment Companies Act providing for criminal fines and prison time for violations of the law); 15 U.S.C. § 80b-17 (Advisers Act providing for criminal fines and prison time for violations of the law); 7 U.S.C. § 13 (CEA providing for criminal fines and prison time for violations of the law); 18 U.S.C. § 1343 (providing for criminal fine or prison time for violation wire fraud law).

2. *Disgorgement and Restitution*

i. Disgorgement

Disgorgement is a type of monetary remedy that requires a party who profits from illegal or wrongful acts to give up his or her ill-gotten gains.[4] Disgorgement has two key purposes: (1) to prevent unjust enrichment and (2) to punish and deter misconduct. Disgorgement can prevent unjust enrichment by prohibiting a culpable party from profiting from his or her wrongdoing. Disgorgement can also serve a punitive purpose, thus acting as a penalty.

The SEC,[5] CFTC,[6] CFPB[7] and banking regulators[8] have the authority to obtain disgorgement in enforcement actions. The DOJ has the authority to seek criminal and civil forfeiture of criminal proceeds and contraband for certain crimes, but this authority does not extend to FCA and FIRREA actions.[9] OFAC and FinCEN do not have authority to obtain disgorgement.

ii. Restitution

Restitution is a type of monetary remedy that compensates victims for loss resulting from wrongful or unlawful conduct.[10] Its objective is to remediate harm by making a victim of wrongdoing whole. Restitution thus requires a determination of the monetary value of the injury incurred by victims of the misconduct.

The CFPB, CFTC and banking regulators are able to seek restitution as a form of relief.[11] OFAC, FinCEN, and the SEC, however, are not expressly authorized to seek restitution. It is not clear why those enforcement authorities do not have the express power to seek restitution, but there are some potential rationales. For example, violations of anti-money laundering and sanctions laws overseen by OFAC and FinCEN do not naturally have third-party victims who would benefit from restitution. And the SEC has access to a wide range of other remedies. For example, while the SEC is not authorized to seek restitution, it is authorized in certain circumstances to compensate investors using monetary amounts collected through civil monetary penalties and/or

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[4] *Disgorgement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/disgorgement (last visited Mar. 16, 2026).
[5] 15 U.S.C. § 78u(d)(7); 15 U.S.C. § 78u-3; 15 U.S.C. § 80a-9; 15 U.S.C. § 80b-3.
[6] 7 U.S.C. § 13a-1(d)(3).
[7] 12 U.S.C. § 5565.
[8] 12 U.S.C. § 1818(b)(6).
[9] Though, it is worth noting that if the underlying misconduct also constitutes wire, mail, or bank fraud, for example, the DOJ can seek forfeiture of property that constitutes or is derived from proceeds obtained from the violation, which is often the same as disgorgement. *See, e.g.*, 18 U.S.C. §§ 981 (civil forfeiture statute), 982 (criminal forfeiture statute). Generally, forfeiture, a complex area of law that has frequently been used as a tool in the war on drugs, is beyond the scope of this Report. *See, e.g.*, Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683, 694–700 (2014).
[10] *Restitution*, LEXISNEXIS. *See* SEC v. Huffman, 996 F.2d 800, 802 (1993) (noting the difference between disgorgement and restitution).
[11] 12 U.S.C. § 5565 (CFPB); 7 U.S.C. § 13a-1(d) (CFTC); 12 U.S.C. § 1818(b)(6) (authorizing banking regulators to seek restitution in conjunction with a cease-and-desist order where either (a) the depository institution or affiliated party was unjustly enriched in connection with the violation or (b) the violation or practice involved a reckless disregard for the law).

disgorgement.[12] This is known as the "Fair Funds" authority, which is discussed in detail in Chapter 3. While similar to restitution in that victims are compensated, the distribution of disgorgement funds may not fully compensate the victims for harm incurred because the amount disgorged is determined based on the gain obtained by the defendant from wrongdoing rather than the harm to victims.

3. Consumer Relief/Extraordinary Restitution

Certain authorities (particularly the DOJ during the post-financial crisis era), have included "consumer relief" amounts in settlement agreements (which is also referred to as extraordinary restitution). Consumer relief or extraordinary restitution payments are payments made or benefits provided to individual consumers, communities, or third-party organizations that were not necessarily victims of misconduct. Examples of consumer relief include forgiveness of principal on loans, donations to community redevelopment organizations or legal aid groups, or funding of affordable housing projects. In Chapter 3, we provide more information about consumer relief and extraordinary restitution payments, including data on the use of these provisions in certain large settlements with financial institutions and policy concerns about their use.

B. Non-Monetary Sanctions

Enforcement authorities also have a wide range of *non*-monetary remedial tools at their disposal, which they can use to punish and deter misconduct without requiring any monetary payments. For example, certain non-monetary sanctions can stop a wrongdoer from continuing to engage in misconduct; others may prevent a culpable party from conducting business in a particular industry or field. These can be effective tools to both punish and remediate wrongdoing, especially when monetary sanctions are insufficient to punish or deter wrongdoing, or where an enforcement target does not have the means to pay monetary sanctions.

1. Cease-and-Desist Orders and Injunctions

To ensure that misconduct is promptly terminated once it has been identified, certain authorities are empowered to issue an order that unlawful conduct stop or to seek a similar order from a federal court.

i. Cease-and-Desist Orders

Agencies can issue a cease-and-desist order, an order handed down by a government agency that directs a person or firm to stop doing something immediately.[13] Importantly, a cease-and-desist order does not require the approval of a court, though such administrative actions can be subject to court challenge.[14]

[12] 15 U.S.C. §§ 78u-2(e), 78u-3(e), 7246.
[13] BLACK'S LAW DICTIONARY 253 (9th ed. 2009).
[14] *Id*.

The banking regulators are authorized to issue cease-and-desist orders against institutions and individuals if they violate any law, rule, regulation or agreement with the agency.[15] The SEC,[16] CFTC,[17] CFPB,[18] and OFAC[19] can also issue cease-and-desist orders in response to violations of the statutes and rules they enforce.

By contrast, the DOJ[20] and FinCEN[21] cannot issue cease-and-desist orders, as in civil matters they are limited to seeking monetary sanctions or court orders. FinCEN may lack cease-and-desist powers because once informed of a violation of anti-money laundering laws, persons and entities are likely to voluntarily cease the violation because they otherwise risk criminal prosecution.

ii. Injunctions

Enforcement authorities can also seek an injunction, which is a court order compelling a person or firm to refrain from doing or to stop doing something immediately.[22] The SEC,[23] CFTC,[24] CFPB,[25] and FinCEN[26] are authorized to seek court-issued injunctions. Banking regulators' and OFAC's enforcement actions are required to be brought as administrative proceedings and thus they cannot seek court-issued injunctions in an original enforcement proceeding. The DOJ also cannot seek injunctions under the FCA or FIRREA, which are solely designed to allow the government to recover monetary relief for certain injuries.[27]

2. Bars, Suspensions and Removals

To protect depositors, investors, and other participants in the capital markets and financial system, the laws also authorize certain agencies to prohibit bad actors from engaging in certain lines of businesses or associating with certain types of firms. The agencies with this authority are the SEC, CFTC, CFPB, the Fed, FDIC, NCUA, and OCC.

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[15] 12 U.S.C. § 1818(b).

[16] 15 U.S.C. §§ 77h-1(a) (cease-and-desist order to enforce the Securities Act), 78u-3(cease-and-desist to enforce Exchange Act), 80a-9(f) (cease-and-desist order to enforce Investment Company Act), § 80b-3 (cease-and-desist order to enforce Investment Advisers Act).

[17] 7 U.S.C. § 13a.

[18] 12 U.S.C. § 5565.

[19] 31 C.F.R. Appendix A to Subpart F of Part 501.

[20] Here we are referring to the DOJ's civil powers under FIRREA and the FCA. 31 U.S.C. § 3729(a); 12 U.S.C. § 1833a(c).

[21] 31 U.S.C. § 5320.

[22] Black's Law Dictionary 855 (9th ed. 2009).

[23] 15 U.S.C. §§ 77t(b) (Securities Act), 78u(d) (Exchange Act), 80a-41 (Investment Company Act), 80b-9 (Advisers Act).

[24] 7 U.S.C. § 13a-1.

[25] 12 U.S.C. § 5565.

[26] 31 U.S.C. § 5320.

[27] *See, e.g.*, Antonio F. Dias & Courtney Lyons Snyder, *FIRREA Civil Money Penalties: The Government's Newfound Weapon Against Financial Fraud*, JONES DAY (May 2013), http://www.jonesday.com/firrea-civil-money-penalties-the-governments-newfound-weapon-against-financial-fraud/ (noting that FIRREA ultimately protects U.S. taxpayers from bearing cost of fraud against insured depository institutions).

For example, the SEC has the ability to: (a) bar persons from serving as officers or directors of public companies; (b) suspend the registration of persons or firms, such as broker-dealers, that must register with the SEC; and (c) restrict who can serve as an employee, director, or advisory board member of a registered investment company.[28] The CFTC can also suspend the registration of persons or firms registered with the CFTC.[29] The CFPB has the authority to limit the activities or functions of a person or entity that violates federal consumer financial law.[30] Finally, the banking regulators can remove or suspend a person from being an employee, officer, director or controlling shareholder of an insured financial institution for certain types of misconduct [31]

Banking regulators routinely remove individuals affiliated with banks from positions or prohibit them from holding positions, as evidenced by the fact that in 2025, the Fed issued 17 orders under its removal/prohibition authority and the FDIC issued 36 such orders.[32] These removals typically result from self-dealing or financial impropriety involving the individual.

It is also worth noting that a criminal conviction obtained by the DOJ can result in individuals or entities being automatically statutorily barred from certain activities. For instance, under the banking laws, individuals convicted of money laundering or crimes involving breach of trust or honesty are prohibited from participating in the affairs of an insured depository institution.[33] Similarly, a conviction can result in a business losing government contracts or licenses in some situations.[34] Individuals convicted of an "egregious violation" of the BSA (which includes both conviction of serious crimes and certain serious civil violations) are barred from serving on the board of directors of a U.S. financial institution for a period of 10 years.[35]

3. Undertakings and Directives

To punish violations and prevent them from recurring, enforcement authorities may also require an enforcement target to perform certain undertakings (i.e., take certain affirmative actions) as part of the relief in an enforcement proceeding or settlement. Banking regulators can require insured depository institutions to restrict the growth of the institution, dispose of loans or assets, rescind agreements or contracts, and take any other action the regulator deems appropriate, when the regulator uncovers a violation of law by the institution.[36] Other federal regulators, including the SEC, CFTC, CFPB, OFAC, FinCEN and the DOJ can also impose undertakings to resolve

[28] 15 U.S.C. §§ 77h-1(f), 77t(e), 78u-3(f), 78u(d), 78o, 80a-9(b).
[29] 7 U.S.C. § 13(b).
[30] 12 U.S.C. § 5565(a)(2)(G).
[31] 12 U.S.C. §§ 1829(a), 1818(e).
[32] BD. GOVERNORS FED. RESERVE SYS., *Enforcement Actions*, https://www.federalreserve.gov/apps/enforcementactions/search.aspx (last visited Mar. 16, 2026); FED. DEPOSIT INS. CORP., *ED&O Search Form*, https://orders.fdic.gov/s/searchform (last visited Mar. 16, 2026).
[33] *See, e.g.*, 12 U.S.C. § 1829.
[34] Wulf A. Kaal & Timothy Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70(1) THE BUSINESS LAWYER 61, 71 (2014).
[35] 31 U.S.C. § 5321(g).
[36] 12 U.S.C. § 1818(b)(6).

enforcement proceedings, which may include, for example, requiring a firm to adopt a compliance system or improve weaknesses in internal reporting processes.

4. Revocations of Registration, Charter or Insurance

Enforcement authorities can also revoke or suspend registrations, charters, or insurance in response to misconduct. This is a powerful form of sanction because many individuals and firms rely on such registrations, charters, and insurance to conduct business. For example, broker-dealers and investment advisers must register with the SEC to engage in business, and commodity dealers must register with the CFTC. Nationally chartered banks must receive a charter from the OCC. And many depository institutions benefit from FDIC insurance in their efforts to attract depositors. The SEC,[37] CFTC[38] and the bank regulators can impose this type of sanction.[39] OFAC, FinCEN, the CFPB and DOJ do not have these types of available relief, because persons and entities are not required to register with them to conduct business.

5. Other Types of Relief

Authorities can also impose other types of non-monetary relief, such as emergency remedies. For example, the DOJ and CFPB, CFTC, and SEC can obtain emergency type relief in federal court.[40] Such relief, that each of those enforcement authorities can seek, includes temporary restraining orders and asset freezes to prevent the movement of assets while a matter is litigated. Asset freezes ensure that money to pay fines or disgorgement or restitution is available in the event the enforcement authority settles or wins the case.

Agencies can also negotiate to require that defendants admit facts or even liability as part of settlement agreements. This condition of settlement is in theory available to any enforcement authority. The SEC, in particular, emphasized this tool under former Chair White in 2013. However, it was rarely used in the years that followed.[41] In 2021, under former Chair Gensler, the director of the Division of Enforcement announced that admissions might again be required, in particular to settle cases "where heightened accountability and acceptance of responsibility are in the public interest."[42] Following this pronouncement, there was a significant uptick in the use of this tool. Under former Chair Gensler through the end of fiscal year 2024, 66 public company and

[37] *E.g.*, 15 U.S.C. §§ 77h(d) (suspension of registration statement), 78o (revoke registration of broker-dealers).
[38] 7 U.S.C. §§ 7b, 13 (allowing revocation of registration for violations of CEA).
[39] 12 U.S.C. § 1818(a)(2) (authorizing revocation of federal depository insurance if the institution, its directors or trustees have engaged or are engaging in an unsafe or unsound practice or have violated applicable law, regulation or written agreement with a banking regulator).
[40] OFAC, FinCEN, the Fed, OCC, FDIC, and NCUA are limited to administrative proceedings as discussed in Chapter 1. Thus, they cannot seek emergency relief in federal court.
[41] David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 IOWA L. REV. 113, 131 (2017).
[42] Gurbir S. Grewal, Director of Division of Enforcement, *Remarks at SEC Speaks 2021* (Oct. 13, 2021), https://www.sec.gov/newsroom/speeches-statements/grewal-sec-speaks-101321.

subsidiary defendants had admissions of guilt, compared to nine under the prior Chair, Jay Clayton.[43]

Finally, it is worth noting that the CFPB is unique among enforcement authorities in that it has the authority to seek or impose *any* legal or equitable relief (i.e., judicially created remedy) for a violation of federal consumer financial law. Thus, in addition to the types of relief discussed above, the CFPB can order rescission (i.e., undoing of a contract) or reformation of a contract.[44] The CFPB is also unique among agencies in that the CFPB can recover the cost of bringing an enforcement action in the event that it is the prevailing party.[45]

[43] Stephen Choi et al., *SEC Enforcement Activity: Public Companies and Subsidiaries: Fiscal Year 2024* at 10, CORNERSTONE RSCH (Nov. 2024), https://www.cornerstone.com/wp-content/uploads/2024/11/SEC-Enforcement-Public-Companies-Subsidiaries-FY2024.pdf.
[44] 12 U.S.C. § 5565.
[45] *Id.* § 5565(b).

II. Laws, Rules, and Guidelines Governing Setting of Monetary Sanctions

Part II of this chapter examines how enforcement authorities determine the amount of monetary sanctions that they obtain in civil and criminal enforcement actions either through administrative or judicial orders or settlement agreements.

First, we discuss the law governing the determination of restitution and disgorgement. We also explain that there appear to be no formal policies or procedures for how consumer relief amounts are determined in settlement agreements. Then, we detail the approaches taken by enforcement authorities to setting civil and criminal monetary penalties. We begin by discussing civil enforcement authorities and then turn to the DOJ and criminal penalties.

We show that *all* enforcement authorities effectively retain unbridled discretion in setting penalty amounts. Such unbridled discretion is concerning because there is a risk that enforcement authorities can act arbitrarily (and unfairly) and impose disproportionate penalties that could chill otherwise lawful and productive financial activities. In particular, enforcement authorities' discretion is relatively unconstrained in matters against financial institutions, which for practical reasons face pressure to settle rather than litigate potential enforcement proceedings. We conclude Part II by recommending that enforcement authorities adopt "guideposts" or key principles to act as guardrails in the penalty setting process.

A. Restitution, Disgorgement, and Consumer Relief

As noted in Part I, restitution is a remedy that compensates victims for loss resulting from wrongful or unlawful conduct. Disgorgement, on the other hand, involves a defendant giving up a monetary amount wrongfully gained. Disgorgement funds are sometimes (but not always) distributed to persons affected by the defendant's unlawful conduct.[46] Thus, while restitution and disgorgement are related types of monetary relief, they are distinct remedies. Below we provide an overview of judicially-developed law about the calculation of restitution and disgorgement. The overview focuses on SEC and CFTC enforcement actions, which have the most developed case law.[47] It is important to note that enforcement actions are frequently resolved though negotiated settlements, rather than being litigated in court and this limits the relevant case law on point.

[46] *See* Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017); SEC v. Hallam, 42 F.4th 316, 338, 344 (5th Cir. 2022); 17 CFR § 201.1102; SEC v. Spartan Securities Group, Ltd., 620 F.Supp.3d 1207, 1224-25 (M.D. Fla. 2022) ("The Court's independent research demonstrates that multiple district courts have, post-*Liu*, allowed disgorgement awards to be directed toward the Treasury.").

[47] For example, we do not address the scope of restitution and disgorgement under the CFPB's authority because the law is less fully developed.

1. SEC

As discussed in Part I, the SEC can use disgorgement as a tool for protecting the investing public and deterring future violations.[48] It is commonly used in the context of insider trading cases[49] as well as for other violations of the securities laws.[50]

Although the governing securities laws do not define how the appropriate disgorgement amount should be calculated, case law establishes certain parameters. Notably, there must be a *causal connection* between the violation and the improper gains to be disgorged.[51] The SEC must also establish a reasonable approximation of the gains attributable to the illegal transaction.[52]

In 2020 the Supreme Court held in *Liu v. SEC* that disgorgement was available in civil actions pursuant to the SEC's authority to seek "any *equitable relief* that may be appropriate or necessary for the benefit of investors,"[53] and therefore must be limited by traditional equitable principles.[54] In particular, the Court held that "to avoid transforming an equitable remedy into a punitive sanction," the SEC may only seek to disgorge a wrongdoer's *net* profits.[55] Further, the Court held that disgorged funds "awarded for victims" is equitable, but called into question the SEC's practice of returning certain portions of disgorged proceeds to the U.S. Treasury.[56]

In 2021 Congress amended the statute governing the remedies available to the SEC in civil actions, explicitly authorizing the SEC to seek "disgorgement... of any unjust enrichment."[57] A split has subsequently developed in the circuit courts over whether the SEC's new disgorgement power is constrained by *Liu*'s equitable principles.[58] For instance, the Fifth Circuit has held that the statutory amendment "ratifies the pre-*Liu* disgorgement framework,"[59] while the Second Circuit has held that "*Liu*'s equitable limitations on disgorgement survive" the amendment.[60]

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[48] 15 U.S.C. § 78u(d)(7); 15 U.S.C. § 78u-3; 15 U.S.C. § 80a-9; 15 U.S.C. § 80b-3; *see also* Henry Merschat, *(Dis)Incentivizing Securities Fraud: How Congress Found a Sufficient Deterrent in Legal, Not Equitable, Disgorgement*, 58(4) COLUM. J. L. & SOC. PROBS 565 (2025).

[49] *See* Thomas Lee Hazen, TREATISE ON THE LAW OF SECURITIES REGULATION § 16:18.

[50] *See, e.g.*, SEC v. Wolfson, 249 Fed. Appx. 701 (10th Cir. 2007) (upholding disgorgement award in a pump and dump scheme); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996) (upholding disgorgement in securities fraud case involving selling securities with excessive markups failing to disclose the nature of the market and the defendant's control of it) and SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) (upholding disgorgement for disclosure failures and misrepresentations in SEC filings in connection with takeover scheme).

[51] SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995); SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989).

[52] *See* SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994); SEC v. Warde, 151 F.3d 42, 50 (2d Cir. 1998); SEC v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004).

[53] 15 USC 78u(d)(5) (emphasis added).

[54] Liu v. SEC, 591 U.S. 71, 74-75 (2020).

[55] *Id.* at 75, 79.

[56] Id. at 75, 87-90.

[57] 15 USC 78u(d)(3)(A)(ii), (d)(7).

[58] *See*, *e.g.*, Timothy K. Halloran, *SEC Disgorgement Stuck in Circuit Split After Supreme Court Declines to Intervene*, BRADLEY (Jun. 18, 2025), https://www.eyeonenforcement.com/2025/06/sec-disgorgement-stuck-in-circuit-split-after-supreme-court-declines-to-intervene/.

[59] SEC v. Hallam, 42 F.4th 316, 338 (5th Cir. 2022)

[60] SEC v. Govil, 86 F.4th 89, 100 (2d Cir. 2023)

Courts continue to allow the SEC to establish a "reasonable approximation" of the amount to be disgorged[61] but are divided as to whether investor harm must be established before disgorgement may be awarded.

While the amount to be disgorged in an SEC case is based on the amount gained by the defendant, the specific approach used to calculate the amount of the gain depends on the type of case. For example, in an insider trading case, the disgorgement amount is generally the difference between (a) the value of the shares when the insider purchased them while in possession of the material, nonpublic information, and (b) their market value a short time after public dissemination of the inside information.[62] In the case of sales based on inside information, the amount of disgorgement can also be based on the amount of loss avoided.[63]

Outside the insider trading context, the disgorgement amount can be equal to compensation received as a result of a fraudulent scheme.[64] In cases where individuals make false and misleading statements in connection with the offering and sale of securities, disgorgement has historically been calculated to be the entire amount of the funds raised (offset against any amount returned to investors).[65]

More generally, in determining the total amount of gain to be disgorged in any specific case, courts typically deduct any amounts returned to defrauded investors[66] or the amount paid under a settlement with defrauded customers.[67] After *Liu*, most courts allow offsets for "legitimate" business expenses,[68] meaning that in principle, the "gain" to be disgorged cannot be larger than the actual net profits from the illicit conduct. However, the continuing application of the "reasonable approximation" test means that where legitimate business expenses are indeterminate or insignificant, courts continue to grant disgorgement without taking such expenses into account.[69] Moreover, the unsettled nature of whether *Liu* applies to the SEC's new statutory disgorgement powers leaves scope for courts to return to the common pre-*Liu* practice of

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[61] *See, e.g.,* Elisha Kobre, *Three Years After Liu v. SEC, Disgorgement is Still a Potent Remedy for the SEC*, REUTERS (Jun. 8, 2023), https://www.reuters.com/legal/legalindustry/three-years-after-liu-v-sec-disgorgement-is-still-potent-remedy-sec-2023-06-08/ ("Courts continue to follow the pre-Liu... reasonable approximation analysis."); Andrew N. Vollmer, *Liu and the New SEC Disgorgement Statute,* 15 WM. & MARY BUS. L. REV. 307, 355 n.270; SEC v. Spartan Securities Group, Ltd., 620 F.Supp.3d 1207, 1225-26 (M.D. Fla. 2022).

[62] *See, e.g.*, SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995); SEC v. MacDonald, 699 F.2d 47, 54–5 (1st Cir. 1983).

[63] *See, e.g.*, SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004). *See also, e.g.*, SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995).

[64] SEC v. Drexel Burnham Lambert, Inc., 956 F. Supp. 503, 505 (S.D.N.Y. 1997), aff'd sub nom. SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997); *see also* SEC v. Hallam, 42 F.4th 316, 342-43 (2022).

[65] SEC v. United Energy Partners, Inc., 88 F. App'x 744, 746 (5th Cir. 2004); Liu v. SEC, 591 U.S. 71, 78 (2020)

[66] *See, e.g.*, Opulentica, LLC, 479 F. Supp. 2d 319, 330 (S.D.N.Y. 2007); SEC v. United Energy Partners, Inc., 88 F. App'x 744, 747 (5th Cir. 2004); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998).

[67] *See* James Tyler Kirk, *Deranged Disgorgement*, 8 J. BUS. ENTREPRENEURSHIP & L. 131, 144 (2014) [hereinafter *Deranged Disgorgement*]. *See, e.g.*, SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996); SEC v. Govil, 86 F.4th 89, 110 (2nd Cir. 2023).

[68] 591 U.S. at 91-92.

[69] *See, e.g.*, Kobre *supra* note 61; SEC v. Goulding, 40 F.4th 558 (7th Cir, 2022).

disallowing offsets for business expenses,[70] which would allow disgorgement to be used in a punitive manner.[71] Despite current uncertainty as to whether disgorgement may be awarded in the absence of investor harm and whether legitimate expenses must be taken into account, the common understanding that disgorgement is the taking away of ill-gotten gains provides an upper bounds on the amount that can be disgorged. This contrasts with monetary penalties, which as discussed later in this chapter, are set in inconsistent, difficult to discern, and overly discretionary ways.

2. CFTC

As noted in Part I, the CEA authorizes the CFTC to seek both restitution and disgorgement.[72] It provides that the CFTC may seek and the courts may impose "equitable remedies" including both "disgorgement of gains received in connection with [violations]" and "restitution to persons who have sustained losses proximately caused by [violations] (in the amount of such losses)."

i. Disgorgement

The law surrounding disgorgement for CFTC enforcement actions is similar to that used for SEC actions.[73] The CFTC must establish that the amount of the disgorgement being sought reasonably approximates the defendant's unjust enrichment.[74] Much like in SEC actions, courts historically declined to offset business expenses from the amount of disgorgement,[75] sometimes resulting in disgorgement amounts greater than the defendant's actual net profit. However, given that disgorgement under the CEA is "equitable," the *Liu* Court's limitations on disgorgement may apply in future CFTC cases. Indeed, the Eleventh Circuit has recognized *Liu*'s holding that equitable disgorgement be limited to net profits in the context of a CFTC enforcement action.[76]

ii. Restitution

The amount of restitution ordered in CFTC cases is generally based on the monetary damages sustained by the victims of the defendant's violation(s),[77] offset by amounts paid to

[70] *See* Deranged Disgorgement, *supra* note 67, at 136–41 (reviewing cases on treatment of business expenses); SEC v. Brown, 658 F.3d 858, 861 (8th Cir. 2011) ("the overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses") (internal quotations and citation omitted).

[71] *See, e.g.*, Merschat, *supra* note 48, at 566-69, 612-13 & n.29.

[72] 7 U.S.C. 13a-1(d)(3).

[73] *See* Verity Winship, *Public Agencies and Investor Compensation: Examples from the SEC and CFTC*, 61 ADMIN. L. REV. 137, 152 (2009).

[74] U.S. CFTC v. Wuensch, Comm. Fut. L. Rep. ¶ 27,661; CFTC v. Tayeh, 848 Fed.Appx. 827, 828 (11th Cir. 2021).

[75] *See, e.g.*, CFTC v. John David Stroud, et al., Comm. Fut. L. Rep. ¶ 33,686.

[76] CFTC v. Tayeh, 848 Fed.Appx. 827, 828-30 (11th Cir. 2021).

[77] U.S. CFTC v. PMC Strategy, LLC, 903 F. Supp. 2d 368, 382 (W.D.N.C. 2012); U.S. CFTC v. Driver, 877 F. Supp. 2d 968, 981 (C.D. Cal. 2012); In the Matter of Walters, 2001 WL 1734770, at *1. *See also* CFTC v. Miklovich, 687 F. App'x 449, 453 (6th Cir. 2017). *But see* U.S. CFTC v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339, 1345 (11th Cir. 2008) (concluding district court abused its discretion in awarding customers' losses).

victims pursuant to awards for criminal restitution.[78] Consistent with this approach, some CFTC consent orders transparently calculate the restitution amount based on net customer losses attributable to the defendant's unlawful actions.[79]

3. *Consumer Relief/Extraordinary Restitution*

There appear to be no publicly-available agency guidelines or policies outlining how consumer relief amounts are set in settlement agreements. The lack of such guidelines is troubling, especially given that billions of dollars of consumer relief have been granted since the financial crisis.[80] In Chapter 3, we provide additional detail on consumer relief payments and related policy concerns.

B. *Civil and Criminal Monetary Penalties*

The imposition of monetary penalties in addition to disgorgement or restitution is to ensure that a wrongdoer makes payments that exceed his or her profit from wrongdoing. This is critical for deterrence. However, determining the appropriate size of monetary penalties is much more complicated than disgorgement or restitution. In this section, we describe the numerous factors that are considered in determining the size of a civil or criminal monetary penalty. These factors include any relevant statutory minimum and maximum amounts, express statutory factors, case law requiring that penalties be in line with an agency's prior penalty decisions, and agency guidelines or matrices, to the extent an agency has adopted such policies or guidance.

This section proceeds in three stages. First, we explain that the SEC, CFTC, CFPB, DOJ Civil Division, and FinCEN appear to set penalties in a largely unstructured, informal, and non-transparent manner. Second, we explain that the banking regulators (the Fed, FDIC, OCC) and OFAC have policy statements and penalty matrices, but that these policies are subject to interpretation rendering them largely meaningless. Finally, we explain the setting of penalties in DOJ criminal matters.

Before proceeding, however, it is important to note that the Federal Civil Penalties Inflation Adjustment Act of 1990 requires agencies to adopt annual rules to adjust the statutory maximum civil monetary penalty amounts for inflation.[81] Throughout the rest of this section, the reader will be provided with the statutory amounts.

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[78] *See, e.g.,* In the Matter of Walters, 2001 WL 1734770, at *1; CFTC v. Carmona, 2024 WL 4744021, at *14 (C.D. Cal. 2024).

[79] *See, e.g.*, U.S. CFTC v. Samaru, 27 F. App'x 885, 886 (9th Cir. 2001).

[80] Settlement agreements providing for extensive consumer relief amounts, such as those with Bank of America, J.P. Morgan, Goldman Sachs, and Deutsche Bank, are described in detail in Chapter 3.

[81] The maximum amounts are adjusted annually by inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, 104 Stat. 890-892 (1990), *amended by* the Federal Civil Penalties Adjustment Act Improvements Act of 2015, Pub. L. 114-74, 129 Stat. 599-601 (2015) (codified at 28 U.S.C. § 2461 note). The adjustments are exempt from public notice and comment and must be published by January 15 of each year. https://web.archive.org/web/20161207001447/https:/www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf. The adjustments are made by the agency that enforces the underlying statutory provisions, using a

1. Regulatory Authorities Without Public Policies or Guidelines

The SEC, CFTC, CFPB, the DOJ's civil enforcement division, and FinCEN take an approach to penalty setting that is not guided by comprehensive public agency policies, guidelines, or penalty matrices. While the enforcement authorities are constrained by statutory maximums and certain mandatory statutory factors, these enforcement authorities do not have publicly available, formal policies and procedures in place for setting the appropriate civil monetary penalty to be imposed in enforcement actions. While a few of these authorities do have high-level guidance, it is not binding and so general as to be practically meaningless. That is particularly problematic because the statutory penalty maximums apply on a "per violation" basis meaning that even those restrictions are largely meaningless because enforcement authorities have vast discretion in how to count the number of violations that have occurred. We describe the problems inherent in the "per violation" approach in Section II.B.1.iii.

i. Statutory and Case Law Constraints

Table 4 illustrates how each of the enforcement authorities listed is subject to statutory caps on the size of the civil monetary penalty that may be imposed. The table shows the generally applicable statutory maximum civil penalty amount. It is important to note that some statutes provide more guidance than others. For example, SEC and CFPB violations must be categorized into one of three tiers, with more egregious conduct subject to increasing maximum penalty amounts. By contrast, the laws applicable to the CFTC do not contain different tiers.

Table 4: Civil Monetary Penalty Statutory Maximums

Enforcement Authority	Violation Type	Maximum Amount
SEC[82]	Tier 1: Any violation of the applicable statute	$5,000/$7,500[83] (individual) per violation; $50,000/$75,000 (entity) per violation
	Tier 2: Violation involving fraud, deceit, manipulation, or deliberate or	$50,000/$75,000 (individual) per violation; $250,000/$375,000 (entity) per violation

multiplier provided to them by the Office of Management and Budget. The multiplier is based on changes to the Consumer Price Index.

[82] *See* 15 U.S.C. § 78u-2(b); 15 U.S.C. § 77h-1(g); 15 U.S.C. § 80a-9(d); 15 U.S.C. § 80b-3(i). There are also some other provisions that impose different penalties for specific types of misconduct. For example, in an insider trading case, the SEC can seek civil monetary penalties up to three time the profit gained or loss avoided as a result of the insider trade. 15 U.S.C. § 78u-1(a)(2). The inflation adjusted maximums are presented and are published in the Federal Register. *See* U.S. SEC. & EXCH. COMM'N, *Adjustments to Civil Monetary Penalty Amounts*, 90 FED. REG. 2,767 (Jan. 13, 2025), https://www.federalregister.gov/documents/2025/01/13/2025-00513/adjustments-to-civil-monetary-penalty-amounts.

[83] The amount on the left is the maximum under the Exchange Act, the Investment Advisers Act and the Investment Companies Act. The amount on the right is the maximum amount under the Securities Act. This holds for all the SEC amounts listed in the table. If the SEC brings a case in federal court, the maximum amount can be up to the gross amount of the pecuniary gain to the defendant if it exceeds the noted maximum. 15 U.S.C. §§ 77t(d), 78u(d), 80a-41(e), 80b-9(e).

Enforcement Authority	Violation Type	Maximum Amount
	reckless disregard of a regulatory requirement	
	Tier 3: A Tier 2 violation AND it resulted in, or created significant risk of substantial losses to others or resulted in a substantial pecuniary gain to the violator	$100,000/$150,000 (individual) per violation; $500,000/$725,000 (entity) per violation
CFTC	False or Misleading Statements[84]	Greater of: (a) $140,000; or (b) triple the defendant's monetary gain per violation
	Manipulation[85]	Greater of: (a) $1,000,000; (b) or triple defendant's gain per violation
CFPB[86]	Tier 1: Any violation consumer financial law	$5,000 per day per violation
	Tier 2: Reckless engagement in violation of federal consumer financial law	$25,000 per day per violation
	Tier 3: Knowing violation of federal consumer financial law	$1,000,000 per day per violation
DOJ	FIRREA[87]	$1,000,000 per violation
	FCA[88]	$5,000 to $10,000 per violation PLUS three times the damages sustained by the government from the false statement
FinCEN[89]	Bank Secrecy Act (BSA)	(1) the amount involved in the transaction that violates the BSA (not to exceed $100,000); or (2) $25,000, whichever is greater

[84] 7 U.S.C. § 9(10); *see also* FED. TRADE COMM'N, *Adjustment to Civil Penalty Amounts*, 90 FED. REG. 5,580 (Jan. 17, 2025), https://www.federalregister.gov/documents/2025/01/17/2025-01361/adjustments-to-civil-penalty-amounts.

[85] 7 U.S.C. §§ 13a, 13a-1(d); *see also* FED. TRADE COMM'N, *supra* note 84.

[86] 12 U.S.C. § 5565(c); *see also* CONSUMER FIN. PROT. BUREAU, *Civil Penalty Inflation Adjustments*, 90 FED. REG. 1,355 (Jan. 8, 2025), https://www.federalregister.gov/documents/2025/01/08/2025-00167/civil-penalty-inflation-adjustments.

[87] 12 U.S.C. § 1833a(b); *see also* U.S. DEP'T JUST., *Civil Monetary Penalties Inflation Adjustments for 2025*, 90 FED. REG. 29,445 (Jul. 3, 2025), https://www.federalregister.gov/documents/2025/07/03/2025-12494/civil-monetary-penalties-inflation-adjustments-for-2025. For a continuing violation, the statutory maximum is the lesser of $1 million per day of the violation or $5 million.

[88] 31 U.S.C. § 3729(a)(1); *see also* U.S. DEP'T JUST., *supra* note 87.

[89] 31 U.S.C. § 5321(a)(1); *see also* FIN. CRIMES ENF'T NETWORK, *Financial Crimes Enforcement Network; Inflation Adjustment of Civil Monetary Penalties*, 90 FED. REG. 5,629 (Jan. 17, 2025), https://www.federalregister.gov/documents/2025/01/17/2025-01374/financial-crimes-enforcement-network-inflation-adjustment-of-civil-monetary-penalties.

In addition to the maximum dollar amounts imposed under the relevant statutes, some of the statutory provisions delineate specific factors that must be considered. For example, the statutes applicable to the SEC and CFPB require consideration of certain qualitative factors in setting penalty amounts.

Under the SEC-applicable statutes, the SEC must determine that a civil monetary penalty is in the public interest before it imposes such a penalty.[90] Importantly, the statutes do not provide the SEC any guidance about how to determine either when a penalty is in the public interest or an appropriate penalty amount within the statutory maximum cap once the SEC has determined that a penalty is in the public interest.

The CFPB's governing statute requires that the CFPB consider specified factors in setting a penalty size. The CFPB is to take into account: (1) the size of the financial resources and good faith of the person charged; (2) the gravity of the violation; (3) the severity of the risks to or losses of the consumer; (4) the history of previous violations; and (5) other factors that justice may require.[91] It does not explain how those factors should affect a penalty amount.

It is important to note that in cases where an enforcement authority sets a penalty amount, federal courts have stated that the penalty should not be "out of line" with the agency's decisions in other cases.[92] Consequently, the decisions in prior matters, in addition to the applicable statutory provisions, should, in theory, also act as a constraint on agency discretion, at least in cases where the agency must seek court approval of the penalty. However, financial institutions are highly unlikely to be able to obtain judicial review of penalty amounts because, due to practical considerations, financial institutions virtually always settle potential enforcement matters.

ii. Absence of Comprehensive Public, Formal Agency Policies

The SEC, CFTC, CFPB, the DOJ's civil enforcement division, and FinCEN have not established comprehensive public guidelines on how civil penalty amounts are determined. That provides a great deal of discretion to those agencies when negotiating settlement agreements and can make it difficult for federal court judges to calculate penalty amounts when a case is litigated and not settled.

This makes the penalty setting process unpredictable and can infuse the process with arbitrariness. For example, the CFPB has been criticized for its lack of transparency surrounding

[90] 15 U.S.C. §§ 78u-2(c), 77h-1(g), 80a-9(d), 80b-3(i). In making that determination, the SEC is statutorily required to consider six factors: (1) whether the misconduct involved fraud, deceit or manipulation; (2) the harm to other persons resulting from the misconduct; (3) the extent to which any person was unjustly enriched; (4) whether the enforcement target is a repeat offender; (5) the need to deter future violations; and (6) any other factors justice may require.

[91] 12 U.S.C. § 5565(c)(3).

[92] Collins v. SEC, 736 F.3d 521, 526 (D.C. Cir. 2013).

how it determines penalty sizes.[93] The SEC has been similarly criticized, including with respect to a series of enforcement actions beginning in 2021 against financial entities relating to the use of unapproved communications channels by firm personnel – including text and messaging apps on personal devices – and the failure of firms to retain required business records sent through these channels.[94] Between December 2021 and January 2025, the SEC assessed over $2 billion in penalties relating to such "off-channel communications" against over 100 financial firms, including broker-dealers, investment advisors, credit rating agencies, and municipal advisers.[95] The SEC announced six non-exhaustive factors it considered in setting penalty amounts in these cases. However, these factors were not sufficient to ensure consistent penalties. Moreover, as discussed further below, one of the factors – the scope of the violations, including how many individuals communicated off-channel and the number of off-channel communications – suggested that the SEC may have been exercising discretion in counting the number of violations by each entity.[96] Penalties ranged from $0 to $200 million for conduct that did not allege fraud or investor harm,[97] with little to no explanation of how they were calculated.[98] In March 2026, a federal district court in Florida ordered the SEC to release documents showing how it determined final penalties in these cases.[99]

Enforcement authorities without formal guidelines and/or matrices likely consider non-statutory factors on an informal basis when determining penalties. For example, Anthony Alexis, a former enforcement official at the CFPB noted that the CFPB looks to non-statutory factors in determining the appropriate penalty amount. For example, whether the violator has worked to independently ferret out violations, reported problems to the CFPB and begun to fix them, and

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[93] *See* Evan Weinberger, *CFPB Enforcement Chief Defends Money Penalty Process*, LAW360 (Apr. 4, 2016), http://www.law360.com/articles/779896/cfpb-enforcement-chief-defends-money-penalty-process.

[94] *See*, *e.g.*, Brian A. Briz, Jessica B. Magee & Allison Kernisky, *A Long Winter's Nap? SEC Off-Channel Communications Enforcement May Draw to a Close*, HOLLAND & KNIGHT (Dec. 20, 2024), https://www.hklaw.com/en/insights/publications/2024/12/a-long-winters-nap-sec-off-channel-communications; Michael A. Hacker, Emily E. Renshaw & Alyse J. Rivett, *The SEC's Recent Off-Channel Communications Settlements Create More Uncertainty*, MORGAN LEWIS (Oct. 1, 2024), https://www.morganlewis.com/pubs/2024/10/the-secs-recent-off-channel-communications-settlements-create-more-uncertainty; Natalie A. Napierala, *SEC Penalties for Off-Channel Communications: Still Blowing in the Wind*, CARLTON FIELDS (Sept. 30, 2024), https://www.carltonfields.com/insights/expect-focus/2024/sec-penalties-for-off-channel-communications; *see also* Andrew N. Vollmer, *Enforcement of Federal Securities Laws Should Be Vigorous but Fair: Testimony before Subcommittee on Capital Markets, Committee on Financial Services, US House of Representatives*. (May 7, 2024), https://www.mercatus.org/research/federal-testimonies/enforcement-federal-securities-laws-should-be-vigorous-fair.

[95] *See*, *e.g.*, U.S. SEC. & EXCH. COMM'N, *Press Release: Twelve Firms to Pay More than $63 Million Combined to Settle SEC's Charges for Recordkeeping Failures* (Jan. 13, 2025), https://www.sec.gov/newsroom/press-releases/2025-6; Commissioner Hester M. Peirce & Commissioner Mark T. Uyeda, *Statement on Qatalyst Partners LP* (Sept. 24, 2024), https://www.sec.gov/newsroom/speeches-statements/statement-peirce-uyeda-qatalyst-09242024.

[96] Sanjay Wadhwa, *Remarks at SEC Speaks 2024* (Apr. 3, 2024), https://www.sec.gov/newsroom/speeches-statements/sanjay-wadhwa-sec-speaks-2024-04032024.

[97] Briz, Magee & Kernisky, *supra* note 94.

[98] Hacker, Renshaw & Rivett, *supra* note 94.

[99] Am. Sec. Ass'n v. Sec.& Exch. Comm'n, CASE NO. 8:24-cv-1377-SDM-SPF (M.D. Fla. 2026) 15c720_c8485acc68154b2eb9638c490d952458.pdf.

voluntarily provided restitution to consumers.[100] The factors announced by the SEC in connection with the off-channel communications cases also covered non-statutory factors, including: (1) the size of the firm, including revenues and number of registered professionals; (2) the scope of the violations, including how many individuals communicated off-channel and the number of off-channel communications; (3) the firm's efforts to comply with recordkeeping requirements and prevent futures violations; (4) precedent from other off-channel cases; (5) self-reporting; and (6) cooperation.[101] Former SEC enforcement officer Sanjay Wadhwa laid these factors out in a speech in which he also stressed that the SEC made "an individualized assessment of each firm" and that these were only "some of the factors" the SEC considered, underscoring the informal and discretionary nature of the SEC's penalty setting process.[102]

We note that in 2020 the CFTC issued public guidance on determining appropriate civil monetary penalties which was incorporated into the CFTC's enforcement manual. The guidance was based, in part, on decades old public policy statements, and lists certain qualitative factors the agency should consider in setting penalty amounts. These include: (1) the gravity of the offense; (2) mitigating and aggravating circumstances, including the target's cooperation with the CFTC; and (3) other considerations.[103] In 2025 the CFTC issued an advisory on the factors it will consider to reduce an initial proposed monetary penalty in light of an entity's cooperation, self-reporting, and remediation.[104] The advisory introduces, for the first time, a matrix to determine the appropriate "mitigation credit" based on the extent of both cooperation and self-reporting.[105] However, the calculation of the initial penalty prior to the application of the mitigation credit is still subject to considerable discretion, and the mitigation credit guidelines themselves are not binding.[106]

The DOJ also issued cooperation guidelines in 2019 applicable to FCA matters, which states that the DOJ may offer credit to individuals and entities that self-disclose, fully cooperate and remediate the wrongdoing.[107] However, the amount and type of credit to be offered is discretionary, with the guidelines indicating that "most often" such discretion will be applied to

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[100] Weinberger, *supra* note 93.
[101] Wadhwa, *supra* note 96.
[102] *Id*.; *see also* Vollmer, *supra* note 94.
[103] COMMODITY FUTURES TRADING COMM'N, *Memorandum from Director of Division of Enforcement on Civil Monetary Penalty Guidance* (May 20, 2020).
[104] COMMODITY FUTURES TRADING COMM'N, *Advisory on Self-Reporting, Cooperation, and Remediation* (Feb. 25, 2025).
[105] *Id*.
[106] *Id*. at 1, 3, 13, 14 ("The Division's initial calculation of the civil monetary penalty before the [Mitigation Credit] discount will be based upon an analysis of the facts, the statute and regulation, past Commission precedent as appropriate, and other applicable law.").
[107] U.S. DEP'T JUST., *Justice Manual 4-4.112*, https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112; U.S. DEP'T JUST., *Press Release: Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual* (May 7, 2019), https://www.justice.gov/archives/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.

reduce penalties or damages.[108] The guidance also does not give further details on how the initial damage amount (to which the credit is applied) is calculated.

The SEC issued a policy statement in 2006 that lists factors to consider in penalizing corporations, which include: (1) the presence or absence of a benefit to the corporation from the violation; (2) the degree to which a penalty will compensate victims or injure innocent shareholders; (3) the need to deter the particular type of offense; (4) the extent of injury to innocent parties; (5) the pervasiveness of the conduct within the corporation; (6) the level of intent of the perpetrators; (7) the degree of difficulty of detecting the wrongdoing; (8) the remedial steps taken by the corporation; and (9) the extent of cooperation with the SEC and others enforcement authorities.[109] A corresponding policy does not appear to exist for penalties against individuals. The corporate penalty policy statement has not been revised, although on occasion additional factors have been announced on an informal basis, such as the announcement regarding the off-channel communications cases. We note that it is also unclear how stringently the agency applies any of the penalty factors,[110] including in light of the fact that many agency dispositions contain no explanation of how the assessed penalty was calculated. The SEC also has a policy for evaluating a company's cooperation and remediation, which was updated in February 2026.[111] The policy sets out factors the SEC will consider in determining whether to grant leniency, including potentially declining to take an enforcement action. However, the policy is discretionary and does not explain how the factors should be applied to reduce penalties.

In 2020 FinCEN published a statement outlining its approach to determining the proper enforcement response to violations of the Bank Secrecy Act, including with respect to assessing monetary penalties.[112] The statement lists ten factors FinCEN considers, including nature and seriousness of the violation, pervasiveness of wrongdoing, financial gain or benefit to the wrongdoer attributable to the violation, self-disclosure, remediation, cooperation, and enforcement actions by other agencies for related activity.[113] However, the guidance stresses that these factors are not exclusive, and that the weight assigned to any factor may change based on the facts and circumstances.[114]

In October 2025, SEC Chair Paul Atkins announced his commitment to improving the SEC's enforcement program. Specifically, he identified the need for the SEC's enforcement

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[108] U.S. DEP'T JUST., *Justice Manual 4-4.112*.

[109] U.S. SEC. & EXCH. COMM'N, *Statement of the Securities and Exchange Commission Concerning Financial Penalties* (Jan. 4, 2006), https://www.sec.gov/news/press/2006-4.htm.

[110] *See, e.g.*, Commissioner Michael S. Piwowar, *Remarks to the Securities Enforcement Forum 2014* (Oct. 14, 2014), https://www.sec.gov/newsroom/speeches-statements/2014-spch101414msp (raising concerns about number of staff recommendations not accompanied by an analysis of the factors in the 2006 policy statement and stating that it is important to have a "clear analytical framework" for determining penalties).

[111] U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, *Enforcement Manual* § 6.1.2. (Feb. 24, 2026), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[112] FIN. CRIMES ENF'T NETWORK, *Statement on Enforcement of the Bank Secrecy Act* (Aug. 18, 2020), https://www.fincen.gov/news/news-releases/fincen-statement-enforcement-bank-secrecy-act.

[113] *Id*.

[114] *Id*.

processes to "provide predictability" and "promote transparency."[115] He stressed that the SEC should "ensure that we follow the Commission's public guidance, including on penalties and co-operation," and "provide the public with enough information to understand why conduct violated the federal securities laws, and why particular relief was imposed."[116] He also emphasized that SEC processes should ensure consistent results across offices and units. Similarly, in late 2025 Acting CFTC Chair Caroline Pham announced settlements with 10 firms which took into account comparable cases over the past decade as well as the CFTC's new mitigation credit guidance,[117] and stressed the need for the CFTC to be more objective in exercising its "nearly boundless discretion to investigate and prosecute violations of the law."[118] While these renewed commitments to predictability and transparency may result in more rational penalty setting in the short term, the lack of robust formal guidelines leaves open the possibility that future administrations may depart from these tenets.

iii. Application of "Per Violation" Penalty Maximums

The lack of formal policies and guidelines is particularly important because the statutory maximum amounts detailed in the previous table are all on a "per violation" basis. Misconduct can be characterized in such a manner that a wide range of penalty sizes are possible, which essentially gives unbridled discretion to enforcement authorities in many instances. For example, if a defendant is charged with distributing a materially misleading prospectus in violation of the SEC's Rule 10b-5, then the SEC might characterize the conduct as a single violation. Alternatively, it might determine that there are as many violations as there are paragraphs in the prospectus containing misstatements. Or, the SEC could determine that there are as many violations as there are investors who received the prospectus.[119] Similarly, in the off-channel communications cases the SEC announced that in setting penalty amounts it considered the scope of the violations, including how many individuals communicated off-channel and the number of off-channel communications, but was not clear on whether it was using the number of individuals or indeed the number of communications as a proxy for the number of violations.[120] A study based on just 16 of the off-channel cases suggested that the statutory maximum penalty amounts implied that

[115] Paul Atkins, Chairman, *Keynote Address at the 25th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law* (Oct. 7, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-100925-keynote-address-25th-annual-aa-sommer-jr-lecture-corporate-securities-financial-law.

[116] *Id*.

[117] COMMODITY FUTURES TRADING COMM'N, *Acting Chairman Pham Announces Successful Completion of Enforcement Sprint* (Sept. 4, 2025), https://www.cftc.gov/PressRoom/PressReleases/9114-25; *see also* COMMODITY FUTURES TRADING COMM'N, *Keynote Address by Acting Chairman Caroline D. Pham, FIA BOCA50* (Mar. 11, 2025), https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham13.

[118] COMMODITY FUTURES TRADING COMM'N, *Acting Chairman Pham Announces Reforms to Wells Process, Amends Rules of Practice and Rules Relating to Investigations* (Dec. 1, 2025), https://www.cftc.gov/PressRoom/PressReleases/9144-25.

[119] *See* Jonathan N. Eisenberg, *Calculating SEC Civil Money Penalties*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 24, 2016), https://corpgov.law.harvard.edu/2016/01/24/calculating-sec-civil-money-penalties/.

[120] Wadhwa, *supra* note 96.

the SEC had determined there were between 89 and 1,110 violations in each case.[121] The SEC, CFTC, CFPB, and DOJ have not disclosed policies about how to make such determinations.

In litigated matters, federal court judges have had to make those judgment calls, but have acted in an inconsistent manner. In the FCA context, for example, some judges have been willing to treat individual false claims as distinct violations even if part of a larger scheme or course of conduct. For example, in a 2013 Fourth Circuit decision, the appeals court held that a defendant had committed over 9,000 violations because it had submitted over 9,000 different invoices to the government, each of which, according to the court, was a separate false claim.[122]

It is important to note that later in this chapter, we discuss how in criminal cases the U.S. Sentencing Guidelines provide instructions to federal judges about how to avoid multiple punishments for the same underlying conduct. Civil cases could benefit from a similar approach.

iv. Concerns with Agencies' Lack of Penalty-Setting Guidance

Our primary concern is that the absence of comprehensive public, formal policies coupled with the malleable nature of the statutory penalty limits, gives enforcement authorities effectively unbridled discretion in setting penalties and thus creates the risk of arbitrary and disproportionate penalties.

Importantly, enforcement targets generally cannot use courts to check agencies' unbounded discretion, because financial institutions face significant pressures to settle matters outside of court. Contested enforcement proceedings create uncertainty among shareholders. They also divert management attention from business operations. In addition, the decision to litigate could have negative effects on employees, customers, suppliers, and communities. In criminal matters, in particular, large financial institutions rarely if ever survive contested criminal cases that have resulted in a conviction. Furthermore, in civil matters, firms are very reluctant to litigate potential enforcement proceedings because of the adverse effect that doing so could have on their relationship with their regulatory supervisors. Regulators provide firms with feedback, request data, have onsite examiners, and engage in reviews of firms' policies, procedures and operations. Thus, a collaborative relationship is often in a firm's best interest and litigating a case could upset that dynamic.

Disproportionate and arbitrary penalties are undesirable for several reasons.

First, they serve no additional deterrent or remedial purpose. As a result, such penalties threaten to undermine the aims of the Eighth Amendment to the U.S. Constitution, which expressly forbids the government from imposing penalties that are disproportionate to the gravity of the

[121] Napierala, *supra* note 94.
[122] United States *ex rel.* Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 407–08 (4th Cir. 2013).

offense.[123] The Supreme Court has held that the Eighth Amendment applies to both civil and criminal penalties.[124]

Second, the law in many areas is necessarily subject to uncertainty and case-by-case interpretations such that the boundaries of the law are not well defined.[125] Well-intentioned actors may therefore avoid lawful and productive financial activities out of fear of being wrongly targeted by enforcement authorities and subject to arbitrary and disproportionate penalties. For example, the concepts of materiality in disclosing information to buyers of a security, or unfair and deceptive practices in the context of providing financial products or services to consumers are necessarily case-specific. Therefore, uncertainty about specific mandatory disclosures or unfair practices coupled with the risk of disproportionate penalties could result in a broker-dealer choosing to forgo engaging in the offering or marketing of valuable securities or products.[126]

The risk that disproportionate penalties will chill lawful and productive activities is especially true because, as behavioral economists have noted, individuals are typically loss averse – they dislike losses more than equivalent gains.[127] If lawful and productive activities of individuals and firms are chilled, then economic growth, financial innovation, access of investors and consumers to products and services, and entrepreneurs access to capital will be constrained. Thus, the problem of disproportionate and arbitrary penalties is felt by investors, consumers, and innovators. In effect, disproportionate penalties act as a tax on lawful activity and produce deadweight loss.

Fear of arbitrary and disproportionate penalties may not only deter financial market participants from engaging in lawful and productive activities, but it can also limit the amount of capital that firms can allocate to loans and investments. Firms instead must devote capital to fund unexpected liabilities arising from disproportionate enforcement actions. Any such funds cannot be used for productive purposes, establishing another mechanism by which unrestrained agency discretion could hinder economic growth.

Third, arbitrary and disproportionate penalties can undermine the basic goals of the enforcement system – ensuring respect for and compliance with the law. According to Professor Christopher Hodges at Oxford University,[128] if the legitimacy of penalties is doubted, then respect for the law could decline and reduce overall compliance rates. Equally as important, disproportionate and arbitrary penalties could result in an excessively adversarial relationship between regulators and those that they regulate. This could be a problem, because a more collaborative approach between enforcement authorities and firms and individuals may best

[123] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."); United States v. Bajakajian, 524 U.S. 321, 334 (1998).
[124] Austin v. United States, 509 U.S. 602 (1993).
[125] *Cf.* Matthew S. Levine, *Rules Make for Better Rules Than Lawsuits Do*, BLOOMBERG (Jan. 30, 2018), https://www.bloomberg.com/view/articles/2018-01-30/the-cfpb-approach-to-regulation-has-it-backward.
[126] The uncertainty of the law itself can deter otherwise lawful conduct. However, the risk of arbitrary and disproportionate penalties being imposed provides a secondary or supplemental deterrent effect on lawful activities.
[127] Christopher Hodges, LAW AND CORPORATE BEHAVIOR 20 (2015).
[128] *Id.* at 28.

achieve compliance. According to Professor Hodges, individuals improve their behavior when they receive feedback,[129] and feedback requires open lines of communications and mutual respect between the parties.

Aside from the risk of arbitrary and disproportionate penalties, the unbridled discretion afforded by an ad hoc approach to penalty setting also fosters the potential for unequal treatment of enforcement targets through the imposition of inconsistent penalties. A hallmark of the American justice system is equality under the law and thus unequal treatment of similar defendants would violate a core American-legal value. Similarly situated defendants who have committed similar violations of similar size, scope and egregiousness might be penalized materially different amounts, particularly in settlement agreements, for several reasons.

First, enforcement targets may not have all the facts about similar misconduct by others. Even though settlement agreements are frequently publicly available, the statement of facts in a settlement agreement is limited and, therefore, certain facts may be omitted. Thus, facts disclosed in other settlement agreements may not be useful precedent. As a result, the target cannot point to prior cases as grounds for an appropriate penalty amount because the government could always assert that other non-disclosed facts were considered. Absent penalty guidelines, the enforcement target lacks a credible source to use to justify its bargaining position.

Second, absent policies or core principles, it is more difficult for an enforcement target to engage in a substantive back and forth with enforcement authorities about the appropriate penalty. The absence of a common starting point about the relevant considerations, how to weigh them, and how to calculate the number of violations that occurred, means that the parties can have widely divergent views of the appropriate penalty amount. That can result in inefficient negotiations because every case requires coming to an understanding about those considerations. That process can also result in materially disparate penalties in otherwise similar cases.

Of course, in the event of an extraordinarily high settlement demand, an enforcement target could force the government to litigate the case. However, that would be costly in terms of the resources that would be needed to try a case, could distract management, and could result in unwanted publicity. Furthermore, as discussed earlier, the possibility of litigating with a supervisory regulator that has day-to-day authority over many aspects of a firm's business is particularly unappealing. As a result, enforcement targets may have strong incentives to settle even if they believe a particular settlement amount is arbitrary or disproportionate. And a target with fewer resources to litigate an enforcement action may feel even more pressure to settle than a defendant with greater resources, even if their conduct was the same.

2. Enforcement Authorities with Penalty Setting Policies – the Banking Regulators and OFAC

The banking regulators (specifically the Fed, OCC, and FDIC), and OFAC have more robust policies – incorporating the use of matrices – for assessing civil monetary penalties. The following discussion focuses first on the approach used by the banking regulators and then

[129] *Id.* at 21.

describes the OFAC approach. While we applaud efforts to implement publicly disclosed policies, the application of these policies requires significant interpretation that can render them meaningless. These policies also do not always apply in the cases with the largest penalties – the stated rationale is that matrices work best in routine matters that involve fewer judgment calls.[130] In effect, the matrices and guidelines can provide a veneer of restraining agency discretion, but in practice they leave enforcement authorities with effectively unbridled discretion in setting penalties.

We note that in March 2026, President Trump issued an executive order requiring the FDIC, Fed, OCC, NCUA, and CFPB to consider promulgating additional enforcement policies which could constrain agency discretion in certain respects.[131] Specifically, with respect to consumer financial laws, these agencies must consider adopting an enforcement policy that: disfavors monetary penalties except for willing, knowing, or reckless violations; considers good corporate conduct; and allows for self-identification and remediation.[132] With respect to mortgage lending, these agencies must consider adopting supervisory guidance reserving enforcement for borrower harm or repeated misconduct.[133] It remains to be seen how any such guidance would interact with the FDIC, Fed, and OCC's existing enforcement policies, described below, which cover some of these factors.

i. FDIC, Fed, and OCC Penalty Setting Approach

The size of the penalties assessed by banking regulators is governed in three ways. First, the statutes provide maximum penalty amounts. Second, the banking regulators have adopted an interagency policy on the assessment of civil monetary penalties that identifies 13 factors the agencies should consider in setting penalty sizes. Third, the banking regulators have adopted penalty matrices that use a points system to calculate penalty amounts.

The primary statutory provision governing the assessment of civil monetary penalties by the FDIC, OCC and Fed is 12 U.S.C. § 1818(i). This provision authorizes the assessment of civil monetary penalties by a bank's primary regulator and provides three different tiers of maximum penalties based on the nature of the misconduct.[134] A table summarizing the three tiers and the applicable penalties is provided below.

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[130] *See, e.g.,* BD. GOVERNORS FED. RESERVE SYS., *Letter from Director of Division of Banking Supervision on Civil Money Penalty Assessment Procedures* (Mar. 24, 1997), https://www.federalreserve.gov/boarddocs/srletters/1997/SR9706.HTM (stating that civil monetary penalty matrix is to be used for routine matters where no special circumstances apply).

[131] THE WHITE HOUSE, *Promoting Access to Mortgage Credit* (Mar. 13, 2026), https://www.whitehouse.gov/presidential-actions/2026/03/promoting-access-to-mortgage-credit/.

[132] *Id*. at Sec. 9.

[133] *Id*. at Sec. 2(b)(ii)

[134] *See* 12 U.S.C. § 1818(i).

Table 5: FDIC, Fed, and OCC Penalty Maximums

Tier	Type of Violation	Maximum Civil Penalty
Tier 1 [135]	Insured depository institution or affiliate: violates any law or regulation; violates any condition imposed in writing by the banking regulator in connection with any action on any application, notice, or other request made by the banking institution; violates any written agreement between the banking institution and the banking regulator	$5,000 per day of the violation
Tier 2 [136]	A Tier 1 violation that involves reckless engagement in an unsafe or unsound practice or breach of a fiduciary duty that either (a) is part of a pattern of misconduct; (b) causes or is likely to cause more than a minimal loss to the banking institution (i.e., harm); or (c) results in pecuniary gain to the violator (i.e., profit).	$25,000 per day of the violation
Tier 3 [137]	Knowingly committing a Tier 1 violation or knowingly engaging in in an unsafe or unsound practice or knowingly breaching a fiduciary duty AND in committing such violation, practice or breach the violator knowingly or recklessly causes substantial loss to the banking institution (i.e., causes harm) or obtains a substantial pecuniary gain (i.e., profits).	Insured depository institution: Lesser of $1,000,000 or 1% of the institution's total assets per day of the violation. Any other enforcement target: $1,000,000 per day of the violation.

The FDIC, Fed, and OCC are also required by statute to consider four "mitigating factors" in determining the size of the penalty to impose. Specifically, the statute provides that the agencies must consider: (1) the size of financial resources and good faith of the institution or person charged; (2) the gravity of the violation; (3) the history of previous violations; and (4) other matters as justice may require. [138]

In addition to the statutory factors, the FDIC, Fed, and OCC are party to a policy released in 1998 by the by the Federal Financial Institutions Examination Council ("**FFIEC**"), a statutorily created interagency body empowered to prescribe uniform principles and standards related to the

[135] *Id.* § 1818(i)(2)(A); *see also* BD. GOVERNORS FED. RESERVE SYS., *Rules of Practice for Hearings*, 90 FED. REG. 2,607 (Jan. 13, 2025), https://www.federalregister.gov/documents/2025/01/13/2025-00419/rules-of-practice-for-hearings (inflation adjusted amounts).

[136] 12 U.S.C. § 1818(i)(2)(B); *see also* BD. GOVERNORS FED. RESERVE SYS., *supra* note 135 (inflation adjusted amounts).

[137] 12 U.S.C. § 1818(i)(2)(C)-(D); *see also* BD. GOVERNORS FED. RESERVE SYS., *supra* note 135 (inflation adjusted amounts).

[138] 12 U.S.C. § 1818(i)(2)(G).

examination of financial institutions.[139] The FFIEC policy sought to "provide guidance on the appropriateness of a civil money penalty" for violations of the laws governing banking institutions.[140] The *non-binding policy* identified 13 relevant, non-exhaustive factors for the agencies to weigh in setting penalty sizes. These include:

1. Whether the violation was intentional or committed with disregard of the law or of the consequences to the institution;
2. The duration and frequency of the violations;
3. Whether the violations continued or ceased after the target was notified of the violations;
4. Whether the target cooperated with the agency to allow an early resolution of the problem;
5. Whether there was concealment of the violation;
6. Threat of loss, actual loss or other harm to the institution and degree of the harm;
7. Whether the target or the target's associates received a financial gain or other benefit as a result of the violation;
8. Whether the target paid restitution of losses resulting from the violation;
9. Prior history of violations;
10. Previous criticism of the target for similar actions;
11. Presence or absence of compliance programs;
12. Tendency to engage in violations of law, unsafe or unsound banking practices or breaches of fiduciary duty;
13. Existence of any agreements, commitments, order or conditions in writing intended to prevent the violation.[141]

Each of the FDIC, Fed, and OCC have adopted and made publicly available civil monetary penalty matrices that incorporate the FFIEC factors.[142] Each of the agency's matrices or

[139] 12 U.S.C. § 3301; FED. FIN. INST. EXAMINATION COUNCIL, *Mission*, https://www.ffiec.gov/about.htm (last visited Mar. 16, 2026).
[140] FED. FIN. INST. EXAMINATION COUNCIL, *Assessment of Civil Money Penalties*, 63 FED. REG. 30,226 (Jun. 3, 1998), https://www.govinfo.gov/content/pkg/FR-1998-06-03/pdf/98-14611.pdf.
[141] *Id*.
[142] FED. DEPOSIT INS. CORP., *II-9 Enforcement Actions* (Nov. 2023), https://www.fdic.gov/consumer-compliance-examination-manual/ii-9-enforcement-actions; OFF. COMPTROLLER CURRENCY, *PPM 5000-7 (REV), Policies and Procedures Manual* (Mar. 20, 2025), https://www.occ.gov/news-issuances/bulletins/2022/ppm-5000-7-rev.pdf; BD. GOVERNORS FED. RESERVE SYS., *SR 91-13 (FIS), Civil Money Penalties and the Use of the Civil Money Penalty*

accompanying guidance provides that the agency retains discretion to deviate from the relevant matrix, and thus they are *non-binding*.

The FDIC and OCC each have one matrix that applies to institutions and one that applies to institutional affiliates (e.g., officers, directors, controlling shareholders).[143] The Fed, by contrast, has one matrix that applies to both individuals and institutions.[144]

The agency matrices operate in similar fashions. The matrices use a point system to reach a penalty amount. The total number of points assigned to a violator is determined by specified substantive factors (based on the statutory factors and the 13 FFIEC factors), each of which are then assigned a score of zero to four based on the conduct in the specific case. Each factor's score is then multiplied by a "weight factor" pre-assigned by the matrix. The points are then summed to reach an aggregate number of points. Finally, the point value is compared to a schedule of point values that provide the suggested civil monetary assessment amount. An illustrative example of the OCC's matrix applicable to financial institutions is presented in **Appendix C**.

The matrix shows that the OCC uses eleven factors like intent, harm to others, gain to the enforcement target from the wrongdoing, and concealment to calculate a total point value. The OCC assigns a point value of between 0 to 4 to each substantive factor listed in the matrix. The matrix also contains mitigating factors like self-identification and remediation to offset the aggravating factors to obtain a final total point value.

The matrix also specifies the weight that the OCC assigns to each factor. The OCC gives the greatest weight to intent and concealment and the least weight to history of violations, duration and frequency of violations before notification, and the mitigating factor of restitution.

The matrix illustrates that agencies can consider factors not specifically enumerated in statutes or FFIEC policy. For example, the OCC considers the loss or harm to consumers or the public, though that is not required under the statute or the interagency policy.

Once the agency assigns point values to each factor, multiplies each factor by the specified weighting, and adds up the point values to get a total point value, then an OCC-developed table describes the maximum civil monetary penalty that should be imposed given the total point score and the size of the institution. As we discuss later, application of the matrix requires interpretation in a manner that does not cabin agency discretion.

Assessment Matrix (Jun. 3, 1991), https://www.federalreserve.gov/boarddocs/srletters/1991/sr9113.htm#Footref4. The NCUA has not publicized a generally applicable matrix showing how it calculates penalty amounts.

[143] *See* FED. DEPOSIT INS. CORP., *supra* note 142; OFF. COMPTROLLER CURRENCY, *supra* note 142.

[144] *See* BD. GOVERNORS FED. RESERVE SYS., *supra* note 142. The scope of the applicability of the matrices differs by agency. The Fed, for example, has stated that its matrix only applies to tier 1 penalties (the least severe type of violations described in the previous table). BD. GOVERNORS FED. RESERVE SYS., SR 97-6 (ENF), *Civil Money Penalty Assessment Procedures* (Mar. 24, 1997). The OCC's matrices apply to tier 1 and tier 2 violations (the lowest and intermediate types of violations described in the previous table). *See* OFF. COMPTROLLER CURRENCY, *supra* note 142, at 4. The FDIC's guidance accompanying its matrices does not state that the matrices are inapplicable with respect to any tier of violations. *See* FED. DEPOSIT INS. CORP., *supra* note 142.

ii. OFAC Penalty Matrix Approach

The statutes OFAC enforces provide statutory *maximums* for the civil penalties that the Secretary of the Treasury is authorized to impose for violations of trade sanction laws. For example, the International Emergency Economic Powers Act caps the civil monetary penalty that can be imposed for a violation of trade restrictions to the greater of: (1) $250,000;[145] or (2) twice the amount of the value of the transaction that violated the law.[146] The statute provides discretion to OFAC so long as the penalty imposed falls below the statutory maximum.

OFAC has developed and published a system that it uses to determine the appropriate penalty size within the statutory cap. It is outlined in a 2009 set of enforcement guidelines that is applicable to firms and individuals.[147] In those guidelines, OFAC explains that it will place actions into one of four categories based on two variables: (1) whether the violation was egregious; and (2) whether the violation was self-disclosed to OFAC. Determining whether a violation was egregious requires the application of agency discretion.

OFAC's guidance also lists the factors it will consider in determining if the case is egregious or not. It weighs the following factors: (1) whether the violation was a willful or reckless violation of law;[148] (2) the violator's awareness of the conduct at issue; (3) the actual or potential harm to the sanctions program caused by the conduct; (4) the size, commercial sophistication and sanctions history of the violator; (5) the existence, nature and adequacy of the violator's risk-based OFAC compliance program; (6) the violator's remedial response to the violation; (7) the violator's cooperation with OFAC; (8) other enforcement actions taken by other agencies for the same or similar misconduct; and (9) the effect the case will have on future compliance and deterrence.[149] OFAC gives substantial weight to the first four factors with particular emphasis on the first two.[150] A case will be deemed egregious if an analysis of the factors "indicates that the case represents a particularly serious violation of the law calling for a strong enforcement response."[151]

Once OFAC categorizes a case as egregious or not and determines whether the violator voluntarily disclosed the violation to OFAC, then OFAC applies its four-quadrant matrix to set the penalty size. The matrix is produced on the next page.

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[145] For inflation adjusted amount, *see* FOREIGN ASSETS CONTROL OFF., *Inflation Adjustment of Civil Monetary Penalties*, 90 FED. REG. 3,687 (Jan. 15, 2025), https://www.govinfo.gov/content/pkg/FR-2025-01-15/pdf/2025-00786.pdf.

[146] 50 U.S.C. § 1705(b).

[147] *See* FOREIGN ASSETS CONTROL OFF., *Economic Sanctions Enforcement Guidelines*, 74 FED. REG. 57,593 (Nov. 9, 2009), https://www.federalregister.gov/documents/2009/11/09/E9-26754/economic-sanctions-enforcement-guidelines, codified at 31 CFR Appendix A to Subpart F of Part 501.

[148] Willful being worse than reckless as a willful violation involves a decision to take an action knowing that it will violate U.S. law.

FOREIGN ASSETS CONTROL OFF., *supra* note 147 at 57,602.

[149] *Id*. at 57,602–03.

[150] *Id*. at 57,605.

[151] *Id*.

Table 6: OFAC Civil Monetary Penalty Maximum Amount Matrix

	Egregious	Not Egregious
Voluntary Disclosure	One-half statutory maximum	One-half of transaction value (capped at one-half statutory maximum)[152]
No Voluntary Disclosure	Statutory maximum	Applicable schedule amount (capped at statutory maximum)[153]

iii. Limitations of Penalty Matrices

Penalty matrices have potential advantages over an ad hoc, case-by-case approach to setting monetary penalties. The use of such a formalized process has the potential to increase consistency in penalty amounts to better ensure equal treatment of similarly situated defendants. It also means that the enforcement authority has given considerable thought to the factors that should be considered in each case and the weight those factors should be given. That contemplative process has the potential to decrease the risk that irrational penalties are imposed. The use of matrices also should increase the efficiency in the penalty-setting process because it pre-establishes the premise for any settlement negotiations.

However, the banking regulators' matrices do not apply in all cases. For example, the Fed only requires that its staff apply its matrix to the least severe violations (i.e., tier 1 violations). The stated rationale is that matrices work best in routine matters that involve fewer judgment calls.[154] But consistency in penalties and mitigating the risk of arbitrary and disproportionate penalties is just as important, if not more important, in the largest cases. And constraints on discretion may be more appropriate in larger cases given that there are fewer similar cases to establish that the enforcement authority's penalty is arbitrary.

An enforcement agency can also reach an extraordinarily wide range of penalty outcomes even when they apply their matrices or guidelines. The decision about how many points to assign to a particular factor requires subjective judgments. Take the OCC matrix for example. If the total points assigned to the misconduct falls within the range of 101-120 points, a large bank can face a fine of up to $280 million. That amount increases to $400 million, a $120 million difference, if the point value instead falls within the range of 121-140. If the point value is going to be near the cutoff of 121 points for a higher penalty, then enforcement authorities could categorize certain factors in a way to obtain a higher point value and thus higher penalty. For example, the matrix's factor of "intent" can be given a score of 3 if the bank disregarded red flags or a 4 if the bank clearly disregarded the law. Under a particular fact pattern, one could imagine a judgment call

[152] For the inflation adjusted maximum, *see* FOREIGN ASSETS CONTROL OFF., *supra* note 145.

[153] The statutory provision sets a cap of $250,000 per violation of the International Emergency Economic Powers Act, prior to inflation adjustment. *Id.*

[154] *See, e.g.,* BD. GOVERNORS FED. RESERVE SYS., *supra* note 130 (stating that civil monetary penalty matrix is to be used for routine matters where no special circumstances apply).

having to be made. Because the "intent" score is multiplied by a factor of 7, that decision can increase or decrease the total points by 7 points. Undoubtedly in some cases that judgment call will be critical.

In addition, the presence of matrices does not eliminate the "per violation" issue we raised in the discussion of SEC, CFTC, and CFPB penalties in section II.B.1.iii. An enforcement authority with a matrix could aggregate conduct into one violation or divide wrongdoing into multiple violations. If the enforcement authority took the former approach, then the matrix would be applied one time to derive one penalty amount. If the latter approach were used, then the matrix would be applied for each violation and the total penalties would be the sum of each analysis, which could result in higher penalties.

3. DOJ's Criminal Monetary Penalties

The process behind the determination of criminal penalties for the DOJ is unique because it depends on whether the case results in a conviction entered by a court or whether the target negotiates a settlement with the DOJ out of court.

i. Court Imposed Criminal Penalties in Criminal Convictions

When the DOJ brings a criminal action, the defendant – whether an individual or entity – can be subject to monetary penalties (as well as prison time for an individual).[155] In the event a defendant is convicted, judges must consider sentencing guidelines that have been developed by the U.S. Sentencing Commission (the "**Commission**").[156] The Commission is an independent agency in the judicial branch that consists of seven voting and two non-voting members, whose purpose is to establish sentencing policies and practices for the federal criminal justice system.[157] The Commission is authorized and empowered to fulfill its duties by federal statute.[158]

To achieve its mission, the Commission has published a Sentencing Guidelines Manual that is over 550 pages long.[159] The manual provides the method by which a court is to determine the appropriate advisory sentencing range and fines for defendants. Specifically, the sentence is determined using a grid with ranges based on an "offense level" (on a range of 1 to 43) and "criminal history" (on a range of I to VI).[160] For example, if the calculated offense level is 30 and

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[155] *See, e.g.*, 15 U.S.C. § 77x (Securities Act providing for a fine of up to $10,000 and prison time of no more than five years for willful violation of the Securities Act); 15 U.S.C. § 78ff (Exchange Act authorizing criminal fines and prison time for willful violations of the law); 15 U.S.C. § 80a-48 (Investment Companies Act providing for criminal fines and prison time for violations of the law); 15 U.S.C. § 80b-17 (Advisers Act providing for criminal fines and prison time for violations of the law); 7 U.S.C. § 13 (CEA providing for criminal fines and prison time for violations of the law); 18 U.S.C. § 1343 (providing for criminal fine or prison time for violation wire fraud law).

[156] *See generally* U.S. SENT'G COMM'N, *Guidelines Manual 2025*, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2025/GLMFull.pdf [hereinafter *USSG*].http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf

[157] *Id*., at 1-4.

[158] 28 U.S.C. § 994(a).

[159] *See generally* USSG, *supra* note 156.

[160] *See* USSG, *supra* note 156, at 386-88.

the criminal history is a III, then the guidelines recommend a sentence of 121 to 151 months in prison for a defendant that is a natural person.[161] Importantly, the Sentencing Guidelines Manual contains detailed instructions on how judges should apply the guidelines when defendants are convicted on multiple different counts, but involve the same underlying misconduct and the same harm.[162] The guidelines are designed to "prevent multiple punishment for substantially identical offense conduct."[163] This would minimize concerns regarding the "per violation" problem described in the prior section.

Criminal fines for *natural persons* are based on the "offense level" obtained after proceeding through the analysis required by the Sentencing Guidelines Manual. These fines range from as low as $200 to as high as $500,000.

The Sentencing Guidelines Manual also provides a multistep process for determining the appropriate criminal fine to impose on an *organizational* defendant.[164] The following describes the process at a high level.

The guidelines first require the calculation of a base criminal fine, which is based on the offense level assigned to the underlying crime.[165] The base fines range from $8,500 to $150 million.[166] The sentencing guidelines also provide that the fine should at least be equal to the pecuniary gain to the organization from the offense, or the pecuniary loss from the offense caused by the organization if the violation was intentional, knowing, or reckless.[167]

The base fine is then multiplied by a "culpability score" based on factors such as the level at which the unlawful conduct took place in the organization, the organization's prior criminal history, whether the organization has an effective compliance and ethics program and whether the organization self-reported the crime or cooperated with the criminal investigation.[168] The court then imposes a criminal fine after considering the recommended amount calculated through this process.

ii. Alternative Resolution Agreements with Prosecutors

However, prosecutors can enter into settlement agreements called non-prosecution agreements ("**NPAs**") and deferred prosecution agreements ("**DPAs**") for which the DOJ is not legally bound to consider the Sentencing Guidelines. Of course, the Sentencing Guidelines are still a factor in negotiations because a defendant is likely to calculate whether the terms of an NPA or

[161] *See id*.
[162] *Id*., at 345-56.
[163] *Id*., at 345-47.
[164] *Id*., at 474-75.
[165] *Id*., at § 8C2.4.
[166] *Id*.
[167] *Id*.
[168] *Id*. § 8C2.5. The multiplier can be less than 1, which reduces the fine, or as great as 4, which quadruples the base fine amount.

DPA offer a better deal than what the defendant could face under the Sentencing Guidelines if convicted after a trial.

a. Role of NPAs and DPAs

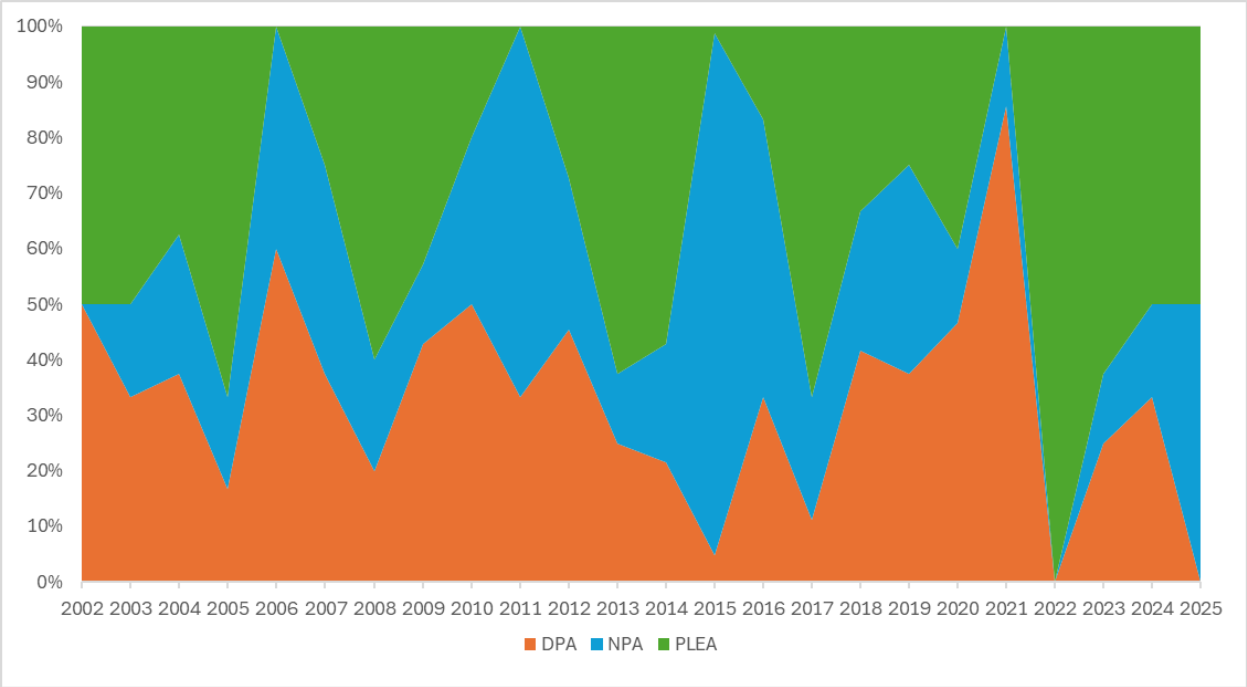
NPAs and DPAs are privately negotiated agreements between prosecutors and a target of a criminal investigation in which the government agrees to close an investigation or dismiss outstanding charges in exchange for the target's acceptance and fulfillment of certain conditions.[169] As a former U.S. Attorney testified before Congress, "[NPAs and DPAs] occupy an important middle ground in the resolution of corporate crimes cases" between seeking a criminal conviction and declining to pursue prosecution.[170] The agreements "typically require the payment of restitution to victims, and/or fines and penalties."[171] They also contain provisions to root out illegal conduct and prevent recidivism by requiring the target to adopt or improve internal controls and ethics and compliance programs.[172]

NPAs and DPAs differ from plea agreements because in plea agreements, the defendant is *convicted* of a crime and a *judge* imposes a sentence.[173] The judge must accept that the plea bargain was entered voluntarily and inform the defendant of the charges it is facing and the rights it is waiving by entering a plea.[174]

Data on DOJ criminal actions against financial institutions from the University of Virginia Corporate Prosecution Registry illustrates the central role NPAs and DPAs play. As **Figure 1** shows, in most years from 2000 through 2021, NPAs and DPAs constituted most criminal matters resolved by the DOJ against financial institutions and in multiple years they represented *all* such resolved criminal matters.[175] In recent years, however, the use of plea agreements has increased relative to NPAs and DPAs.

[169] *See* Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 LOY. L.A. L. REV. 1, at 4-5 (May 22, 2014).
[170] *Concerning Corporate Settlement Agreements: Hearing Before the H. Judiciary Subcomm. on Commercial and Admin. Law* (Mar. 11, 2008) (statement of David E. Nahmias, U.S. Att'y for the N. Dist. of Ga., Dep't of Justice).
[171] *Id*.
[172] *Id*.
[173] *See* Larkin, supra note 169, at 25–26.
[174] *See id.* at 23.
[175] CORP. PROSECUTION REGISTRY DATABASE, https://corporate-prosecution-registry.com/ (last visited Mar. 16, 2026).

Figure 1: Method of Resolution of Financial Institution DOJ Criminal Matters



b. Differences Between NPAs and DPAs

NPAs and DPAs "differ in form rather than substance."[176] The difference between the two is that an NPA is entered into before criminal charges are ever filed against a person or firm, whereas a DPA is entered into upon the filing of criminal charges.[177]

NPAs are entered into before criminal charges are filed in court and the agreement is therefore only maintained by the parties and not filed in court.[178] NPAs are *not* reviewed by courts before they are finalized[179] because they are entered into before any charges are filed in court.[180] Thus, there is no judicial oversight of NPAs. By contrast, DPAs are entered into after formal criminal charges have been filed in court. As a result, the agreement is typically filed with the court to seek the court's leave to stay the case while the defendant takes the necessary steps to meet the

[176] James R. Copland & Rafael A. Mangual, *Justice Out of The Shadows: Federal Deferred Prosecution Agreements and The Political Order* at 4, MANHATTAN INST. (Jun. 2016), https://www.manhattan-institute.org/sites/default/files/R-JC-0616.pdf.

[177] The difference in timing can have reputational implications because a defendant who enters into a DPA is an indicted criminal defendant, while one who enters into an NPA is not.

[178] U.S. DEP'T JUST., *Memorandum from Acting Deputy Attorney General on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* at n.2, (Mar. 7, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

[179] *See* Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 556–57 (2015).

[180] *See* Copland & Mangual, *supra* note 176, at 4.

terms of the agreement, at which point the case is dismissed.[181] However, DPAs are subject to limited judicial review.[182] According to the D.C. Circuit Court of Appeals, , the courts are not to substantively review the terms of such an agreement or second guess the government's decision to enter into one.[183]

c. Prosecutorial Discretion to Enter into NPAs and DPAs

DOJ prosecutors have enormous discretion in negotiating and implementing NPAs and DPAs in three key ways.

First, the DOJ does not have a comprehensive formal policy that directly governs when it is appropriate for prosecutors to enter into such agreements. Instead, they are often entered into on an ad hoc, case-by-case basis. As a May 2025 memo to DOJ Criminal Division personnel stated, "where corporate criminal resolutions are necessary, prosecutors should consider all forms—non-prosecution agreements, deferred prosecution agreements, and guilty pleas—in making a case-by-case analysis about the appropriate disposition."[184] Prosecutors base their decisions about whether to enter these agreements based on an analysis involving the Principles of Federal Prosecution of Business Organizations (the **"Principles"**) contained in the Justice Manual.[185] The Principles list a number of factors to be considered in deciding whether to decline prosecution, seek a conviction, or enter into a plea agreement, NPA or DPA. The prosecutors view the analysis as existing along a continuum in which the use of NPAs and DPAs lies in the middle of the decision to decline prosecution or seek a conviction.[186]

Second, prosecutors have great discretion in negotiating the specific terms of NPAs and DPAs, including the amount of monetary fines imposed under these agreements. As a June 2025 memo to Criminal Division personnel explained, "prosecutors must determine appropriate penalties, fines, and forfeiture based on the evidence and the law in each case. This can include review of the U.S. Sentencing Guidelines, statutory penalties, assessment of victim loss, and determination of any discount on the fine as a result of a corporate defendant's cooperation and remediation pursuant to the [Corporate Enforcement and Voluntary Self-Disclosure Policy]."[187]

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[181] *See id*.

[182] *See id*.

[183] *See generally* United States v. Fokker Services B.V., 818 F.3d 733 (D.C. Cir. 2016); *see also* United States v. HSBC Bank USA, N.A. (2d Cir. 2017); In re: Naoise Connolly Ryan, et al. (5th Cir. 2023); Kaleb Byars, *A Concrete Standard of Judicial Review for Corporate Deferred Prosecution Agreements*, FLA. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5139547.

[184] U.S. DEP'T JUST., CRIM. DIV., *Memorandum from Head of the Criminal Division on Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime* (May 12, 2025), https://www.justice.gov/criminal/media/1400046/dl?inline.

[185] *See, e.g.,* U.S. GOV'T ACCOUNTABILITY OFF., *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements* at 4 (Jun. 25, 2009), http://www.gao.gov/assets/130/122853.pdf.

[186] *Id*.; U.S. DEP'T JUST., *U.S. Attorneys' Manual 9-28.200 – Principles of Federal Prosecution of Business Organizations*, https://www.justice.gov/archives/usam/archives/usam-9-28000-principles-federal-prosecution-business-organizations (last visited Mar. 16, 2026).

[187] U.S. DEP'T JUST., CRIM. DIV., *Memorandum from Head of the Criminal Division on Guidance on Coordinating Corporate Resolution Penalties in Parallel Criminal, Civil, Regulatory, and Administrative Proceedings* (Jun. 5, 2025), https://www.justice.gov/criminal/media/1402751/dl.

In practice, most NPAs and DPAs use the sentencing guidelines as a starting point and include a section in the agreement showing how monetary penalties were calculated thereunder.[188] However the desire to avoid a criminal conviction may cause some potential criminal defendants to accept harsher penalties than they might expect after trial to avoid the reputational costs that may arise from an indictment or ultimate criminal conviction. Indeed, a 2025 study observed that "the penalties imposed on companies pursuant to [NPAs and DPAs] routinely dwarf those of companies formally convicted of crimes by a factor of ten."[189]

Third, prosecutors normally have unilateral discretion about whether to terminate an agreement and bring criminal charges.[190] . In the event of a dispute about compliance with the terms of the agreement, there is significant uncertainty as to whether a venue exists to resolve the dispute.[191]

d. Recent Changes to DOJ Practices Involving NPAs and DPAs

The DOJ has made efforts in recent years to increase transparency and better guide prosecutors' discretion in selecting the form of resolution and amount of monetary sanctions. In 2017, the DOJ adopted a policy in connection with cases involving the Foreign Corrupt Practices Act to guide resolution when a target self-discloses a violation, cooperates, and remediates the problem. The policy, now known as the Corporate Enforcement and Voluntary Self-Disclosure Policy (the "**CEP**"), has subsequently been refined and expanded to apply to all corporate criminal matters, with the exception of antitrust offenses.[192]

The current version of the CEP, issued on March 10, 2026, establishes the first uniform Department-wide framework, superseding all preexisting corporate enforcement policies across DOJ components, including U.S. Attorney's Offices. Under this framework, the DOJ will decline to prosecute a corporation where the company voluntarily self-discloses the misconduct, fully cooperates with the DOJ's investigation, and timely and appropriately remediates the misconduct, provided there are no aggravating circumstances (such as particularly egregious conduct or severe harm caused).[193] In "near miss" cases where the company self-reports in good faith but has not done so "voluntarily," or where there are aggravating circumstances, the DOJ will offer a NPA and reduce any fine by at least 50% but not more than 75% off the low end of the U.S. Sentencing Guidelines range. However, the DOJ reserves the discretion not to offer a NPA where there are

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[188] Todd Haugh & Mason McCartney, *DPA Discounts*, 61 AM. CRIM. L. REV. 35, 42 (2024).
[189] *Id*. at 36.
[190] Jacob Stock, *Judicial Review of Corporate Non-Prosecution and Deferred Prosecution Agreements: A Narrow Road to Checking Prosecutorial Discretion*, 3 CORP. & BUS. L. J. 212, 232 (2022).
[191] *See, e.g., id*.
[192] U.S. DEP'T JUST., *Corporate Enforcement and Voluntary Self-Disclosure Policy,* (Mar. 10, 2026), https://www.justice.gov/dag/media/1430731/dl?inline; *see also* Stephanie Brooker et al., *Kew Takeaways from DOJ's First Ever Department-Wide Corporate Enforcement and Voluntary Self-Disclosure Policy*, GIBSON DUNN (Mar. 19, 2026), https://www.gibsondunn.com/key-takeaways-from-doj-first-ever-department-wide-corporate-enforcement-and-voluntary-self-disclosure-policy/; Jeffrey J. Izant et al., *Key Questions Remain Under DOJ's New Department-Wide Corporate Enforcement Policy*, PILLSBURY (Mar. 17, 2026), https://www.pillsburylaw.com/en/news-and-insights/doj-new-corporate-enforcement-policy.html.
[193] *Id*.

particularly egregious or multiple aggravating circumstances. Finally, if a company is not eligible for a declination or a "near miss" NPA, prosecutors must use their discretion to determine the proper resolution. In exercising this discretion, prosecutors will consider factors such as the seriousness of the offense, the company's role and prior misconduct, the harm caused, and the effectiveness of its compliance program consistent with Chapter 8 of the U.S. Sentencing Guidelines.[194] However, in any case, companies in this category will not receive a reduction in monetary penalties of more than 50% off the sentencing guidelines. For companies that fully cooperate and remediate, there will be a presumption that the penalty reduction will be taken off the bottom of the sentencing range, prosecutors will use discretion to determine both the appropriate reduction in penalty amount and the starting point within the sentencing range from which to apply the reduction.

In addition to the CEP, in 2023 the DOJ announced a safe harbor provision for companies in the mergers and acquisitions context, under which the DOJ will presumptively decline prosecution if a company "voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated misconduct uncovered as a result of due diligence."[195] In 2024, the DOJ also launched a pilot program on voluntary self-disclosures for individuals in criminal matters, under which the DOJ will offer a NPA if certain criteria are met.[196]

Apart from these self-disclosure policies, in 2022 the DOJ announced a new policy to increase the transparency of criminal corporate resolutions, which has been incorporated into the Justice Manual.[197] Specifically, to the greatest extent possible, agreements to resolve corporate criminal matters should include a statement of facts outlining the criminal conduct and "a statement of relevant considerations that explains the Department's reasons for entering into the agreement."[198] Further, all corporate criminal resolution agreements will be posted to the DOJ website, absent exceptional circumstances.[199]

C. Rationalizing the Determination of Penalties with Guideposts

As we have shown, there is wide disparity in the policies, procedures, and approaches governing the determination of sanctions in enforcement actions. However, in practice, agencies have unbridled discretion to set penalty amounts. We believe that enforcement authorities should

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[194] U.S. DEP'T JUST., *supra* note 192 (In exercising discretion to determine the monetary penalty, prosecutors will consider the factors under U.S.S.G. § 8C2.8).

[195] U.S. DEP'T JUST., *Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions* (Oct. 4, 2023), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.

[196] U.S. DEP'T JUST., *The Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals* (Apr. 15, 2024), https://www.justice.gov/criminal/media/1347991/dl?inline.

[197] U.S. DEP'T JUST., *Memorandum from the Deputy Attorney General on Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (Sept. 15, 2022), https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf; U.S. DEP'T JUST., *Justice Manual* 9-28.200.

[198] U.S. DEP'T JUST., *Justice Manual* 9-28.200.

[199] *Id*.

adopt core principles or "guideposts" that will appropriately cabin agency discretion and serve as guardrails to prevent enforcement authorities from straying off the road and imposing arbitrary and irrational monetary penalties.

The Committee makes separate recommendations with respect to non-DOJ enforcement authorities and the DOJ. This is largely for two reasons. First, in criminal matters before federal judges, the U.S. Sentencing Guidelines apply and we wish to make clear that our recommendations do not apply to such matters. Second, for the non-DOJ enforcement authorities, we recommend involving the Financial Stability Oversight Council ("**FSOC**") in the development of principles. Given the historical importance of DOJ's independence from outside influences, and the fact that the DOJ is not otherwise involved in FSOC, we believe the DOJ should take similar steps, but act independently of FSOC.

1. Development of Guideposts for Non-DOJ Federal Agencies

We believe that FSOC should develop core principles for enforcement authorities to apply in enforcement matters when setting monetary penalties. FSOC was created as part of Dodd-Frank and is comprised of the Secretary of the Treasury and includes, among others, representatives from the Fed, OCC, CFPB, FDIC, SEC, CFTC, NCUA, all of which are important enforcement authorities.[200] Given the perspective of all of these different members, we believe FSOC is well-positioned to craft a set of thoughtful and balanced principles.

The principles designed by FSOC and adopted and implemented by the enforcement authorities should constrain agency discretion, ensure that penalties achieve their deterrent and remedial aims without suppressing lawful economic activity, avoid duplicative penalties, promote consistency in penalties across similarly situated enforcement targets, and seek transparency in the penalty setting process. We believe there are four principles or guideposts that can achieve those aims.

The first guidepost should be that the penalties must be proportionate. More specifically, penalties should be proportionate to the harm caused by the misconduct, as well as the gravity or intentionality of the misconduct. Where the harm that resulted from wrongdoing is large, a higher penalty may be more justified than when an unlawful act did not harm investors or consumers. In addition, penalties should not be determined on a "per violation" basis. The problem with such an approach is that it can result in penalties that are disproportionate. For example, if a defendant mails out 1,000 copies of a disclosure document at one time that contain the exact same misstatement, such a violation could presently be treated as 1,000 violations. In general, we believe that focusing on the harm caused rather than the number of violations would result in more rational and proportionate penalties. In addition, enforcement authorities should consider the gravity or intentionality of the misconduct. Holding all other factors constant, misconduct that is intentional and brazen deserves to be penalized more than misconduct that results from carelessness.

[200] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 111, 124 Stat. 1376, 1392 (2010).

A second guidepost should be that enforcement authorities must take into account the enforcement target's efforts to remedy the misconduct. Individuals and firms that seek to redress the wrong committed should be provided with recognition of such efforts through a reduced penalty. Likewise, steps taken to quickly end wrongdoing upon its discovery should be accounted for, as should efforts to assist government investigators in identifying and prosecuting culpable individuals. These mitigating factors should play a part in penalty setting because doing so creates incentives for firms to voluntarily compensate harmed investors or consumers and quickly stop wrongdoing before the government is even involved or aware of a matter.

Third, enforcement authorities should have to conclude that the penalties being imposed are not unnecessarily duplicative in light of other penalties that the enforcement target has incurred or is about to incur from other enforcement authorities for the same underlying misconduct. This analysis helps ensure that the overall penalties faced by a target are proportionate to its misconduct. A penalty that appears proportionate in isolation could be disproportionate when viewed in light of other punishment that has already been assessed.

Fourth, enforcement authorities should have to consult and rely upon outcomes in other enforcement actions involving similar wrongdoing and conclude that the penalties being imposed are consistent with those imposed in similar matters. More specifically, the enforcement authority should identify cases involving similar misconduct, evaluate how the facts of the current matter are similar to or different from those cases, and then determine that the penalties being imposed in the current case are justified by the penalties imposed in the prior cases. This guidepost should help ensure consistency across cases over time and across defendants. However, we believe that past enforcement actions should not be relied upon for this analysis unless imposed by a federal court in a contested matter, because the lack of existing standardized policies for determining penalties could result in enforcement agencies relying upon past actions that imposed arbitrary and disproportionate penalties. Thus, with respect to reliance on past settled matters, this approach should only apply to new enforcement actions that have had penalties determined in accordance with our other recommendations. Moreover, we believe that more weight should be given to non-settled matters where penalties were set by federal judges because a more fully developed factual record exists for comparison purposes and the matter benefited from the involvement of the judge as an independent third-party adjudicator.

To allow the public to hold enforcement authorities accountable and have confidence that the guideposts are being utilized, enforcement authorities must be transparent. Transparency should be accomplished in two ways. First, enforcement authorities should publish the guideposts that they adopt. Second, in every enforcement action, the enforcement authority should explain how the guideposts were applied.

- **Recommendation 4:** Enforcement authorities should adopt publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties. FSOC should establish these principles or guideposts and they should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct;

and (4) relying on historical precedents for consistency. Enforcement authorities should explain how the guideposts were applied in each enforcement action.

2. Establishment of DOJ Guidelines

In the 2018 Report, the Committee Staff recommended that the DOJ adopt the same types of public guideposts for both civil FIRREA and FCA matters and for the resolution of criminal matters through NPAs and DPAs. The DOJ continues to lack public policies for the determination of penalties in the settlement of civil cases under FIRREA and the FCA. The potential benefits of DOJ guideposts in FIRREA and FCA, matters are the same as those outlined above. We thus recommend the adoption of guideposts for the setting of monetary penalties by DOJ in these cases.

In the criminal context the DOJ has made significant progress in establishing guidelines regarding the use of NPAs and DPAs and the monetary sanctions assessed thereunder, as well as in increasing transparency about the reasoning for entering into such agreements. Our recommendation therefore no longer extends to criminal NPAs and DPAs.

- **Recommendation 5:** The DOJ should establish publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties in DOJ civil matters under FIRREA and the FCA. They should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. The DOJ should explain how the guideposts were applied in each enforcement action.

III. Data on Monetary Sanctions

In this part, we first describe the Committee Staff's data collection process and the general shortcomings in publicly available information regarding U.S. enforcement actions. We then present the Committee Staff's analysis of the data that it collected, covering a roughly 25-year period. The data show upward trends in the total aggregate monetary sanctions imposed in enforcement actions and the size of the mean and median monetary sanctions imposed on enforcement targets during the period. However, due to the lack of principles or guideposts for the setting of monetary penalties, the drivers of the increase in monetary sanctions remain unclear. That illustrates another potential benefit of principles or guideposts. Policies or guideposts could provide confidence to the public that increases in the sanctions imposed in the typical (median) or average (mean) case are actually driven by changes in behavior, including more egregious conduct or harm to investors, rather than a simple ratcheting up of sanctions for similar acts. Such transparency would enable policymakers to better respond to such trends with reforms that would enhance deterrence.

A. Data Collection Process and Limitations of Available Data

1. Data Collection Process

The Committee Staff gathered data on enforcement actions from the following agencies: (1) SEC (2) CFTC; (3) CFPB; (4) Fed; (5) FDIC; (6) OCC; (7) OTS;[201] (8) NCUA; (9) OFAC; (10) FinCEN; (11) DOJ civil and criminal cases (against financial institutions only in each instance); and (12) New York Department of Financial Services ("**NY DFS**").

Data collection sources and methods differed depending on the specific enforcement authority. The data collection methods are described in **Appendix D**. Our data analysis generally spans from 2000 to 2024, except where otherwise indicated in individual figures, charts, or graphs. The Committee Staff intends to update this data annually.

2. Limitations of Publicly-Available Enforcement Data and Recommendations to Improve Access to Enforcement Data

The Committee Staff found numerous flaws in the presentation, disclosure, and accessibility of enforcement authorities' case-level data. Therefore, the data analyses use only the case-level data that could be gathered and analyzed using our reasonable best efforts.

One major complication was that SEC and DOJ enforcement action information and documents are not located on one centralized webpage. For example, SEC enforcement action documents are located in at least four different pages on its website.[202] In addition, it is not clear

[201] The OTS was dissolved in October 2011.

[202] The four different webpages are: (1) "Litigation Releases" for matters brought in federal court; (2) "Administrative Proceedings" for cases initiated and/or settled in the administrative forum; (3) "ALJ Initial Decisions" for cases litigated before administrative law judges; and (4) "Commission Opinions and Adjudicatory Orders" for administrative cases appealed to the commissioners. *See* U.S. SEC. & EXCH. COMM'N, *Litigation Releases*,

that all relevant information about enforcement matters is posted on agency websites.[203] Another complication is that most of the enforcement authorities do not provide summary information in tabular or spreadsheet form about the outcomes and sanctions imposed in specific enforcement actions.[204]

It is important to note, however, that the Fed, OCC, and FDIC provide relatively robust public disclosures regarding enforcement actions. These banking regulators present enforcement information on their websites in tabular form or downloadable spreadsheets that identify enforcement actions, the defendants, and sanctions imposed in each action. We commend the Fed, OCC, and FDIC for their efforts to enhance transparency in this regard.

The current arrangement and disclosure of enforcement actions makes it extremely difficult for the public to effectively monitor enforcement activity and creates dependency on the use of annual aggregated statistics released by the agencies. Furthermore, the aggregated data does not allow policymakers, the public, academics, or others to conduct analyses on important trends, such as the median and mean monetary sanctions being imposed, the types of defendants (i.e., individuals versus firms), or the extent to which the cases with the largest monetary sanctions drive aggregate sanction amounts.

- **Recommendation 6:** Each enforcement authority should establish an easily accessible, searchable, centralized database of its enforcement actions.

The databases should include, in a downloadable format, information on: (1) the defendants' identities (including an identification number for firms that allows for the consistent identification of firms across agencies and for the identification of the corporate parent of any subsidiaries); (2) whether the defendant was a natural person or a corporate entity; (3) the date the enforcement action was filed; (4) the date the enforcement action was resolved; (5) a breakdown of the types of monetary and non-monetary sanctions imposed on each defendant; (6) the amount of civil monetary penalties, disgorgement, restitution, and/or consumer relief imposed on each defendant (broken out by category of monetary relief); and (7) the aggregate amount of each type of monetary sanction imposed against all defendants in the enforcement action. In addition, if the government's case is dismissed or the government loses a non-settled matter, the database should

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https://www.sec.gov/litigation/litreleases.shtml (last visited Mar. 16, 2026); U.S. SEC. & EXCH. COMM'N, *Administrative Proceedings*, https://www.sec.gov/litigation/admin.shtml (last visited Mar. 16, 2026); U.S. SEC. & EXCH. COMM'N, *ALJ Initial Decisions: Administrative Law Judges*, https://www.sec.gov/alj/aljdec.shtml (last visited Mar. 16, 2026); U.S. SEC. & EXCH. COMM'N, *Commission Opinions and Adjudicatory Orders*, https://www.sec.gov/litigation/opinions.shtml. (last visited Mar. 16, 2026).

[203] For example, it appears that the SEC does not post a litigation release for every case resolved or settled in federal court. Because Lexis Nexis Securities Mosaic does not review individual case dockets in federal court, the SEC data reported herein may be missing monetary sanction amounts from civil cases that the SEC does not publish press releases for and thus would underestimate the total amount of monetary sanctions imposed by the SEC.

[204] To collect data on CFPB, NCUA, OFAC, FinCEN, and NY DFS enforcement actions, research assistants had to review the relevant order, opinion, or press release in each action. Had a third-party vendor not already hand collected data from SEC and CFTC enforcement actions, a similar hand review of individual SEC and CFTC orders would have also been necessary.

clearly and prominently indicate the resolution of the matter and that the defendant incurred no sanctions.

The public deserves the ability to evaluate if authorities are operating in a fair, impartial, and just manner, and to analyze outcomes in enforcement actions. Making data on specific enforcement cases more easily accessible would advance that interest. In turn, this increased transparency should increase the accountability of enforcement authorities to the public. Implementing these databases should not be a significant burden on enforcement authorities. Many of them already have some internal capacity to analyze the outcomes of enforcement actions. Others, like the OCC, FDIC, and Fed, already engage in efforts to disclose the results of specific enforcement actions in an easily accessible manner.

B. Data Findings on Enforcement Activity and Monetary Sanctions

The Committee Staff's collection of case-level enforcement data permits it to conduct analyses of enforcement trends during a 25-year period and across many different U.S. enforcement authorities. This section presents data on: enforcement activity, as measured by the number of enforcement actions per year and the total monetary sanctions ordered to be paid per year, and median and mean monetary sanctions ordered to be paid by enforcement action defendants.

1. Enforcement Activity

The Committee Staff measure: (a) the annual amount of enforcement activity in the United States as measured by the number of enforcement actions and (b) the total monetary sanctions imposed each year.

i. Number of Enforcement Actions

Figure 2 illustrates the number of enforcement actions brought each year from 2000 through 2024. Each vertical bar shows the combined actions brought by all of the agencies indicated in the legend.[205]

[205] OFAC was excluded from this analysis because in the early 2000's, OFAC brought a significant number of cases involving minimal financial penalties against individuals for activities such as travelling illegally to Cuba, which are outside the scope of the Report's focus on capital markets and the financial system. We also excluded notices from banking regulators to banks that certain individuals were automatically barred by statute from being affiliated with the bank because of legal problems. Data for the DOJ consists only of actions against financial institutions. For all other enforcement authorities, the number of enforcement actions includes all enforcement actions brought by the enforcement authority.

Figure 2: Number of Enforcement Actions Per Year

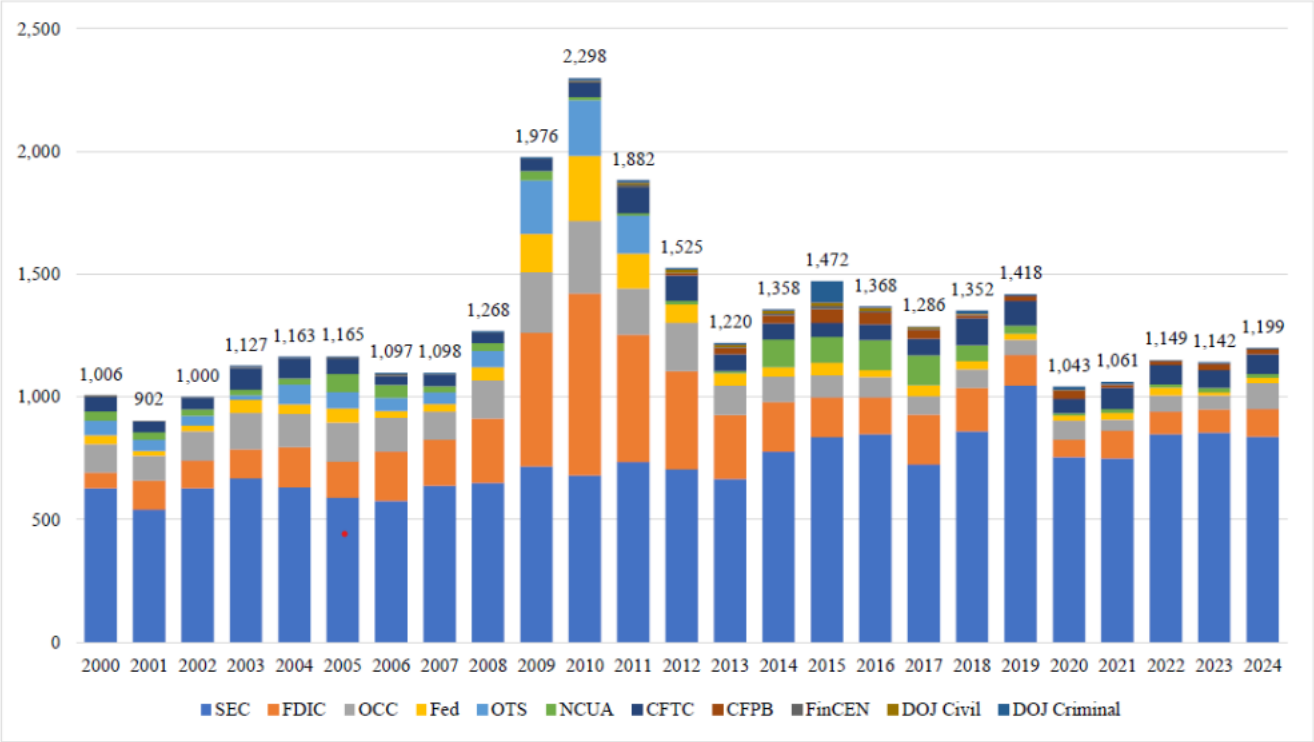


Figure 2 shows that the SEC is the most active enforcement authority, as measured by the number of actions brought each year. Such actions have generally risen from less than 600 cases in 2001 to about 850 cases in 2024. In all years except 2009-2012, the SEC was responsible for more than 50% of total enforcement actions across the analyzed agencies. The only other enforcement authorities that have brought more than 100 enforcement actions in a year are the FDIC, Fed, OCC, OTS, CFTC, and NCUA

There was a noticeable sharp increase in overall enforcement activity beginning in 2009, in the aftermath of the 2008 financial crisis. The trend was driven primarily by an increase in enforcement actions by the FDIC, Fed, OCC, and OTS. In 2010, enforcement actions by those enforcement authorities peaked at 742, 265, 296, and 226, respectively, and accounted for about two-thirds of enforcement activity. The activity of those agencies has declined since then, to 240 cases in total in 2024.

The CFTC, CFPB, and FinCEN bring comparatively fewer actions than other enforcement authorities. The CFTC has brought between about 40 to 110 cases per year, while the CFPB has brought between 10 and 60 cases per year since its inception. FinCEN typically brings fewer than 10 cases per year. In addition, DOJ criminal cases against financial institutions[206] typically number

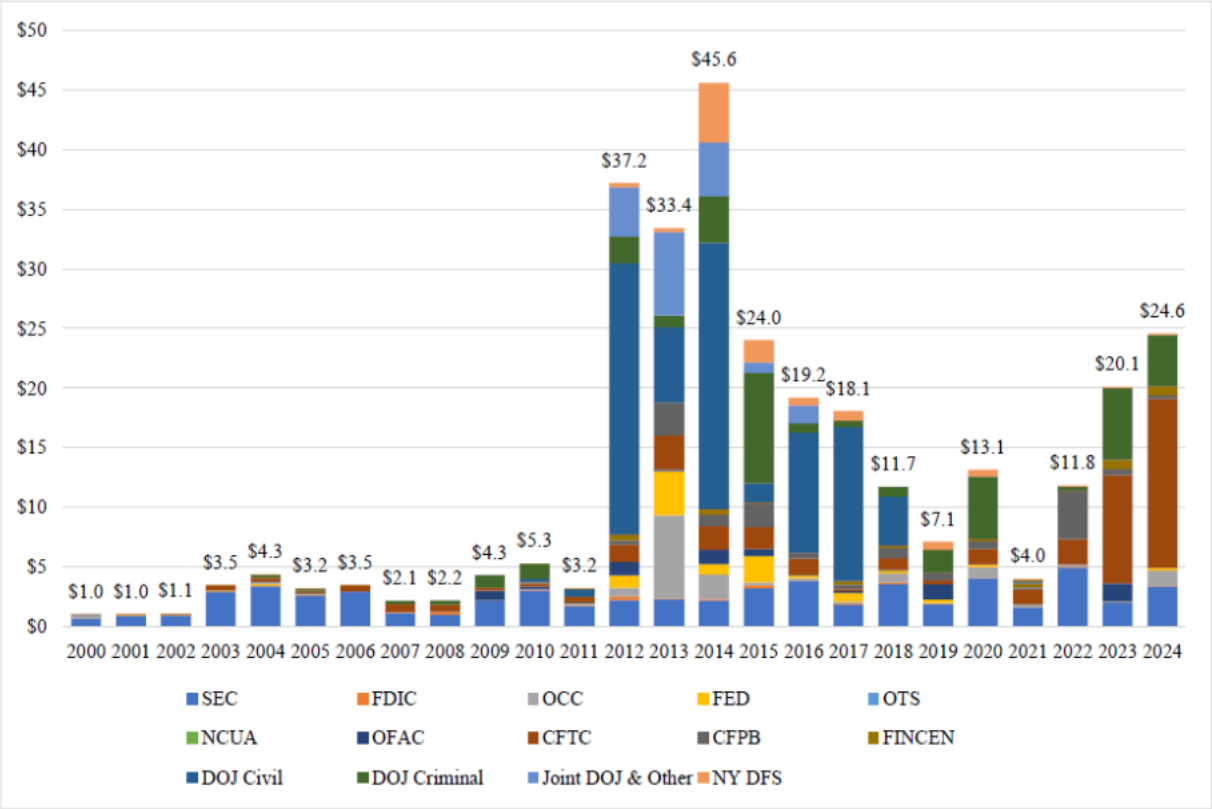
[206] DOJ criminal cases include cases brought by U.S. Attorney's offices and DOJ headquarters.

fewer than 15 per year, with the exception being 2015 in which 87 criminal matters were brought, mostly in connection with its investigation of Swiss tax shelters.

ii. Total Monetary Sanctions

A separate measure of enforcement activity is the total amount of monetary sanctions imposed in enforcement actions. **Figure 3** shows the aggregate amount of monetary sanctions ordered to be paid in actions brought by enforcement authorities, plus those imposed by the NY DFS, OFAC, and penalties obtained by states and others in joint actions with the DOJ.[207]

Figure 3: Total Monetary Sanctions (Billions of Dollars)



In most years, the SEC and CFTC are the enforcement authorities that impose the most monetary sanctions. While the SEC typically has imposed aggregate sanctions of between $1 billion to $5 billion per year (around $3.5 billion in the most recent year), the CFTC increased from roughly $450 million in 2006 to approximately $14.1 billion in 2024. However, since 2012, the DOJ has joined the SEC and CFTC as a leading enforcer by monetary sanctions imposed with

[207] The "Joint DOJ & Other" amounts are comprised of amounts awarded to states or to agencies like the FDIC, NCUA or FHA as receivers for failed institutions in actions settled or brought together with the DOJ action. The amounts awarded to receivers of failed institutions are not included in the individual agency amounts as they are not included in the enforcement actions on those agencies' websites because rather than acting as regulatory authorities in those instances, the agency is standing in the shoes of the failed institution asserting private legal claims.

annual totals exceeding $25 billion in 2012 and 2014 (from roughly 20 cases per year), exceeding $10 billion in 2015 and 2016, and exceeding $4 billion in each of the most recent two years.

Figure 3 shows a very large spike in the total monetary sanction amounts awarded after the 2008 financial crisis. The spike in monetary sanction begins in 2012, going from about $3 billion in 2011 to over $37 billion in 2012. The amounts peaked in 2014 at around $45 billion. The increase is driven by very large cases that settled matters arising from the financial crisis. For example, the $25 billion National Mortgage Settlement, discussed in **Appendix B**, occurred in 2012 and accounts for about 67% of the total in the Committee Staff's data for that year. Similarly, the $16.65 billion Bank of America referenced in Chapter 1 and described in **Appendix B** accounts for more than 33% of the monetary sanctions in 2014.

The spike in monetary sanctions in 2012-2017 was primarily driven by the DOJ civil and criminal actions against financial institutions. Given the relatively small number of DOJ cases shown in **Figure 2**, a very small number of cases drove the exponential growth in penalty amounts following the crisis.[208] **Figure 3** also shows large increases in the amounts imposed by banking regulators such as the OCC and Fed from 2012-2015. For example, in 2012-2015, Fed monetary sanctions ranged from around $850 million to over $3.6 billion, compared to only $85 million in 2011 and less than $1 million in 2010. During the 2012-2015 period, the Fed resolved a number of large matters, including the Independent Foreclosure Review, foreign exchange rigging, and LIBOR rigging cases.

After a general decline in total monetary sanctions from 2015 to 2021 (with the exception of 2020), the pattern appears to have reversed in the most recent years. In 2024, overall monetary sanctions climbed to $24.6 billion from only $4.0 billion in 2021.

2. Median and Mean Monetary Sanctions

Trends in the median and mean size of financial sanctions ordered against particular defendants in enforcement actions can be analyzed using case-level data. The median and mean size of monetary sanctions are particularly useful to observe differences in the approach taken by distinct types of regulators in "typical" cases. Median penalty amounts are determined by ranking penalty amounts from smallest to largest and taking the amount that falls in the middle of that ranked list. A mean penalty is the average penalty and is calculated by adding up all penalties and dividing by the number of defendants. Of course, mean penalties are impacted more directly by a few very large penalties than median penalties. Differences in median and mean amounts could demonstrate changes in the role of monetary sanctions to accomplishing enforcement's aims of deterrence and remediation.[209]

[208] Over 76% of the penalties from 2000-2017 are accounted for by the top 1% of cases and 97% by the top 10%.

[209] Differences could also result, among many reasons, because the enforcement authorities are bringing enforcement actions that are different in nature. One agency could be brining cases against more egregious types of misconduct. The data does not allow the Committee Staff to control for that possibility or others.

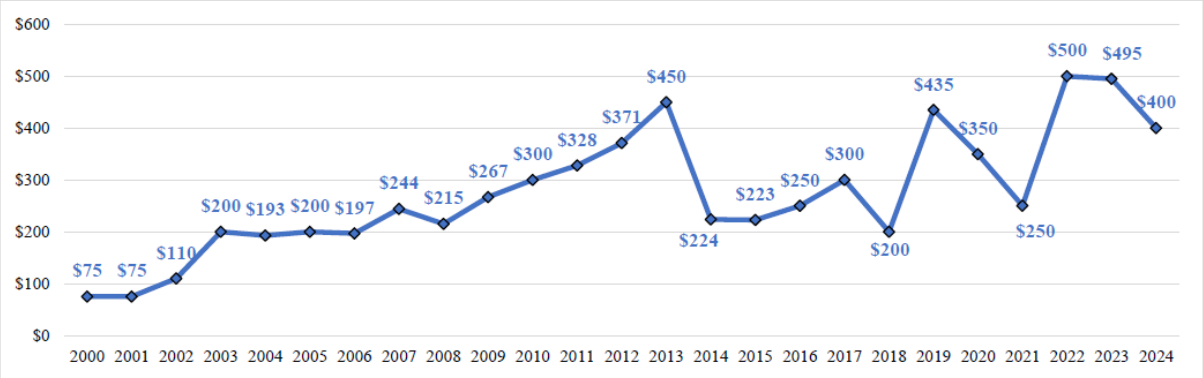
i. Median Monetary Sanctions by Enforcement Authority Category

Figure 4, below, shows the median monetary sanction against defendants in cases brought by capital markets regulators, banking regulators, and the DOJ in which a financial sanction was imposed.[210] It is useful to analyze median sanction amounts because while outlier cases with large monetary sanctions can affect the mean or average, the median amount reflects penalty amounts in an ordinary case.

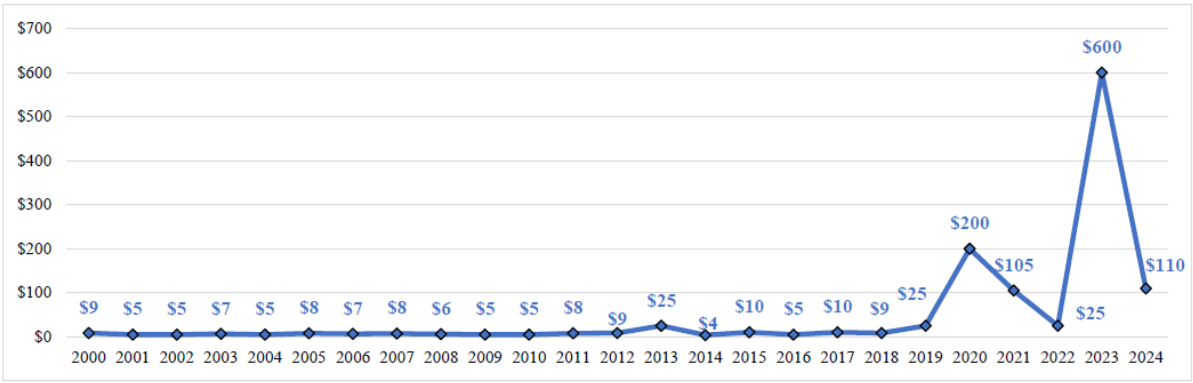
[210] Data on capital markets regulators and bank regulators includes all enforcement actions against institutions and individuals. DOJ data is comprised only of actions against financial institutions as outlined in Appendix D.

Figure 4: Median Monetary Sanctions

Panel A: Capital Markets Regulators Median Monetary Sanctions ($ thousands)



Panel B: Bank Regulators Median Monetary Sanctions ($ thousands)



Panel C: DOJ Criminal and Civil Median Monetary Sanctions ($ thousands)

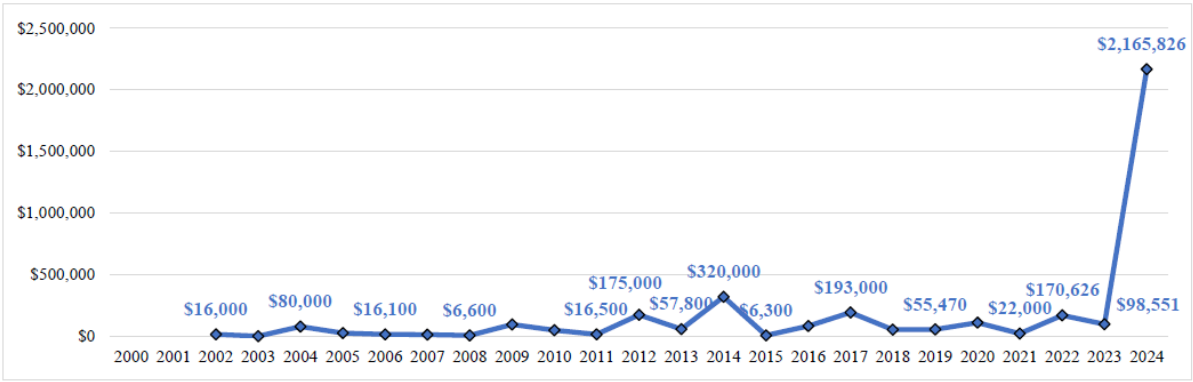


Figure 4 shows that the median monetary sanction imposed by capital markets regulators has increased over five-fold from 2000 to 2024.. The figure also shows that the median monetary sanction before 2020 was usually relatively small in cases brought by banking regulators (the record high before 2019 was $25,000, recorded in 2013). During the period from 2000–2024, with

the exception of 2022, the median has always been higher than $100,000. This sharp increase is probably caused by a decline in the number of small monetary penalties imposed during and after COVID-19 and a general rise in the size of monetary penalties imposed by all bank regulators, particularly against entity defendants.

This data shows that increases in overall monetary sanctions appear to be driven, in part, by higher monetary sanctions at the defendant-level, and not solely by an increase in the number of cases. Increasing median monetary sanctions could be a result of enforcement authorities increasing the amounts imposed over time in similar cases. Unfortunately, the lack of a standardized process to determine penalties does not allow the Committee Staff to evaluate this possibility.

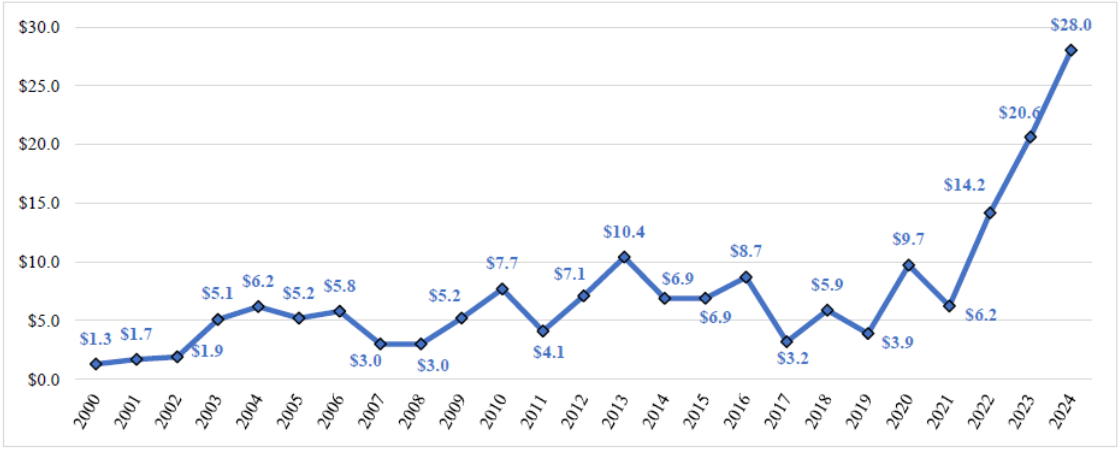
ii. Mean Monetary Sanctions by Enforcement Authority Category

Figure 5, below, presents the mean financial sanction against defendants in cases involving monetary sanctions brought by capital markets regulators, banking regulators, and the DOJ in financial system-related matters.[211] The mean monetary sanctions against defendants has also increased generally from 2000-2024.

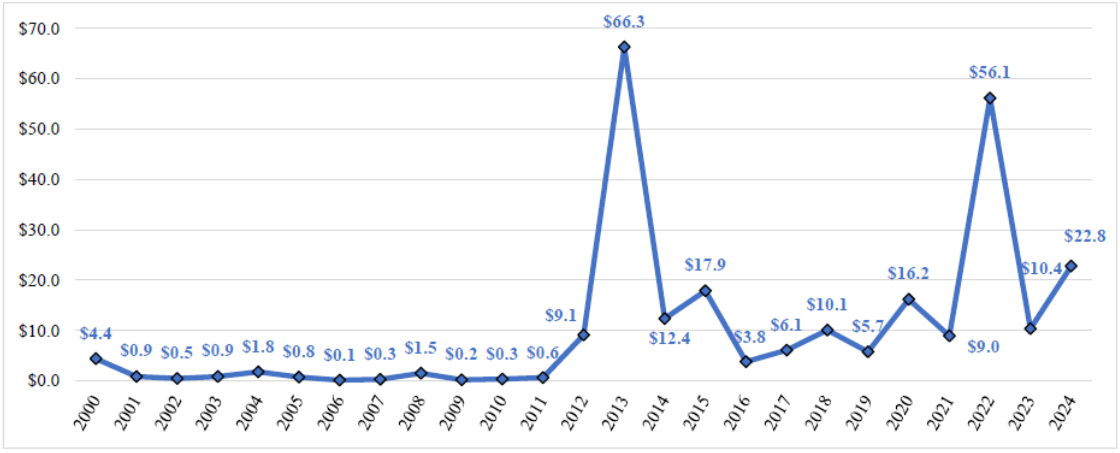
[211] Data on capital markets regulators and bank regulators includes all enforcement actions against institutions and individuals. DOJ data is comprised only of actions against financial institutions as outlined in Appendix D.

Figure 5: Mean Monetary Sanctions

Panel A: Capital Markets Regulators Mean Monetary Sanctions ($ millions)



Panel B: Bank Regulators Mean Monetary Sanctions ($ millions)



Panel C: DoJ Criminal & Civil Mean Monetary Sanctions ($ millions)

Capital markets regulators have seen an increase in mean monetary sanction amounts from around $1 million in 2000 to $28 million in 2024. The banking regulators had mean monetary sanctions below $1 million prior to 2011 before jumping to over $66 million in 2013. The mean amount from 2012-2015 was particular high, because the OCC and Fed reached agreements with multiple banks in several large settlements. These settlements included: a $500 million settlement with HSBC for money laundering in 2012, the Independent Foreclosure Review, which resulted in over $8.5 billion in financial sanctions, including direct payments to consumers and consumer relief in 2013, and foreign exchange and LIBOR rigging in 2014. Afterwards, the mean penalty imposed by bank regulators has fluctuated between around $4 billion and $22 billion, except in 2022, when the mean soared to over $56 billion, mainly due to a few outliers, such as the $3.7 billion sanction imposed on Wells Fargo by the CFPB.

Figure 5 also shows a spike in the mean DOJ sanctions in the last years, particularly affected by huge outliers such as the penalties imposed on Allianz in 2023 and Binance in 2024. .

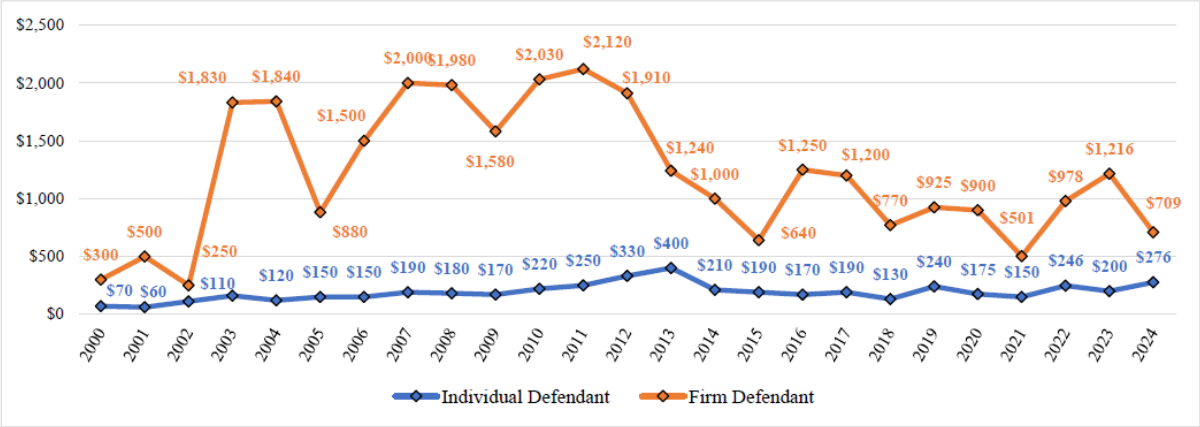
iii. Median Monetary Sanctions: Individual vs. Firm Defendants by Agency Category

Case-level data also permits an analysis of the median monetary sanctions imposed on individuals and firms and to observe trends for both types of defendants. **Figure 6** shows the median monetary sanction against an individual defendant and a firm defendant in cases brought by capital markets regulators and bank regulators in which monetary sanctions were imposed.[212]

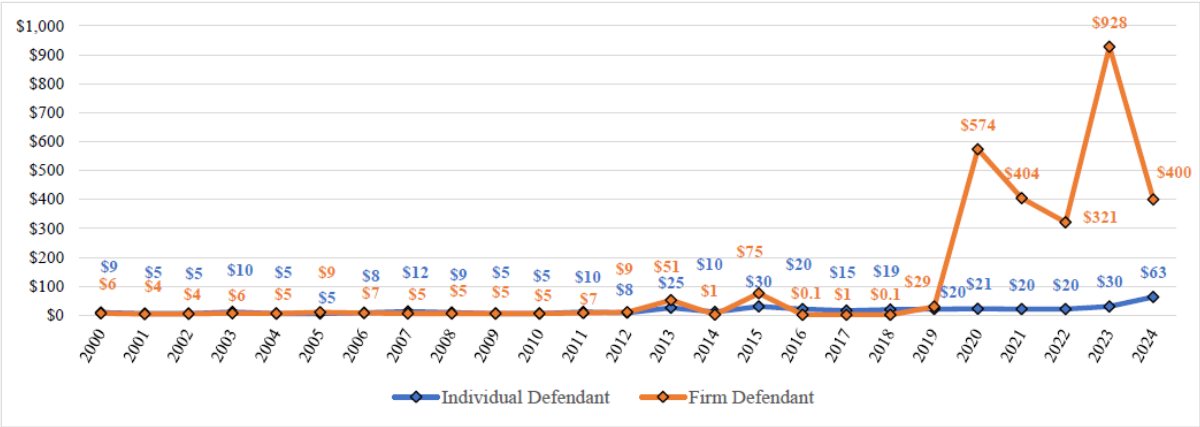
[212] DOJ is excluded because the case-level data we have is only with respect to firms.

Figure 6: Median Individual and Firm Monetary Sanctions

Panel A: Capital Markets Regulators Median Monetary Sanctions ($ thousands)



Panel B: Bank Regulators Median Monetary Sanctions ($ thousands)



The median penalty amount has increased for both individuals and firm defendants. Median individual monetary sanctions from capital markets regulators increased from $70,000 in 2000 to $276,000 in 2024 (almost a 300% increase) while median individual monetary sanctions from bank regulators increased from $9,000 in 2000 to $63,000 in 2024 (a 600% increase). Similarly, median firm monetary penalties from capital markets regulators increased from $300,000 in 2000 to $709,000 in 2024 (more than doubled) and median firm monetary sanctions from bank regulators jumped from $6,000 in 2000 to $400,000 in 2024 (a whooping 6566% increase).[213]

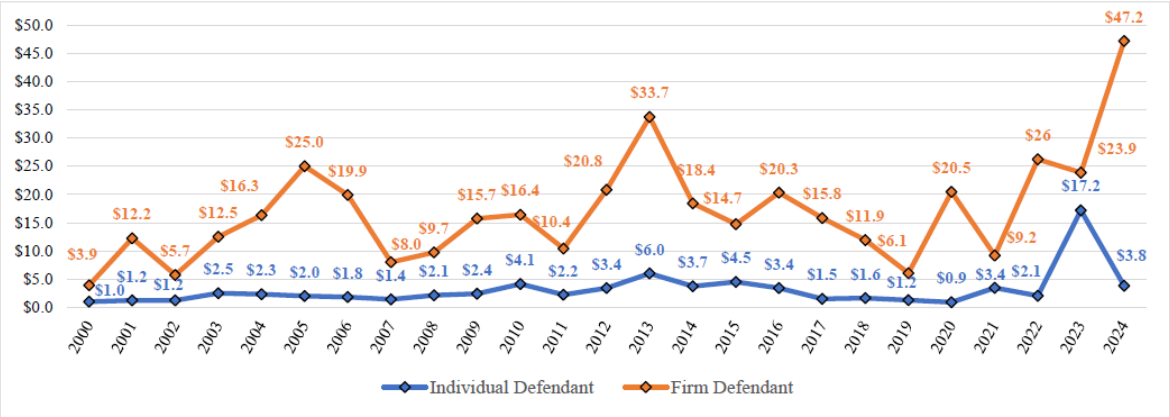
[213] The volatility in the median amount imposed on firms in the banking regulator category in 2014 and 2016 can be attributed to a large number of small dollar cases brought by the NCUA against credit unions for filing late reports. If one truncates the data from 2000 to 2013, banking regulators imposed a median fine against individuals of $9,000 in 2000 and $25,000 in 2013 (approximately a 175% increase) and $6,250 in 2000 and $50,000 in 2013 against firms (a roughly 700% increase).

iv. Mean Monetary Sanctions: Individual Vs. Firm Defendant by Agency Category

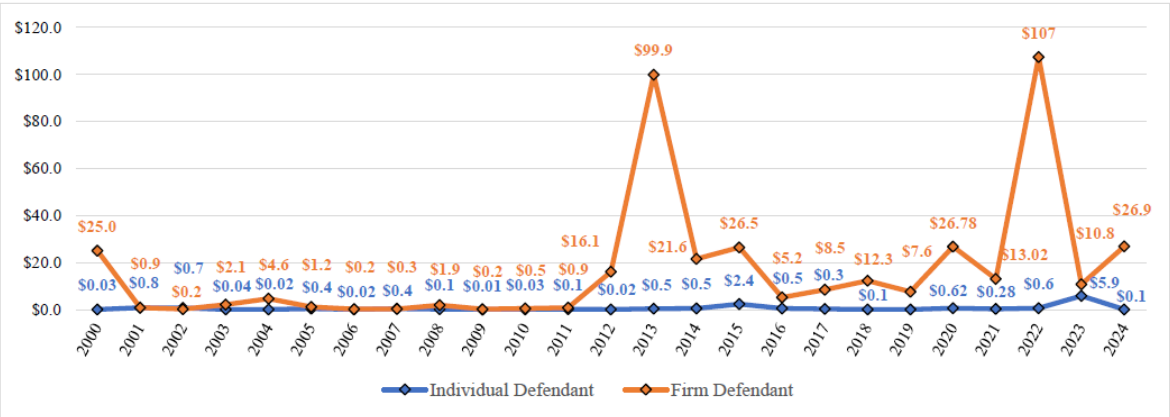
Our data also allows for an analysis of the mean monetary sanctions imposed on individual and firm defendants. **Figure 7** shows that mean monetary sanctions imposed by capital markets regulators against individuals increased almost four-fold from $1 million in 2000 to $3.8 million in 2024. Mean individual monetary sanctions from bank regulators also increased by more than threefold, from $30,000 in 2020 to $100,000 in 2024. As for firm defendants, mean monetary penalties from capital markets regulators increased from $3.9 million in 2000 to $47.2 million in 2024 (an increase of over 1,100%), while mean monetary sanctions from bank regulators remained largely unchanged, increasing only modestly from $25 million in 2000 to $26.9 million in 2024 (a 7.6% increase over 25 years). The mean monetary sanction by capital markets regulators against individual defendants increased from $1 million to $3.4 million and against firm defendants increased from $3.9 million to $20.3 million.

Figure 7: Mean Individual and Firm Monetary Sanctions

Panel A: Capital Markets Regulators Mean Monetary Sanctions ($ millions)



Panel B: Bank Regulators Mean Monetary Sanctions ($ millions)



C. Conclusion

Our 25-year data analysis shows increasing enforcement activity, significant growth in the aggregate amount of monetary sanctions being assessed, and increases in the median and mean monetary sanctions imposed on both individual and firm defendants facing monetary sanctions across different types of regulators. These trends warrant further study, discussion, and debate. They also highlight the importance of guideposts for determining penalties, so enforcement trends can be understood and policy can be adapted to respond. For example, has there been an increase in the frequency and severity of illicit behavior or simply an increase in the prioritization of enforcement actions and the size of monetary penalties for the same behavior? It is not possible to reach a conclusion as to the drivers of these enforcement trends because of the lack of guideposts to ensure that monetary penalties are set in a consistent manner for similar acts and over time.

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

Monetary sanctions should be used to advance the public interest, including to remediate harm caused to victims. In Chapter 3, we examine the existing policies and procedures for the use of monetary sanctions.

Part I describes the core constitutional and statutory framework governing the allocation of monetary penalties recovered by federal enforcement authorities. These laws provide that monetary penalties paid to the federal government should generally be deposited with the U.S. Treasury for Congress to appropriate with other sources of government revenue, such as tax revenue.[1] We also explain that enforcement authorities often do not recover the monetary sanctions owed to them and that this undercuts the deterrent and remedial effect of the imposed sanctions. We therefore recommend that enforcement authorities provide an annual accounting that discloses the amount of such monetary sanctions collected.

Part II explores instances where Congress has used its appropriations authority to earmark penalties collected by certain agencies for specific uses. In these cases, the funds are used as directed and never deposited with Treasury. These programs include: (a) investor and consumer relief funds, such as the SEC "Fair Funds" and the CFPB Civil Penalty Fund; (b) whistleblower programs, such as those conducted by the SEC and CFTC; and (c) the DOJ's Three Percent Fund. We conclude Part II with several recommendations to enhance the transparency of certain of these programs.

Part III examines how enforcement authorities, particularly the DOJ, can structure settlement agreements to direct funds to consumers and certain pre-approved third parties who were not necessarily victims. This practice is often referred to as "extraordinary" restitution and these allocations are made without subjecting these funds to Congress's appropriation authority. We set forth two recommendations that would impose some restrictions to prevent misuse and enhance transparency about how extraordinary restitution is spent.

Part IV describes the discretion state attorneys general have in spending settlement funds. In some states, attorneys general have broad legal authority to disperse settlement funds and in others, where the law is unclear, attorneys general have attempted to structure settlement agreements to delineate how the funds will be spent. The ultimate use of settlement funds by states is highly opaque. To address these concerns, we recommend that the states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds

[1] The states have differing practices. Some states require through constitutional or statutory provisions that collected penalties must be deposited into the state's general fund to be appropriated by the state legislature. *See* U.S. CHAMBER OF COMMERCE, *Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds* at 34-41 (2015), https://instituteforlegalreform.com/research/enforcement-slush-funds-funding-federal-and-state-agencies-with-enforcement-proceeds/http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf. Other states, however, allow the state attorney general to determine how to disperse penalties or to use penalties to fund other enforcement activities.

are spent; and (2) prohibiting third parties that receive state settlement funds, from using those funds to engage in political activities.

I. Constitutional and Statutory Provisions Requiring Collected Monies be Deposited with Treasury

A. The Constitution's Appropriations Clause

The U.S. Constitution vests the spending powers of the federal government in the hands of Congress.[2] Indeed, the Appropriations Clause establishes that money may not be withdrawn from the U.S. Treasury or spent without express Congressional authorization.[3] The framers granted Congress the power of the purse because they determined that it is the branch of government that is most representative of the people and therefore best positioned to allocate the nation's resources.[4] The courts have stated the Congress' appropriations power is "a bulwark of the Constitution's separation of powers."[5] Many state constitutions likewise vest such authority exclusively in the legislative branch.[6] Critically, for our purposes, federal enforcement authorities are not constitutionally permitted to spend money that they have collected from penalty assessments unless expressly authorized to do so by Congress.[7]

B. Statutory Provisions that Supplement the Appropriations Clause

Congress has fortified its constitutionally prescribed spending powers by adopting two laws limiting the ability of agencies to spend monies received from sources other than Congress, such as monies received from enforcement penalties.

First, the Anti-Deficiency Act of 1982 prohibits government agencies from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding . . . an appropriation."[8] In other words, an agency cannot spend government money that Congress has not expressly authorized.[9] Second, the 1982 Miscellaneous Receipts Act[10] requires that "an official or agency of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable."[11] The statutory provision closed a potential loophole in the Appropriations Clause and the Anti-Deficiency Act because an argument existed that those provisions only applied to funds that were actually deposited in the Treasury.[12] Under such an interpretation, an agency

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[2] U.S. CONST. art. I, § 9, cl. 7.
[3] Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care about Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 336 (2009).
[4] Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 740 (1978).
[5] Dep't of Navy v. FLRA, 665 F.3d 1339, 1347 (D.C. Cir. 2012).
[6] U.S. CHAMBER OF COMMERCE, *supra* note 1.
[7] U.S. CONST. art. I, § 9, cl. 7.
[8] 31 U.S.C. § 1341(a)(1)(A).
[9] Peterson, *supra* note 3, at 329.
[10] 31 U.S.C. § 3302.
[11] *Id*. § 3302(b).
[12] Peterson, *supra* note 3, at 331, 340.

could receive money and spend it before depositing it in the Treasury. The Miscellaneous Receipts Act precludes that possibility.

As a consequence of Congress' constitutional and statutory spending powers, monies received by an agency are generally deposited with the Treasury and pooled with other government revenue, such as tax revenue, which are then used to fund the government's expenditures.

We believe that in most circumstances the best policy is for Congress to control how monetary sanctions are spent, especially those that are not distributed to victims of wrongdoing. Members of Congress are directly accountable to the public through the ballot box. Therefore, if the public disapproves of how money being collected by the government is spent, then the public has a direct outlet to voice that frustration. In addition, the amount appropriated by Congress to different programs is publicly disclosed and thus there is some transparency about how money is being spent.

C. Issue of Collecting Monies to be Deposited into the Treasury

Enforcement authorities can only deposit money into the Treasury if they have successfully collected money owed from an enforcement action. In practice, defendants can fail to pay their debts to the government for several reasons, but the most common reason is that defendants simply do not have the ability to pay.[13]

Collection of monetary sanctions has been a historical problem for the SEC. For fiscal year 2018, for example, the SEC collected only $1.1 billion of the $3.9 billion it was ordered to be paid, or 28%,[14] and in the three fiscal years that ended on September 30, 2018, the SEC collected approximately 50% of the money it was entitled to.[15] The SEC has not released any more recent data. Similarly over a decade long-period, the CFTC only was able to collect roughly 50% of the civil monetary fines ordered against its enforcement targets.[16]

Congress has been cognizant of the difficulty and importance of collecting on unpaid debts owed to the government. As such, the DOJ is authorized to collect debts that are referred to it by

[13] Michael Rothfeld & Brad Reagan, *Prosecutors Are Still Chasing Billions in Uncollected Debts*, WALL ST. J. (Sept. 17, 2014), https://www.wsj.com/articles/prosecutors-are-still-chasing-97-billion-in-uncollected-debts-1410984264.

[14] U.S. SEC. & EXCH. COMM'N, *Fiscal Year 2020 Congressional Budget Justification and Annual Performance Plan* at 127 (2019), https://www.sec.gov/files/secfy20congbudgjust.pdf. https://www.sec.gov/files/secfy19congbudgjust.pdf

[15] *Id*.

[16] Rothfeld & Reagan, *supra* note 13; *see also* COMMODITY FUTURES TRADING COMM'N, *Audit of the CFTC Financial Statements* at 17 (2023), https://www.oversight.gov/sites/default/files/documents/reports/2023-12/OIGFinancialStatementAudit111523.pdf ("historical experience has indicated that a high percentage of [fines and penalties] receivables prove uncollectible.").

other agencies, such as the SEC or CFTC, through legal actions.[17] For example, in fiscal 2023, the DOJ was seeking to collect on 97 debts owed to the CFTC totaling over $163 million.[18]

The DOJ is required to provide an annual report to Congress accounting for the referrals it received and its success at recovering funds owed under those referrals.[19] For example, in fiscal year 2023, the DOJ disclosed that it had received referrals to collect on over $6 billion of money owed to the government and collected nearly $7 billion during the same period.[20] However, the SEC, CFTC, and other enforcement authorities are not required to disclose their success rates for collecting monetary sanctions owed to them. It is important for the public to understand what percentage of monies owed to the government are being collected because uncollected funds undermine the deterrent effect of the sanctions and hinder the ability of the government to remediate harm caused by the wrongdoing. Additionally, public disclosure of the policies enforcement authorities follow to collect monetary sanctions will allow the public to assess the sufficiency of collection processes. Transparency in the amount of monetary sanctions collected by an enforcement authority and in that enforcement authority's collections policy will also increase accountability of enforcement authorities and incentivize greater efforts to collect unpaid sanctions.

- **Recommendation 7:** Enforcement authorities should provide an annual accounting that discloses the amount of monetary sanctions assessed through orders, judgments, and settlements, and the amount of such monetary sanctions collected.

[17] *See* U.S. DEP'T JUST., *Fiscal Year 2023: Annual Civil Debt Collection Activity Report to Congress* at 2 (Jan. 2024), https://www.justice.gov/jmd/media/1370026/dl [hereinafter *2023 Debt Collection Annual Report*].

[18] https://www.justice.gov/jmd/media/1370026/dl*Id.* at 21.

[19] *Id*. at 8.

[20] *Id.* at 5-6.

II. Congressionally Approved Statutory Programs for the Use of Penalties

In certain instances, Congress has authorized agencies to distribute or spend money received on specific schemes or programs operated by the relevant agency. In these situations, money is not deposited into the Treasury, but into another specified fund, and is therefore not subject to Congress' typical appropriations process. Part II explains three such programs: (1) investor and consumer compensation funds, including SEC "Fair Funds" and the CFPB's Civil Penalty Fund; (2) whistleblower programs, most notably those conducted by the SEC and CFTC; and (3) the DOJ "self-funding" system, the Three Percent Fund.

A. Increasing Transparency on the Use of Monetary Sanctions

Before delving into the specifics of the Congressionally approved programs, we first want to highlight more generally the lack of transparency that surrounds the amount of money used in such programs. For example, the DOJ is not required to and the DOJ does not regularly disclose to the public the amount of sanctions allocated to the Three Percent Fund as compared to the funds deposited with the Treasury. Similarly, the SEC is not required to provide an annual accounting of the amount of funds disbursed in the aggregate through the Fair Funds program, and what amounts are sent to the Treasury. The public's understanding of and confidence in how monetary sanctions are used could be greatly improved if enforcement authorities were required to provide an annual accounting. Such an accounting would allow for a more effective evaluation of individual programs that Congress has authorized. It would also facilitate efforts to analyze the enforcement system at a macro level to understand what proportion of monetary sanctions are being used to achieve remedial aims, or are deposited with Treasury to be appropriated by Congress.

- **Recommendation 8:** Each federal enforcement authority should provide an annual accounting of how monetary sanctions imposed in their enforcement actions are used. The accounting should include: (1) the amount of monetary sanctions that the enforcement authority collected and deposited with the Treasury; and (2) the amount of monetary sanctions that the enforcement authority directed to Congressionally authorized programs (itemized by program).

B. Investor and Consumer Compensation Funds

A key goal of enforcement is to remediate the harm caused to victims of wrongdoing. That can be achieved by compensating victims with monetary sanctions that are obtained and collected by enforcement authorities. The SEC "Fair Funds" and CFPB Civil Penalty Fund exist to do just that.

1. SEC Fair Funds

i. SEC Fair Funds Statutory Authority and the Agency's Implementation

The SEC's "Fair Funds" authority has expanded and evolved in three stages.

It was created in 1990 when Congress gave the SEC discretion to collect disgorged ill-gotten gains in enforcement actions and to pay them to investors.[21] Then in 2002, the Sarbanes-Oxley Act granted the SEC the authority to distribute civil monetary penalties (i.e., fines for illicit conduct) to investors as compensation for harm suffered from the unlawful conduct.[22] However, a distribution of civil monetary penalties could only be made when the SEC also disgorged ill-gotten gains from the same defendant for distribution to victims. Finally, in 2010, Section 929B of Dodd-Frank further empowered the SEC to create a distribution fund (i.e., "Fair Fund") to distribute civil penalties to injured investors, even in the absence of any collection of disgorgement amounts.[23]

The SEC retains the discretion to determine whether to establish a Fair Fund in a specific matter.[24] Under the SEC's rules, the SEC does not need to pay out any monetary sanctions collected to victims of wrongdoing and instead could choose to deposit money it collects in the Treasury.[25] Although the SEC's Rules of Practice and Enforcement Manual do not provide guidance about the circumstances in which it is appropriate to create a Fair Fund, the SEC's Assistant Director of the Office of Distributions has said that the SEC considers: (1) whether there is an identifiable class of investors that suffered identifiable harm; and (2) whether the amount of money likely to be collected is large enough to justify a distribution given the number of victims.[26]

If a Fair Fund is created, a proposed fund plan detailing procedures and eligible fund beneficiaries is drafted. It is then submitted for public notice-and-comment, and ultimately approved or disapproved by the SEC Commissioners.[27]

ii. The SEC's Use of its Fair Funds Authority

The SEC has actively and regularly used its Fair Funds authority. The most recent comprehensive study of the SEC's use of its Fair Funds powers was conducted by Professor Urska

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[21] 15 U.S.C. § 78u-2(e) ("In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.").

[22] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 308, 116 Stat. 746, 784 (2002) (codified at 15 U.S.C. § 7246), *amended by* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929B, 124 Stat. 1376, 1852 (2010).

[23] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929B, 124 Stat. 1376, 1852 (2010) ("If . . . the Commission obtains a civil penalty against any person for a violation of [the securities] laws . . . the amount of such civil penalty shall . . . be added to and become part of a disgorgement fund *or other fund* established for the benefit of the victims of such violation.").

[24] In an administrative proceeding, the SEC can order the creation of a fair fund. In a federal court proceeding, the SEC can move for the court to order the creation of a fair fund.

[25] U.S. SEC. & EXCH. COMM'N, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans* at Rule 1102 (Sept. 2019),https://www.sec.gov/about/rules-of-practice-2016.pdf https://www.sec.gov/about/rules-of-practice-2019-09.pdf [hereinafter *SEC Rules of Practice*].

[26] *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Funds Distributions*, 67 (2) STAN. L. REV. 331, 342 (2015).

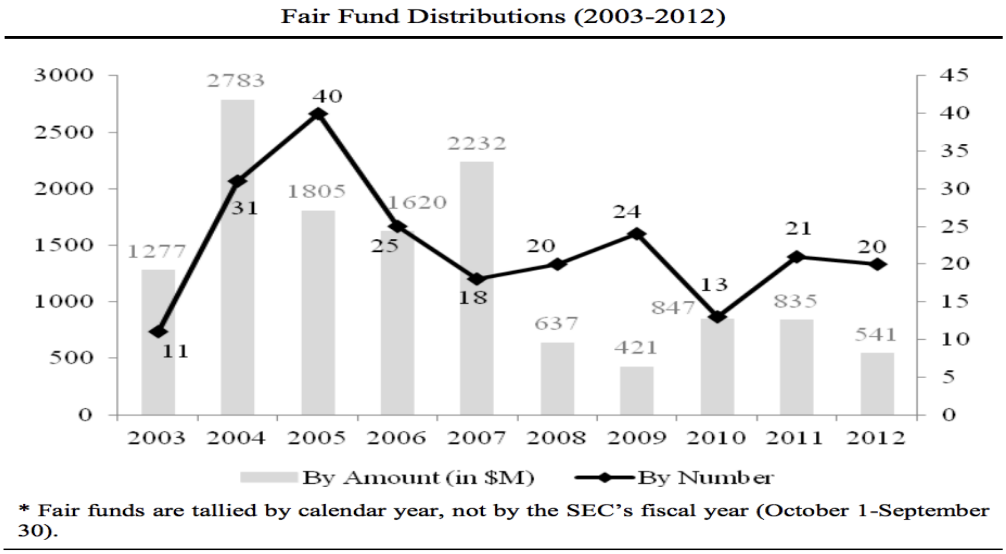
[27] SEC Rules of Practice, *supra* note 25, at Rule 1101, 1103–04.

Velikonja of Georgetown University Law Center in a *Stanford Law Review* article.[28] Professor Velikonja examined all SEC distribution funds created from July 25, 2002 (the date the Sarbanes-Oxley provision took effect) until December 31, 2013. She found that during that time, the SEC ordered $14.46 billion to be distributed to harmed investors,[29] which accounted for about 75% of the monetary sanctions the SEC collected.[30] The size of the total distributions from particular Fair Funds has ranged from $24,959 to $816.5 million.[31]

The figure, below, from Professor Velikonja's paper, shows that the SEC has distributed hundreds of millions of dollars a year to victims. From 2003 through 2012, the study found that the SEC distributed nearly $13 billion from Fair Funds. In the last five years of the data period (2008-2012), the SEC distributed money from about 20 funds per year. For fiscal years 2017-2019, the SEC published data on the money distributed to harmed investors from Fair Funds. In those three years, a total of over $2.6 billion was distributed from 89 Fair Funds.[32] Unfortunately, more recent data is not available as after fiscal year 2019 the SEC reverted to its prior practice, and no longer regularly collects and releases such data on an annual basis. While in fiscal years 2023 and 2024 the SEC did report the total amount of funds returned to harmed investors, it did not differentiate between Fair Funds and disgorgement funds.[33]

[28] *See* Velikonja, *supra* note 26.
[29] *Id*. at 350.
[30] *Id*. at 334.
[31] *Id*.
[32] U.S. SEC. & EXCH. COMM'N, DIV. ENF'T, *Annual Report* (2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf.; U.S. SEC. & EXCH. COMM'N, DIV. ENF'T, *Annual Report* (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf; U.S. SEC. & EXCH. COMM'N, DIV. ENF'T, *Annual Report* (2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf.
[33] U.S. SEC. & EXCH. COMM'N, *Press Release: SEC Announces Enforcement Results for Fiscal Year 2023* (Nov. 14, 2023); http://sec.gov/newsroom/press-releases/2023-234; U.S. SEC. & EXCH. COMM'N, *Press Release: SEC Announces Enforcement Results for Fiscal Year 2024* (Nov. 22, 2025), https://www.sec.gov/newsroom/press-releases/2024-186.

Figure 8: SEC Fair Funds Activity



2. CFPB Civil Penalty Fund

i. CFPB Consumer Protection Fund Statutory Authority and the Agency's Implementation

Unlike the SEC, Section 1017 of the Dodd-Frank Act *requires* the CFPB to deposit all civil monetary penalties into the Consumer Financial Civil Penalty Fund ("**Civil Penalty Fund**").[34] The Civil Penalty Fund is used as a pool of cash to compensate victims injured by activities for which civil penalties were imposed.[35]

Victims eligible to receive compensation out of the Civil Penalty Fund are persons that: (1) have suffered harm from misconduct for which a civil monetary penalty has been imposed through a final court or CFPB order,[36] (2) suffered uncompensated harm (i.e., the victim must not have been fully compensated and is not reasonably expected to be fully compensated through other legal actions),[37] and (3) to whom it would be practicable to make a payment (i.e., harm is reasonably calculable and it is administratively feasible to make a payment to them).[38]

Section 1017 and CFPB rules provide that all the civil monetary penalties collected by the CFPB be *pooled together* in the Civil Penalty Fund for victim compensation.[39] Thus, the penalties collected from one defendant can be used to compensate the victims of another defendant's

[34] 12 U.S.C. § 5497(d)(1). The CFPB can order restitution. Restitution is not placed into the Civil Penalty Fund but paid to the victims.
[35] *Id.* § 5497(d)(1)-(2).
[36] 12 C.F.R. § 1075.103 (2013).
[37] *Id.* § 1075.104(a)-(b).
[38] CONSUMER FIN. PROT. BUREAU, *Consumer Financial Civil Penalty Fund*, 78 FED. REG. 26,489, 26,493-94 (May 7, 2013), https://www.federalregister.gov/documents/2013/05/07/2013-10320/consumer-financial-civil-penalty-fund.
[39] 12 U.S.C. § 5497(d); 12 C.F.R. § 1075.100-.110.

misconduct. This is another key difference between the CFPB Civil Penalty Fund and SEC Fair Funds, which are each set up with respect to a specific case.

CFPB rules provide that the Civil Penalty Fund is run by a Fund Administrator.[40] Every six months, the Fund Administrator determines the amount of money to allocate to various classes of victims out of the Civil Penalty Fund.[41] If the amount of uncompensated harm among all classes of victims exceeds the amount of money in the Civil Penalty Fund, priority is given to classes of victims who suffered harm from the most recent enforcement actions closed during that period.[42]

Unused funds can remain in the Civil Penalty Fund for distribution to victims in subsequent periods[43] or be allocated as grants to consumer education and financial literacy programs.[44] Funds used on consumer education and financial literacy programs can be spent for the benefit of consumers who were not victims of any wrongdoing. Rather, they are more preventative in nature, as the hope is that more informed, educated, and financially literate consumers may avoid schemes, scams, or deceptive practices. In June 2025, the CFPB announced that it did not intend to allocate future funds to consumer education and financial literacy programs and proposed to remove references to these programs from its rules.[45] The CFPB's rationale was that the existing rules do not provide enough guidance and transparency around the CFPB's exercise of discretion to award grants for these programs, and that the CFPB intends to consider revised procedures in relation to such grants.[46]

ii. The CFPB's Use of the Civil Penalty Fund

Since its creation through the end of fiscal year 2024, the CFPB has deposited approximately $3.6 billion into the Civil Penalty Fund and paid out approximately $3.5 billion in victim compensation and distributed approximately $29 million in consumer education and literacy program allocations.[47] The individual recipients of distributions from the Civil Penalty Fund are not publicized. The annual data through the close of the fiscal year ended September 30, 2024 is produced in the table below.

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[40] 12 C.F.R. § 1075.102.
[41] *Id*. § 1075.105(b).
[42] *Id*. § 1075.106(b).
[43] CONSUMER FIN. PROT. BUREAU, *supra* note 38 at 26,491.
[44] 12 U.S.C. § 5497(d)(1)-(2).
[45] CONSUMER FIN. PROT. BUREAU, *Consumer Financial Civil Penalty Fund Rule Amendment*, 90 FED. REG. 25,904 (Jun. 18, 2025), https://www.govinfo.gov/content/pkg/FR-2025-06-18/pdf/2025-11248.pdf.
[46] *Id*.
[47] CONSUMER FIN. PROT. BUREAU, *Financial Report of the Consumer Financial Protection Bureau* (Nov. 14, 2024), https://files.consumerfinance.gov/f/documents/cfpb_financial-report-fy-2024.pdf.

Table 7: Accounting of CFPB Civil Penalty Fund

Activity	Amount	Amount
Cash Collections:		
FY 2012	$32,000,000	
FY 2013	$49,520,001	
FY 2014	$77,502,001	
FY 2015	$183,120,079	
FY 2016	$182,138,760	
FY 2017	$42,488,801	
FY 2018	$522,761,388	
FY 2019	$131,171,664	
FY2020	$34,189,709	
FY 2021	$61,411,211	
FY 2022	$172,520,004	
FY 2023	$1,918,920,125	
FY 2024	$169,954,725	
Total Cash Collections		**$3,577,698,469**
Less Allocations:		
Victim Compensation		
FY 2013	$10,488,815	
FY 2014	$20,803,560	
FY 2015	$158,827,932	
FY 2016	$130,696,406	
FY 2017	$161,415,457	
FY 2018	$69,582,179	
FY 2019	$119,852,385	

FY 2020	$11,354,672	
FY 2021	$207,089,843	
FY 2022	$177,081,630	
FY 2023	$417,443,832	
FY 2024	$2,048,801,727	
Total Allocations to Victim Compensation		**$3,533,438,439**
Consumer Education and Financial Literacy Programs		
FY 2013	$13,380,000	
FY 2014	$0	
FY 2015	$0	
FY 2016	$15,432,809	
FY 2017–2024	$0	
Total Allocations to Consumer Education and Financial Literacy Programs		**$28,812,809**
Total Allocations		**$3,562,251,248**
Less Administrative Set-aside[48]		
FY 2013	$1,573,322	
FY 2015	$500,000	

[48] The CFPB Financial Report for FY 2015 excludes a line item for FY 2014 set-aside administrative expenses. *See* CONSUMER FIN. PROT. BUREAU, *Financial Report of the Consumer Financial Protection Bureau* (Nov. 16, 2015), http://files.consumerfinance.gov/f/201511_cfpb_report_fiscal-year-2015.pdf.

FY 2016	$2,500,000	
FY 2017	$1,000,000	
FY 2018	$0	
FY 2019	$500,000	
FY 2020	$0	
FY 2021	$4,000,000	
FY 2022	$0	
FY 2023	$2,500,000	
FY 2024	$44,000,000	
Total Available for Future Allocation		**$118,900,160**

3. Policy Considerations for the SEC and CFPB Investor and Consumer Compensation Funds

The rationale behind the SEC Fair Funds and CFPB Civil Penalty Fund – the compensation of harmed investors and consumers – is consistent with one of the core aims of enforcement systems, remediation. In addition, attempting to ensure that victims are made whole for their losses may help instill public confidence in the overall enforcement system. We therefore believe these programs serve a valuable function.

However, the transparency of the SEC's use of its Fair Funds authority could be improved. Specifically, the SEC is not required to disclose the total amount of distributions made per year under its Fair Fund authority and what percentage of the monies it collects each year are spent on Fair Funds distributions. To obtain annual data for her paper, Professor Velikonja had to review individual Fair Funds orders. Annual data about Fair Funds distributions could help the public evaluate the effectiveness of the SEC's Fair Funds authority.

- **Recommendation 9:** The SEC should publicly disclose annually the amount of funds distributed through its Fair Funds authority and the amount of money in Fair Funds that remains available for distribution (on both an aggregate and individual fund basis).

The CFPB Civil Penalty Fund also has a few issues that warrant attention. First, the CFPB is not limited in how much money it can hold in the Civil Penalty Fund at one time or how much it can use on financial education and literacy programs. While CFPB rules provide that compensation should be paid out to victims to whom it is practical to make payments,[49] the CFPB

[49] 12 C.F.R. § 1075.106.

may not be properly incentivized to ensure it is effectively and efficiently identifying or locating victims to use the funds to provide compensation.

Second, while the CFPB is required to provide annual reports on how much money has been deposited into the Civil Penalty Fund and how much money has been paid out, there do not appear to be current efforts by Congress, the GAO, or others to evaluate the effectiveness of the program, which has existed for only a little over 10 years. While the Fed Office of Inspector General did release a report on the Civil Penalty Fund in June 2024, the report was limited to studying the process for allocating funds to consumer education and financial literacy and investigating whether the CFPB had effective processes for overseeing contractors who distribute payments to victims.[50]

- **Recommendation 10:** The CFPB should conduct a retrospective analysis of the Civil Penalty Fund that evaluates whether: (1) the Civil Penalty Fund is effectively compensating injured consumers; (2) victims are being adequately identified; and (3) there should be a cap on the total amount of money that can remain in the Civil Penalty Fund (with the balance distributed to the Treasury) to encourage efficient distribution of funds to injured consumers, rather than allowing the CFPB to retain the funds indefinitely.

C. Whistleblower Programs

In certain instances, Congress has authorized enforcement authorities to award payments to individuals who provide information that assists the agency in enforcing the law. Whistleblower awards create incentives for individuals with relevant information of wrongdoing to disclose that information, which may help uncover misconduct that could otherwise go undetected and enable enforcement authorities to more efficiently use investigative and enforcement resources.[51] Thus, the whistleblower programs serve a deterrence function. Prominent examples of whistleblower programs are those run by the SEC and the CFTC. FinCEN and the DOJ Criminal Division have also recently established whistleblower programs, which are still in nascent stages.

1. SEC and CFTC Whistleblower Programs

As part of the Dodd-Frank Act, Congress required the SEC and CFTC to establish "whistleblower" programs. The term "whistleblower" generally refers to an employee of an organization who becomes aware of illicit conduct at the organization and reports this misconduct to authorities. The SEC and CFTC whistleblower programs require those agencies to provide bounties to whistleblowers who report information to the agencies that allow them to levy monetary sanctions for violations of the laws they enforce.[52]

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[50] CONSUMER FIN. PROT. BUREAU, *Audit Report: The CFPB Effectively Designed a Process to Allocate Surplus Civil Penalty Funds and Monitored Contractor Payments to Victims* (Jun. 10, 2024), https://oig.federalreserve.gov/reports/cfpb-civil-penalty-fund-jun2024.pdf.

[51] U.S. SEC. & EXCH. COMM'N, *Office of the Whistleblower*, https://www.sec.gov/whistleblower (last visited Mar. 16, 2026).

[52] *See* 15 U.S.C. § 78u-6; 7 U.S.C. § 26.

a. Authority for Whistleblower Programs and Agency Implementation

Sections 922 and 748 of the Dodd-Frank Act established whistleblower funds at the SEC and the CFTC, respectively.[53] The SEC and CFTC are *required* to deposit money into their respective whistleblower funds from monetary sanctions that they collect that are not paid out to victims, if the balance of the funds fall below specified thresholds. The thresholds are $300 million for the SEC's Investor Protection Fund and $100 million for the CFTC's Customer Protection Fund.[54]

The statute and rules governing distributions from the SEC and CFTC whistleblower funds are very similar. The key provisions of the SEC whistleblower program are summarized to illustrate the statutory scheme.

Exchange Act Section 21F, established by Section 922 of the Dodd-Frank Act, requires the SEC to pay an award to a whistleblower if the whistleblower *voluntarily*[55] provides *original information*[56] to the SEC that leads to the SEC *obtaining monetary sanctions exceeding $1 million*.[57] The *amount* that the SEC must pay to someone who qualifies as a whistleblower must not be less than 10% and not more than 30%, of the total monetary penalties that have been collected in the case.[58] In addition, the SEC rules provide that a whistleblower must be an individual and that the individual must provide the SEC with information that relates to a possible violation of securities laws.[59]

The statute explicitly provides the SEC with discretion to determine the size of the appropriate award (within the statutory range) for an individual whistleblower.[60] However, in determining the size of an award the SEC is statutorily required to take into account: (a) the significance of the information provided by the whistleblower to the success of the enforcement action; (b) the degree of assistance the whistleblower provided; (c) the SEC's interest in deterring violations of securities laws by making awards to whistleblowers; and (d) any other factors the SEC deems relevant in its rules and regulations.[61] The size of the award granted by the SEC is not appealable.[62]

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[53] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, §§ 748, 922, 124 Stat. 1376, 1739, 1841 (2010).
[54] 15 U.S.C. § 78u-6(g); 7 U.S.C. § 26.
[55] The statute leaves the meaning of "voluntary" undefined. The SEC's rules define the term broadly such that a person is deemed to have voluntarily provided information as long as the SEC or other regulatory authorities did not directly ask the individual for information. 17 C.F.R. § 240.21F-4(a).
[56] SEC rules require that original information be derived from the whistleblowers own "independent knowledge" or "independent analysis" and not from publicly available sources. § 240.21F-4(b). The whistleblower must be the "original source" of the information as well. *Id*.
[57] 15 U.S.C. § 78u-6(b). Monetary sanctions include penalties, disgorgement and interest.
[58] 15 U.S.C. § 78u-6(b).
[59] 17 C.F.R. § 240.21F-2(a).
[60] 15 U.S.C. § 78u-6(c).
[61] *Id*.
[62] *Id*. § 78u-6(f).

The statutory provisions governing the SEC and CFTC whistleblower programs do not provide for much transparency about individual awards. In fact, the statute prohibits the agencies from disclosing information that could reasonably lead to the identification of the whistleblower.[63] This provision was intended to protect whistleblowers from retaliation.

b. Use of the SEC and CFTC Whistleblower Programs

Since their implementation, the whistleblower programs have become important sources of enforcement information for the agencies, particularly for the SEC. Indeed, former SEC Chair White stated that the SEC has received high-quality tips through the program and that whistleblowers have provided the SEC with highly technical analyses of evolving fraud schemes, identified additional witnesses for enforcement actions, and explained documents to the SEC to enhance its understanding of cases.[64] Subsequent SEC Chairs, including Jay Clayton and Gary Gensler, have also broadly acknowledged the benefits of the whistleblower program.[65]

Scholarly work supports Chair White's observation. For example, Professors Call, Martin, Sharp and Wilde found that whistleblowers lead to faster discovery of financial misconduct and higher monetary penalties in enforcement actions.[66] Professors Dyck, Morse and Zingales also found that employees can play a key role in fraud detection.[67] In studying over 200 cases of alleged fraud at U.S. companies from 1996 to 2004, the authors found that employees revealed the same percentage of alleged frauds as the SEC and company auditors combined.[68] They also found that individuals who have access to inside information, like employees, are more likely to detect and expose fraud, particularly in smaller cases.[69] Finally, they found that monetary incentives motivate people with information to come forward and divulge their knowledge.[70]

The SEC has awarded more than $2.2 billion in awards to nearly 500 individual whistleblowers since the program began.[71] In fiscal year 2025, the SEC received approximately 27,000 tips and awarded more than $60 million to 48 individual whistleblowers.[72] The table below shows the amount of whistleblower awards granted in fiscal years 2020-2025. We also note that

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[63] *Id.* § 78u-6(h)(2); 7 U.S.C. § 26(h)(2).

[64] Chair Mary Jo White, *The SEC as the Whistleblower's Advocate* (Apr. 30, 2015), https://www.sec.gov/newsroom/speeches-statements/chair-white-remarks-garrett-institute.

[65] U.S. SEC. & EXCH. COMM'N, *Press Release: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program* (Sept. 23, 2020), https://www.sec.gov/newsroom/press-releases/2020-219; Chair Gary Gensler, *Prepared Remarks for National Whistleblower Day Celebration* (Jul. 30, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-whistleblower-celebration.

[66] Andrew C. Call, et al., *Whistleblowers and Outcomes of Financial Misrepresentation Enforcement Actions*, 56 J. ACCT. RSCH. 123, 126 (2018), https://ssrn.com/abstract=3165572.

[67] Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65(6) J. FIN. 2213 (Dec. 2010).

[68] *Id.* at 2214.

[69] *Id.* at 2214–15.

[70] *Id.*

[71] U.S. SEC. & EXCH. COMM'N, *Annual Report to Congress for Fiscal Year 2025* at 1 (Feb. 11, 2026); https://www.sec.gov/files/fy25-annual-whistleblower-report.pdf.

[72] *Id.* at 4.

in May 2023, the SEC announced its highest ever whistleblower award of $279 million to a single whistleblower.[73]

Table 8: SEC Whistleblower Program Payments by Fiscal Year

Fiscal Year	2020	2021	2022	2023	2024	2025
Amount of Whistleblower Awards	$175 million	$564 million	$229 million	~$600 million	$255 million	~$60 million

In addition, during the life of the CFTC program, the CFTC has awarded over $390 million to whistleblowers pursuant to 55 orders.[74] A single award of nearly $200 million granted in October 2021 accounts for most of the total award money to date.[75] In fiscal year 2025 approximately 30% of open investigations involved whistleblowers.[76]

2. FinCEN and DOJ (Criminal) Whistleblower Programs

FinCEN and the DOJ Criminal Division have nascent whistleblower programs. While FinCEN has long had statutory authority to make whistleblower awards under the BSA, the power was historically underutilized. In 2021 and 2022 Congress amended the whistleblower provisions of the BSA, modeling them in part on the SEC's program.[77] The revised statute establishes a separate revolving fund for the payment of whistleblower awards, which must be funded from monetary sanctions collected by FinCEN (or the DOJ, in certain circumstances) if the balance of the fund falls below $300 million.[78] In enforcement actions where monetary sanctions exceed $1 million, whistleblowers are now eligible to receive between 10-30% of the monetary sanctions collected.[79] Prior to the amendments, whistleblower awards were capped at $150,000. Further, awards are *required* to be made to qualifying whistleblowers, although the precise amount to be awarded within the statutory range is discretionary.[80] While FinCEN has established an Office of the Whistleblower and is actively receiving tips, the bureau has yet to propose rules to guide the program's implementation and has not announced any awards made under the program.[81]

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[73] Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues Largest-Ever Whistleblower Award (May 5, 2023), https://www.sec.gov/newsroom/press-releases/2023-89.

[74] U.S. SEC. & EXCH. COMM'N, *Whistleblower Program: 2025 Annual Report* (Feb, 2026) https://www.whistleblower.gov/sites/whistleblower/files/2026 02/FY%202025%20Whistleblower%20%26%20Customer%20Education%20Report.pdf

[75] COMMODITY FUTURES TRADING COMM'N, *CFTC Awards Nearly $200 Million to a Whistleblower* (Oct. 21, 2021), https://www.cftc.gov/PressRoom/PressReleases/8453-21.

[76] U.S. SEC. & EXCH. COMM'N, *supra* note 74.

[77] CRS, *The Financial Crimes Enforcement Network (FinCEN): Anti-Money Laundering Act of 2020 Implementation and Beyond* at 7 (Sept. 27, 2022), https://www.congress.gov/crs-product/R47255.

[78] 31 U.S.C. § 5323.

[79] *Id*.

[80] 31 U.S.C.§ 5323(b)(1), (c)(1).

[81] FIN. CRIMES ENF'T NETWORK, *Congressional Budget Justification FY 2026*, https://home.treasury.gov/system/files/266/11.-FinCEN-FY-2026-CJ.pdf.

In 2024 the DOJ established a three-year corporate whistleblower awards pilot program for those who provide information regarding criminal corporate misconduct, noting that the SEC, CFTC, and FinCEN whistleblower programs do not cover the full range of corporate crimes under the DOJ's jurisdiction.[82] The program was established pursuant to DOJ's statutory authority to pay awards for information leading to civil or criminal forfeitures.[83] Under the program, if an eligible individual provides the DOJ with original information leading to a civil or criminal forfeiture of greater than $1 million, the individual may be eligible for an award in the DOJ's sole discretion.[84] The whistleblower's information must pertain to one of eight specific subject areas, including violations by financial institutions.[85] The DOJ has not yet announced any awards paid pursuant to the program.

D. DOJ Three Percent Fund

Congress has authorized the DOJ to allocate three percent of certain civil monetary penalties collected into a fund known as the "Three Percent Fund" that the DOJ may then use internally. This section explains the DOJ's Three Percent Fund and how it has evolved over time. We note that there has been a lack of public information since the 2018 Report with respect to both the DOJ's treatment of its Three Percent Fund authority as well as relevant data about the fund's size and use. We therefore provide historical insight as to the size of the Three Percent Fund and how such funds have been spent. We highlight the persistent lack of transparency surrounding the collection and use of Three Percent Fund money. And how it has expanded in size and scope. We conclude by making a recommendation to limit the scope of the Three Percent Fund.

1. DOJ Authority to Take Three Percent of Civil Monetary Penalties

The DOJ is responsible for collecting debts arising from its own enforcement actions and for collecting unpaid debts that are referred to it by other federal agencies.[86] In 1993, Congress authorized the Three Percent Fund to help fund the DOJ's debt-collection activities[87] by authorizing the DOJ to retain three percent of "all amounts collected pursuant to [its] civil debt collection litigation activities."[88] This legislation followed a DOJ estimate that hundreds of

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[82] U.S. DEP'T JUST., *Department of Justice Corporate Whistleblower Awards Pilot Program* (May 12, 2025), https://www.justice.gov/criminal/media/1400041/dl?inline.

[83] *Id.*; 28 U.S.C. 524(c).

[84] U.S. DEP'T JUST., *supra* note 82.

[85] *Id.* at 5.

[86] *See* 2023 Debt Collection Annual Report, *supra* note 17, at 2. However, the DOJ generally only acts as collector (including through filing suit and obtaining and enforcing judgments) once a federal department or agency has failed to persuade a debtor to pay what is owed. *See* GOV'T ACCOUNTABILITY OFF., *Alternative Sources of Funding Are a Key Source of Budgetary Resources and Could be Better Managed* at 16, (Feb. 2015) [hereinafter *2015 GAO Report*].

[87] *See* 139 Cong. Rec. H7968-01 at 24,548 (Oct. 14, 1993); *see also* Maj. Staff Rep. of the S. Comm. on Homeland Security and Governmental Aff., The Justice Department's Housing Settlements: Millions of Consumer Relief Funds Disbursed with No Guarantees of Helping Homeowners 30, 33 (May 18, 2016) [hereinafter *Housing Staff Report*].

[88] Pub. L. 103-121, § 108, 107 Stat. 1153, 1164 (1993). Thus, the three percent cannot be applied to criminal debts or monetary penalties from criminal judgments. However, Loretta Lynch, the former Attorney General, stated in 2015 that it can be applied to "penalties associated with certain financial recoveries, including through non-prosecution and deferred prosecution agreements." *Responses to Questions from the S. Comm. on the Judiciary* 21 (Feb. 9, 2015) (Loretta Lynch, Att'y Gen., Dep't of Justice).

millions of dollars of additional debt could be recovered each year if the DOJ were provided with more resources.[89]

In determining what cases it can take three percent of the proceeds from, the DOJ has historically interpreted the phrase "civil debt litigation activities" liberally, to include: (1) the DOJ's debt collection litigation, where it sues on behalf of a federal agency to collect an unpaid debt;[90] (2) administrative activities like tracking unpaid debts and issuing notices for payments due;[91] and, (3) most importantly, DOJ-initiated civil enforcement actions, including judgments and settlements.[92] This means that the DOJ can obtain funds not only in instances in which it is seeking to collect penalties that have already been imposed by a prior judgment, but can also collect three percent of monetary sanctions in any case it originates even when the monetary sanctions are paid immediately and no debt collection activities are necessary.[93]

i. The Size of the DOJ Three Percent Fund

The DOJ does not publicly disclose total annual contributions to the Three Percent Fund or the current size of the fund. However, according to a 2016 Majority Staff Report of the Senate Committee on Homeland Security and Governmental Affairs (the "**2016 Majority Staff Report**")—which provides the most recent publicly available data—the DOJ deposited more than $1.5 billion into the Three Percent Fund from 2009 to 2015, and the fund had a remaining balance of over $325 million at the end of the 2015 fiscal year.[94] Indeed, according to the 2016 Majority Staff Report, the DOJ retained approximately $449.5 million from the 2013 JP Morgan Chase and 2014 Bank of America settlements alone.[95]

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[89] *See* 139 Cong. Rec. H7968-01 at 24,548 (Oct. 14, 1993).

[90] *See, e.g.,* U.S. v. Lippard, Civil Action No. 23–cv–01078–MDB (D. Colo. 2024).

[91] 2015 GAO Report, *supra* note 86, at 66. Such administrative activities also include payment processing; according to a recent GAO report, "[i]f . . . a civil settlement results in [a payment] for the government, DOJ generally manages the transactions from the debtor to the government entity receiving the funds" and, as a result, receives a three percent cut of the funds dispersed. *See id*. at 16. *See also* Housing Staff Report, *supra* note 87, at 31.

[92] 2015 GAO Report, *supra* note 86, at 17, n.38; *see also* U.S. DEP'T JUST., CRIM. DIV., *Memorandum from Head of the Criminal Division on Guidance on Coordinating Corporate Resolution Penalties in Parallel Criminal, Civil, Regulatory, and Administrative Proceedings* (Jun. 5, 2025), https://www.justice.gov/criminal/media/1402751/dl. ("[T]hree percent of penalties and amounts collected pursuant to DPAs, NPAs, and CEP declinations (which are civil debt) are deposited into the Department's Working Capital Fund.").

[93] However, the DOJ may only exercise its right to retain three percent of civil penalties *after* payment has been collected by the DOJ, and it cannot retain three percent from criminal fines or penalties or from asset forfeitures. 2015 GAO Report, *supra* note 86, at 16–17, n.36, 38; *Id.* at 66; see also Pub. L. No. 107-273, § 11013, 116 Stat. 1758, 1823 (2002).

[94] Housing Staff Report, *supra* note 87, at 31. Collections for the Three Percent Fund in 2015 were $393.6 million. The DOJ's total budgetary resources in that year were $46.4 billion.

[95] *See* Letter from Hon. Peter J. Kadzik, Assistant Att'y Gen., DOJ, to Hon. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs (Aug. 24, 2015) [hereinafter *Kadzik Letter*]. Approximately $238 million was retained by the DOJ for the 2013 JP Morgan Chase settlement and roughly $211.5 million was retained for the 2014 Bank of America settlement. As a part of the settlements, approximately $16.1 billion was paid to federal entities and Fannie Mae and Freddie Mac. Of this, $7.9 billion came from the JP Morgan settlement and $8.2 came from the Bank of America settlement. *Id.*

The table below shows the amount and percentage of civil debt collections that were deposited into the Three Percent Fund from 2012 to 2015, based on data provided in the 2016 Majority Staff Report. Fiscal years 2014 and 2015 show a substantial increase in the monies deposited into the Three Percent Fund. The increase in deposits in those years was due to several large settlements with financial institutions.[96]

Table 9: Data on DOJ Three Percent Fund Deposits

Fiscal Year	Total Amount of Civil Debts Collected by DOJ[97]	Amount Deposited into the Three Percent Fund[98]	Amounts Added as a Percentage of Civil Debt Collections
2012	$11 billion	$161.1 million	1.5%
2013	$7.1 billion	$158.3 million	2.2%
2014	$20.6 billion	$526.0 million	2.5%
2015	$18.1 billion	$393.6 million	2.2%
Total	$56.8 billion	$1.239 billion	2.2%

More recent data is not available.

2. DOJ Uses of Monies Deposited in the Three Percent Fund

Unlike the SEC's Fair Funds, the SEC, CFTC and FinCEN's whistleblower programs, and the CFPB's Consumer Protection Fund, once the DOJ deposits monies into the Three Percent Fund, the funds can be used by the DOJ *internally*.[99]

The specifics about *how* the funds can be used internally have evolved over time. Under the original 1993 statutory language, the amounts in the Three Percent Fund were to be used "for paying the costs of processing and tracking [civil debt collection] litigation."[100] In 2002, however, Congress amended the statute to expand the allowable uses: under the current law they must be used "first, for paying the costs of processing and tracking civil and criminal debt collection litigation activities, and, thereafter, for financial systems and for debt-collection-related personnel, administrative, and litigation expenses."[101]

The DOJ has historically taken the view that the language in the 2002 amendment allows the DOJ to allocate Three Percent Fund amounts to activities related to affirmative civil and

[96] Letter from Lee J. Loftus, Assistant Attorney General for Administration, DOJ, to David Maurer, Director, Homeland Security and Justice Issues, GAO (Feb. 9, 2015) [hereinafter *DOJ-GAO Letter*].
[97] *See* 2023 Debt Collection Annual Report, *supra* note 17, at 9.
[98] Housing Staff Report, *supra* note 87, at 32. Amount listed are rounded to the nearest one hundred thousand dollars.
[99] *See* Pub. L. No. 107-273, § 11013, 116 Stat. 1758, 1823 (2002) (stating that "[s]uch amounts in the Working Capital Fund shall remain available until expended"); Pub. L. 116–93, div. B, title II, § 218, Dec. 20, 2019, 133 Stat. 2415 ("such amounts so credited... shall remain available until expended."). *See also* 2015 GAO Report, *supra* note 86, at 67. Monies do not need to be spent in the year that they are collected.
[100] Pub. L. No. 103-121, § 108, 107 Stat. 1153, 1164 (1993).
[101] Pub. L. No. 116–93, div. B, title II, § 218, 133 Stat. 2415 (2019); *see also* Pub. L. No. 107-273, § 11013, 116 Stat. 1758 1823 (2002).

criminal investigations and cases that *could* produce any sort of debt to the government (i.e., funds can be used on cases seeking an initial order of penalties where the DOJ might lose).[102] Costs for those enforcement-related actions may include administrative and labor costs for court cases and investigations.[103] Thus, in this view, the Three Percent Fund can be used to fund core civil and criminal enforcement functions.

i. DOJ Internal Procedures for Disbursing Three Percent Fund

The DOJ's Collection Resources Allocation Board ("**CRAB**") historically decides how monies in the Three Percent Fund are dispersed.[104] The CRAB, which was established in 1994, is composed of the DOJ Controller, the Director of the DCM and the Chief Financial Officer of the U.S. Marshals Service.[105] While there is no recent public information available about CRAB practices, there is also no indication that the CRAB has been abolished. We therefore present the most recently available information regarding the CRAB's process for disbursing funds.

The CRAB reviews requests for funds from different areas within the DOJ based on proposed uses and determines how they will be allocated. All CRAB decisions are briefed to and reviewed by the Deputy Attorney General.[106] The DOJ stated that the CRAB follows the statutory guidance in allocating the Three Percent Fund.[107] Additional statements from the DOJ on how the CRAB prioritizes Three Percent Fund allocations are unavailable. However, according to a 2015 GAO report, the CRAB historically emphasized allocating Three Percent Fund monies to:[108]

1. Costs to manage debt collection activities, including funding the DCM and the computer system infrastructure.

2. Debt collection activities, such as tracking debtors' funds and conducting administrative activities (e.g., sending demand letters to debtors).

3. Costs of conducting civil litigation and investigations where collections are presumed to be obtained. Three Percent Fund monies are used to pay the personnel, court costs, and administrative activities that support such litigation.

4. Costs of conducting criminal litigation or investigations where collections are presumed to be obtained from the defendant.

Beyond these broad priorities, the CRAB also considers the long-term viability of the DOJ Three Percent Fund when making funding decisions. Importantly, grants to DOJ activities or programs that have the potential to bring in additional monies to the Three Percent Fund may be

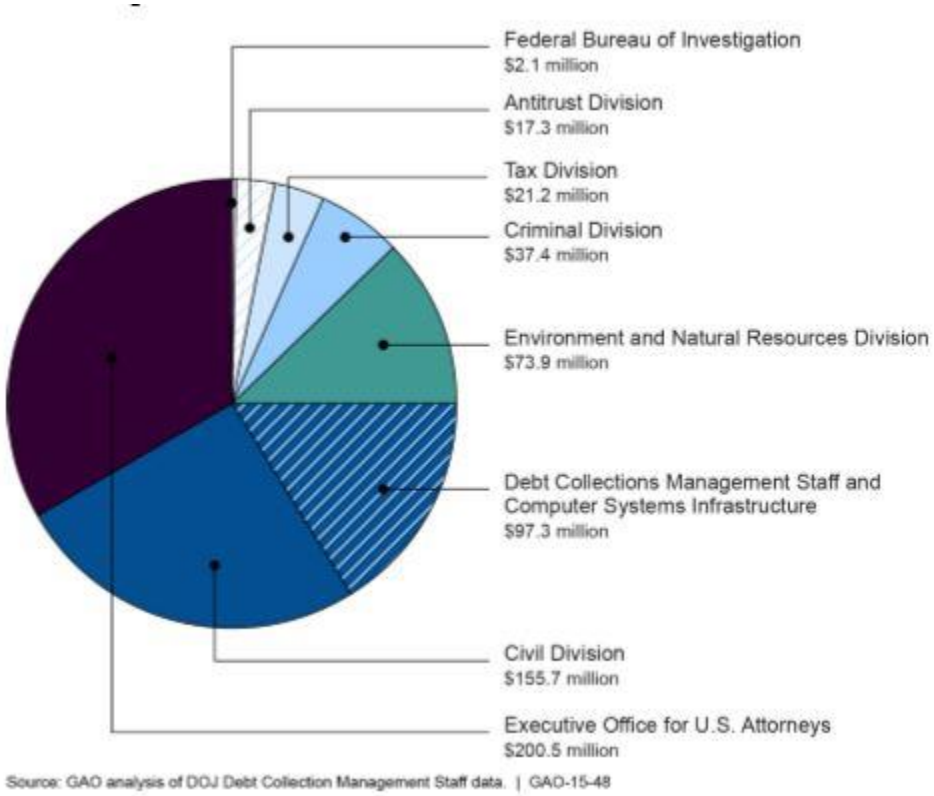
[102] *See* 2015 GAO Report, *supra* note 86, at 17 n.39.
[103] *See id*.
[104] *See id*. at 17, 18, 67.
[105] *See* Kadzik Letter, supra note 9595; *See also* 2015 GAO Report, *supra* note 86, at 18. The Chief Financial Officer of the U.S. Marshals Service is a nonpermanent member of the CRAB.
[106] Kadzik Letter, *supra* note 95, at 2.
[107] *See id*. at 3.
[108] 2015 GAO Report, *supra* note 86, at 68–9.

prioritized over other DOJ activities that bring in less funding.[109] Once funds are allocated by the CRAB, it does not involve itself in any litigation or settlement activities.[110]

ii. Data on the How Three Percent Funds Have Been Allocated

While some information can be gleaned from the exhibits to DOJ divisions' budget submissions,[111] the DOJ is not required to publish Three Percent Fund allocations. And there is no public comprehensive information on where the monies from the Three Percent Fund are deployed. However, the 2015 GAO report—which remains the most recent report on this topic—gives some insight into historical allocations. On the next page is a chart from the GAO report showing how monies from the Three Percent Fund were allocated during fiscal years 2009-2013.

Figure 9: Expenditure of DOJ Three Percent Fund Amounts



[109] *Id*. at 18–19.

[110] *See* DOJ-GAO Letter, *supra* note 96, at 2.

[111] *See, e.g.,* Exhibit H: Summary of Reimbursable Resources, U.S. Attorneys FY 2018 Congressional Budget Submission.

Of the approximately $600 million allocated from 2009 to 2013, the largest allocations from the Three Percent Fund were to the Executive Office for U.S. Attorneys ($200.5 million),[112] the Civil Division ($155.7 million), the Debt Collections Management staff and computer systems infrastructure ($97.3 million) and the Environment and Natural Resources Division ($73.9 million).[113] Based on the publicly available information, it is not possible to determine what proportion of these allocations are devoted to debt collection activities and what are devoted to funding investigations and enforcement litigation activities.

3. Potential Problems with the Three Percent Fund

We have two major concerns with the Three Percent Fund. First, the DOJ provides little to no transparency on the amount of money deposited into the Three Percent Fund and how such funds are used. The public deserves to know the amount of money flowing into the Three Percent Fund each year and how such funds are being spent.

Our second concern is that the size and purpose of the Three Percent Fund have grown beyond what were contemplated at its inception. As the 2016 Majority Staff Report noted, intake into the Three Percent Fund far exceeds what Congress originally considered.[114] In 1993, Congress estimated that the DOJ's civil debt collection activities would recover approximately $918 million, meaning Congress considered the possibility of up to $27 million going into the coffers of the DOJ annually.[115] By contrast, in fiscal 2015, $393.6 million was deposited into to the Three Percent Fund, nearly 15-times more than Congress' original estimate. While part of this increase was due to natural growth in the size and volume of traditional debts referred to the DOJ for collection, a significant portion resulted from the DOJ's broad view of what constitutes "civil debt litigation activities" for which it can impose its three-percent collection.

The scope of how the funds may be *used* has also expanded. For example, the DOJ allocates Three Percent Fund monies to affirmative civil and criminal investigations and cases that *could* produce a debt to the government.[116] The 2016 Majority Staff Report noted that by allowing funds to be allocated to any investigation or case that could theoretically result in a civil debt to the government, "the DOJ is operating in a gray area" because it is not limiting use of funds to cases where a debt already exists. We believe the DOJ can serve a vital role in collecting debts owed to enforcement authorities and the government. However, we are concerned that the self-funding of enforcement actions could go beyond the intended uses of Three Percent Fund monies, which potentially raises separation of powers problems between the DOJ and Congress's constitutional appropriations powers.

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[112] The Executive Office for U.S. Attorneys provides management oversight and administrative support for United States Attorneys throughout the country and acts as a liaison between the DOJ and U.S. Attorneys. *See generally* OFF. INSPECTOR GEN., *Review of Debt Collection Programs of the United States Attorneys' Offices* at 3, 5-6 (Jun. 2015), https://oig.justice.gov/sites/default/files/reports/e1506.pdf.

[113] 2015 GAO Report, *supra* note 86, at 69–70.

[114] Housing Staff Report, *supra* note 87, at 33.

[115] 139 Cong. Rec. H7968-01 (Oct. 14, 1993) at 24,548.

[116] 2015 GAO Report, *supra* note 86, at 17 n.39.

- **Recommendation 11:** The DOJ Three Percent Fund should be reformed so that: (1) the DOJ can only use money from the Three Percent Fund on activities to collect existing delinquent debts; and (2) the DOJ provides a public annual accounting of the amount of money deposited into the Three Percent Fund, the amount of money distributed from the Three Percent Fund, and how money distributed out of the Three Percent Fund was spent.

III. Extraordinary Restitution

Enforcement authorities can negotiate settlements with enforcement targets that direct monies to provide relief or benefits to consumers or to fund third-party organizations or groups. Such arrangements are referred to as extraordinary restitution,[117] as they are payments made by the enforcement target to third parties who were not necessarily injured by the target's alleged misconduct.[118] The amount and potential recipients of the funds are negotiated between the enforcement authority and target.

In Part III of this chapter we describe the legal basis under which enforcement authorities can include extraordinary restitution payment provisions in settlement agreements given that settlement funds are usually subject to Congressional appropriations. In addition, we provide more detailed data about the extent to which extraordinary restitution payments were included as part of settlements with large financial institutions following the financial crisis, and use a case study to analyze how such extraordinary restitution payments were spent. Finally, we identify policy concerns relevant to the use of extraordinary restitution and make a recommendation to address those concerns and increase transparency. We primarily focus on extraordinary restitution by the DOJ in large settlement agreements, because the DOJ has used this tool most extensively, though it is a tool that other enforcement authorities could use as well.[119]

A. The Legal Basis for the DOJ's Use of Extraordinary Restitution

The DOJ is able to include extraordinary restitution in settlement agreements because it has great discretion in carrying out litigation on behalf of the United States. Congress has statutorily delegated to the DOJ the power to conduct litigation[120] and, inherent in the power to litigate, is the authority to *settle* litigation.[121] The Supreme Court has stated that the DOJ's authority to conduct litigation may only be limited by direct legislative statements to the contrary.[122] Similar logic would apply to settlements entered into by other agencies that have been granted litigation authority.

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[117] *See generally* Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 LOY. L.A. L. REV. 1, at 4-5 (May 22, 2014); Peterson, *supra* note 3, at 327.

[118] *See* Larkin, *supra* note 117, at 8 (describing extraordinary restitution as "the government compell[ing] a party to contribute to an organization of the government's choosing.")

[119] As noted in Chapter 2, the Fed and OCC used the tool in one high-profile instance when resolving the "independent foreclosure review," which provided for over $5 billion in relief to consumers who were not necessarily victims of wrongdoing. Press Release, Bd. of Governors of the Fed. Reserve Sys. & Office of the Comptroller of the Currency, Independent foreclosure review to provide $3.3 billion in payments, $5.2 billion in mortgage assistance (Jan. 7, 2013). As we show later in this chapter, DOJ settlement agreements with 10 financial institutions included more than $40 billion worth of extraordinary restitution provisions.

[120] 5 U.S.C. §§ 515–16, 3106.

[121] Peterson, *supra* note 3, at 342 (citing Op. Att'y Gen. 98, 102 (1934)).

[122] Kern River Co. v. United States, 257 U.S. 147, 155 (1921).

In addition, the Miscellaneous Receipts Act, which, as described earlier, requires monies received by government agencies to be deposited in the U.S. Treasury, does not directly limit an enforcement authorities' power to negotiate settlement payments to third parties. This is because the government itself never receives any money in these settlements. Rather, the DOJ takes the position that such arrangements avoid the Miscellaneous Receipts Act restrictions so long as two conditions are met: (1) the settlement is executed prior to an admission or finding of wrongdoing; and (2) the government does not have post-settlement control over the funds (*i.e.*, the funds remain in the hands of the enforcement target or some other non-government party to distribute).[123]

Moreover, the courts have limited power to review or reject extraordinary restitution arrangements. For example, when the government enters into a civil settlement agreement, or an NPA (as defined in Chapter 2) in a criminal case, before a matter has been filed in court, there is no court involvement or review of the agreement.[124] In those instances, the agreement is merely a contract between two parties and no rule, regulation, or law defines what elements are out of bounds.[125]

Even when a civil or criminal case has been filed in court, the federal courts take a hands-off approach to reviewing the contents of the agreements. In civil cases, the Second Circuit, which has the most developed case law on point, has held that it will only review a settlement agreement to verify it does not violate the law, that the terms are clear, that it resolves the claims of the complaint, and is not tainted by collusion or corruption.[126] In criminal cases, several circuit courts have held that when the DOJ enters into a DPA, courts should not second-guess the DOJ's decision to dismiss criminal charges in exchange for monetary payments or other undertakings. Such decisions are within the province of the executive branch under the constitutional separation of powers.[127]

The DOJ can enforce compliance with the extraordinary restitution payment requirements by monitoring the other party's performance and terminating the settlement agreement and pursuing the underlying legal claims in an enforcement action if the other party does not comply with the terms of the agreement.

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[123] David K. Min, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Written Testimony Before the Subcomm. On Oversight and Investigations of the H. Comm. On Fin. Services*, 114th Cong. (May 19, 2016); *see also* U.S. DEP'T JUST., *Memorandum from the Attorney General on the Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties* (May 5, 2022), https://www.justice.gov/archives/ag/file/1217691-0/dl?inline. ("Any such settlement must be executed before an admission or finding of liability in favor of the United States, and the Justice Department and its client agencies must not retain post-settlement control over the disposition or management of the funds..."); U.S. DEP'T JUST., *Memorandum Re Final Rule Prohibiting Settlement Payments to Non-Governmental Third Parties* (Dec. 4, 2020), https://www.justice.gov/oip/foia-library/foia-processed/general_topics/settlement_guidelines_third_parties_2_14_23/dl. This logic should apply to any government agency, not just the DOJ.

[124] Larkin, *supra* note 117, at 29.

[125] *Id*.

[126] SEC v. Citigroup Global Markets, Inc., 752 F.3d 285, 295 (2d Cir. 2014).

[127] United States v. Fokker Services B.V., 818 F.3d 733, 741–48 (D.C. Cir. 2016).

B. Examples of Extraordinary Restitution in DOJ Settlements

The DOJ included extraordinary restitution provisions in some of the largest settlements in the post-financial crisis era. For example, the DOJ used such arrangements in the settlement of mortgage fraud cases with the largest banks. These settlement agreements included consumer relief provisions that required financial institutions to provide principal forgiveness or other relief to borrowers and payments to third-party community organizations or charities that were not directly harmed by the alleged misconduct underlying the claims being resolved. These remain the most prominent examples of extraordinary restitution provisions in DOJ settlements as the DOJ's use of extraordinary restitution has fluctuated greatly in recent years, as explained more below.

1. The DOJ's Use of Extraordinary Restitution in the Post-Financial Crisis Era

In the $25 billion National Mortgage Settlement with Ally, Bank of America, Citigroup, J.P. Morgan, and Wells Fargo over foreclosure practices, the settlement agreements with the DOJ required that the banks provide "consumer relief" to borrowers who were not necessarily directly harmed by the banks' alleged misconduct.[128] The same is true for separate settlements with Citigroup ($7 billion), Bank of America ($16.65 billion), J.P. Morgan ($13 billion), Deutsche Bank ($7.2 billion), Credit Suisse ($5.3 billion), and Goldman Sachs ($5.06 billion) over mortgage underwriting and securitization practices.[129]

Consumer relief in these cases included:

- modification to first lien mortgage loans,

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[128] U.S. DEP'T JUST., *Press Release: $25 Billion Mortgage Servicing Agreement Filed in Federal Court* (Mar. 12, 2012), https://d9klfgibkcquc.cloudfront.net/Settlement-USDOJ-FILING-news-release.pdf.

[129] *See, e.g.*, Consent Judgment, United States v. Bank of Am. Corp., No. 12-cv-00361-RMC (D.D.C. Apr. 4, 2012); U.S. DEP'T JUST., *Press Release: Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages* (Jul. 14, 2014), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement; U.S. DEP'T JUST., *Press Release: Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis* (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading; U.S. DEP'T JUST., *Press Release: Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages* (Nov. 19, 2013), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement; U.S. DEP'T JUST., *Press Release: Deutsche Bank Agrees to Pay $7.2 Billion for Misleading Investors in its Sale of Residential Mortgage-Backed Securities* (Jan. 17, 2017), https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed; U.S. DEP'T JUST., *Press Release: Credit Suisse Agrees to Pay $5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities* (Jan. 18, 2017), https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed; U.S. DEP'T JUST., *Press Release: Goldman Sachs Agrees to Pay More than $5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities* (Apr. 11, 2016), https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed.

- write-downs of second lien mortgage loans,
- incentive payments for owners to participate in short sales,
- forbearance for unemployed borrowers,
- anti-blight activities, and
- refinancing programs.[130]

Table 10[131] illustrates how the "consumer relief" provisions constituted *more than 50%* of the $85 billion total settlement amount in ten of the largest settlement agreements involving the DOJ and financial institutions pertaining to foreclosure, mortgage-lending and securitization practices. Although the DOJ does not maintain a publicly accessible centralized repository of all of its settlement agreements, these agreements were widely reported in the press and could be found in the public domain.

Table 10: Consumer Relief in Major Post Financial Crisis DOJ Settlements

Bank	Total Settlement Amount	Amount of Consumer Relief	% of Settlement as Consumer Relief
JPMorgan Chase	$13 billion	$4 billion	30.8%
Citigroup	$7 billion	$2.5 billion	35.7%
Deutsche Bank	$7.2 billion	$4.1 billion	56.9%
Credit Suisse	$5.3 billion	$2.8 billion	52.8%
Morgan Stanley	$3.2 billion	$400 million	12.5%
National Mortgage Settlement	$24.1 billion	$19.1 billion	79.3%
Bank of America	$16.65 billion	$7.49 billion	44.5%
Standard & Poor's	$1.375 billion	$0	0%
Wells Fargo	$1.2 billion	$0	0%
Goldman Sachs	$5.06 billion	$1.8 billion	35.6%
Total	**$85.085 billion**	**$42.19 billion**	**50.18%**

The percentage of the settlement amounts in these cases allocated to consumer relief is similar to the findings of the Boston Consulting Group's 2017 study of enforcement actions against E.U. and U.S. banks from 2009 through 2016. The study found that 38% ($123 billion of $321

[130] *See* sources cited *supra* note 129.

[131] *See* Dealbook, *Where Does the Mortgage Settlement Money Go?*, N.Y. TIMES (Dec. 23, 2016), https://www.nytimes.com/2016/12/23/business/dealbook/24mortgagelist.html?_r=0; Michael Wilt, *Evaluating 'Consumer Relief' Payments in Recent Bank Settlement Agreements*, 17 J. BUS. & SECS. L. 255, 263, (2017), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2916436. The table excludes the $2 billion settlement with Barclays in March 2018 and the $4.9 billion settlement with RBS in April 2018, each of which were entered into after Attorney General Sessions issued a memo largely prohibiting the practice of including consumer relief in settlements. That memo is discussed in more detail later in this chapter.

billion) of the total dollar amount of enforcement actions against the 50 largest European and U.S. banks went to consumers.[132] It should be noted that DOJ policy regarding the use of extraordinary restitution (including consumer relief payments) has significantly fluctuated in recent years. In 2017 a memo from Attorney General Session barred its use in DOJ settlement agreements. Extraordinary restitution was reauthorized in 2022, but once again barred in February 2025. We discuss these changes in more detail later.

2. *Bank of America Settlement Agreement Case Study on Consumer Relief Provisions*

There is no legal requirement that the distribution of consumer relief funds be disclosed to the public. However, the independent monitor for Bank of America's 2014 residential mortgage-backed securities settlement with the DOJ and six states made his reports publicly available online with specific details about the dispersion of funds. Given the level of detail provided in these monitor reports, we have chosen the Bank of America settlement as an illustrative case study.

As discussed in **Appendix B**, in 2014, Bank of America settled FCA, FIRREA, and securities fraud claims with the DOJ, as well as state law claims with six states, for a total settlement amount of $16.65 billion. Of that amount, $7 billion was designated as consumer relief, and $490 million was designated to cover taxes that recipients of the relief were expected to incur (which was to be allocated to third-party organizations if the tax relief was not needed).[133] The settlement agreement included a "menu" of the specified types of consumer relief that Bank of America could provide. The agreement required that minimum amounts of certain types of consumer relief be provided and capped the amounts of other types of consumer relief. **Table 3.5** on the next page sets forth the types of consumer relief and relevant minimums and maximums.[134]

Table 11: Types of Consumer Relief in Bank of America Settlement Agreement

Menu Number	Type of Consumer Relief	Minimum or Maximum Amount
1.A	First Lien Principal Forgiveness (i.e., reducing unpaid principal balance)	$2.15 billion minimum
1.B	Principal Forgiveness Forbearance (i.e., reducing any principal whose payment had been delayed)	N/A

[132] Gerold Grasshoff et al., *Global Risk 2017: Staying the Course in Ranking* at 16, BOS. CONSULTING GRP. (2017), https://www.bcg.com/publications/2017/financial-institutions-growth-global-risk-2017-staying-course-banking. The BCG study used data from penalties, fines, and settlements that exceeded $50 million.

[133] *See generally*, Bank of America Settlement Agreement, http://bankofamerica.mortgagesettlementmonitor.com/Settlement-Agreement-Documents/US-DOJ-Bank-of-America-Settlement-Agreement.pdf.

[134] *See* Annex 2 to the Bank of America Settlement Agreement, http://bankofamerica.mortgagesettlementmonitor.com/Settlement-Agreement-Documents/Settlement-Agreement-Bank-of-America-Consumer-Relief-Annex-2.pdf.

Menu Number	Type of Consumer Relief	Minimum or Maximum Amount
1.C	First Lien – Forbearance (delaying repayment of principal)	N/A
1.D	Second Lien Extinguishment (i.e., forgive full balance of second lien mortgage)	Combined with 1.E, $2.5 billion maximum
1.E	Junior Liens – Unsecured Principal Forgiveness/Extinguishment	Combined with 1.E, $2.5 billion maximum
2	Low- to Moderate Income Lending and Other Loans [135]	N/A
3.A	Principal Extinguishment (i.e., forgive entire first lien principal balance,	Combined maximum limit with items 1.D and 1.E is $3 billion
3.B	Costs Paid for Demolition and Property Remediation of Abandoned and Uninhabitable Residential Properties as Part of Comprehensive Local Strategy to Stabilize Neighborhoods	N/A
3.C	Donations of Mortgages and Real-Estate Owned Properties to Municipalities, Land Banks, Non-Profit Organizations and Service Members with Disabilities	N/A
3.D	Donations to Non-Profit Organizations to Facilitate Reduction, Rehabilitation or Maintenance of Abandoned and Uninhabitable Residential Properties it has Donated	N/A
3.E	Donations to Community Development Financial Institutions	$50 million minimum
3.F	Donations to Legal Assistance Organizations	$30 million minimum
3.G	Donations to Housing Counseling Agencies	$20 million minimum

[135] Bank of America could make purchase-money loans to creditworthy borrowers who (a) are located in certain geographic areas, (b) lost their primary residences to foreclosure or short sale, or (c) are first-time homebuyers from low- and moderate-income households.

Menu Number	Type of Consumer Relief	Minimum or Maximum Amount
4	Making Subordinated Loans at a Loss for Affordable Rental Housing	$100 million minimum

Under the settlement agreement, certain types of consumer relief are given different amounts of "credit" toward the required amount of total consumer relief and the minimums and maximums. For example, a $1 donation to a housing counseling agency is generally counted as $2 worth of credit. The independent monitor published his final report on Bank of America's progress on March 17, 2017. It showed that Bank of America has fulfilled its consumer relief obligations.

Table 12 summarizes the monitor's findings. The table divides up the payments into two categories, (1) relief to consumers, and (2) payments to third-party organizations. For each of those categories, it shows: (a) the actual dollar figure of consumer relief provided; (b) the dollar value of *credit* received by Bank of America for that relief; and (c) the percentages of the total relief and credit that these amounts represent.

Notably, a vast majority of the relief (97.4% of the actual dollar amount and 95.5% of the credited amount) was provided in the form of consumer relief payments such as principal forgiveness on first lien mortgages and unsecured loans. These payments helped homeowners suffering as a result of the housing crash and financial crisis, and demonstrate that extraordinary restitution devoted to consumer relief can provide valuable public assistance.

Table 12: Allocation of Consumer Relief Amounts in Bank of America Settlement

Relief Category	Actual $ Amount	% of Actual $ Amount	Credit $ Amount	% of Credit $ Amount
Consumer Relief	$6.2 billion	97.4%	$6.55 billion	95.5%
Payments to Third-Party Organizations	$166.6 million	2.6%	$308 million	4.5%

C. Potential Benefits of and Problems Arising from Extraordinary Restitution

If structured appropriately, one potential benefit of extraordinary restitution it is that it could allow for payment of general compensation to society. This is helpful when it is difficult to identify specific victims, or harm is widely dispersed through a community and it could be logistically challenging to calculate the harm to each member. Second, misconduct can indirectly harm a community through negative externalities of the wrongdoing and extraordinary restitution can help mitigate those costs.

However, extraordinary restitution can present opportunities for political or personal favoritism. This is of particular concern when the funds are directed to third-party organizations,[136] especially if the funds are used for political activities like issue advocacy ads, electioneering, or lobbying. Indeed, enforcement officials making settlement decisions may direct funds to their political or ideological allies, to advance their own political views or ambitions. Critics of the DOJ have pointed out that the Bank of America settlement resulted in payments to liberal activist organizations like La Raza,[137] which by its nature is a political organization. However, the DOJ has not been publicly criticized for specific instances of political payments in extraordinary restitution orders in recent years.

D. Recent DOJ Reforms and Committee Recommendations

In the criminal context, the DOJ barred payments to non-victims beginning in 2008.[138] The bar was implemented after certain extraordinary restitution payments attracted public scrutiny. Specifically, they were implemented after public criticism that resulted from a settlement in which a U.S. Attorney allegedly directed a corporate criminal defendant to endow a $5 million chair at his law school alma mater.[139]

In June 2017, the DOJ also imposed a severe restriction on extraordinary restitution in civil matters. Attorney General Sessions distributed a memo (the "**Sessions Memo**") to DOJ lawyers that stated that the DOJ would "no longer engage in [the] practice" of including "payments to various non-governmental, third-party organizations as a condition of settlement with the United States," and that the DOJ would not enter into agreements that direct or provide for payments to "any non-governmental person or entity that is not a party to a dispute."[140] Had this restriction been in place in 2014, the Bank of America settlement would not have been permitted.

The Sessions Memo provided only three limited exceptions for: (1) payments that provide restitution to victims or directly remedy the harm being redressed, including, for example, harm to the environment; (2) payments for legal or professional services rendered in connection with the

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[136] SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. OF FIN.SERVS., *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers*, 114th Cong. (May 19, 2016) (statement of Paul J. Larkin, Jr., Senior Legal Research Fellow, The Heritage Foundation), https://financialservices.house.gov/uploadedfiles/114-90.pdf.

[137] Kimberly A. Strassel, *Justice's Liberal Slush Fund*, WALL ST. J. (Dec. 3, 2015), https://www.wsj.com/articles/justices-liberal-slush-fund-1449188273.

[138] U.S. ATTORNEYS' MANUAL § 9-16.325 ("Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendants to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct."). Memorandum from Mark Filip to Holders of the United States Attorneys' Manual (May 14, 2008), https://www.jenner.com/a/web/9DjWKdigZhx4T3c1Hy4H6q/4HRMZQ/Memo.pdf?1320336780

[139] *See, e.g.*, David Kocieniewski, *In Testy Exchange in Congress, Christie Defends His Record as A Prosecutor*, N.Y. TIMES (June 26, 2009), http://www.nytimes.com/2009/06/26/nyregion/26christie.html (noting criticism of case where a law professor chair was endowed at the U.S. attorney's alma mater as part of a deferred prosecution agreement).

[140] U.S. DEP'T JUST., *Memorandum from the Attorney General, Jeff Sessions, on Prohibition on Settlement Payments to Third Parties* (Jun. 5, 2017), https://www.justice.gov/opa/press-release/file/971826/download.

matter; and (3) payments authorized by statute.[141] Thus, the memo appears to prohibit both types of extraordinary restitution previously identified: (1) payments to consumers who were not direct victims; and (2) payments to charities, non-profits, and other third-party organizations that were not direct victims.

In 2022 Attorney General Merrick Garland issued a memo (the "**Garland Memo**") rescinding the Sessions Memo and reauthorizing the use of extraordinary restitution in both civil and criminal matters, subject to certain guidelines and limitations.[142] Under the Garland Memo, payments to non-governmental third parties were required to "have a strong connection to the underlying violation" by advancing at least one objective of the statute that was violated. Specific projects were to be defined with particularity, and "designed to reduce the detrimental effects of the underlying violation." The DOJ was prohibited from selecting any particular third-party to carry out or benefit from any projects. Further, payments solely for general public education or awareness, contributions solely to generalized research, and unrestricted cash donations were prohibited. While the Garland memo limited the ability of the DOJ to direct payments to non-specific projects or to particular recipients, it did not explicitly ban the use of funds for political activities.

In February 2025, Attorney General Pam Bondi rescinded the Garland Memo and announced that "[e]xcept in limited circumstances... settlements should not be used to require payments to non-governmental, third-party organizations that were neither victims nor parties to the lawsuits."[143] The memo does not provide any more detailed guidance on the circumstances under which such payments would be permissible. However, Attorney General Bondi stressed that civil and criminal settlements should be used to "compensate victims, redress harm, or punish and deter unlawful conduct," which at least suggests that the exception under the Sessions memo for payments that provide restitution to victims or directly remedy the harm being redressed may be permissible.[144]

We support the DOJ's restrictions on extraordinary restitution due to its risk of misuse. However, as this discussion demonstrates, DOJ policy on extraordinary restitution has heavily fluctuated in recent decades and could be revised again by a subsequent Attorney General. In addition, these memos have applied only to the DOJ. They have not restricted the availability of extraordinary restitution in settlements by other enforcement authorities, nor have those authorities adopted their own guidelines on its use. While currently uncommon, the potential exists for other enforcement authorities to use this remedy more widely in the future. At a minimum, any future use of extraordinary restitution should be subject to restrictions to prevent the major concerns

[141] *Id*.
[142] U.S. DEP'T JUST., *Memorandum from the Attorney General, Merrick Garland, on the Guidelines and Limitations for Settlement Agreements Involving Payments to non-Governmental Third Parties* (May 5, 2022) https://www.justice.gov/archives/ag/file/1217691-0/dl?inline.
[143] U.S. DEP'T JUST., *Memorandum from the Attorney General, Pam Bondi, on Reinstating the Prohibition on Improper Third-Party Settlements* (Feb. 5, 2025) https://www.justice.gov/ag/media/1388536/dl?inline.
[144] *Id*.

about misuse and the appearance of misuse. We therefore recommend that Congress should impose guardrails on the use of extraordinary restitution to directly address these issues.

- **Recommendation 12:** Third parties that receive settlement funds from extraordinary restitution should be prohibited from using those funds to engage in political activities. Federal enforcement authorities should adopt policies and guidelines to effectively implement the ban.

Such legislation would make the adopted policy binding on the DOJ and all other enforcement authorities, and bar the most concerning and egregious use of settlement funds – the potential direction of funds to political allies for political purposes. Obviously, Congress will either need to define the meaning of "political activity" in any legislation it adopts, or agencies will have to define such activities in their own rules. While we leave the details to Congress and the enforcement authorities, we believe that political activities should include activities like running issue advocacy ads, electioneering, and lobbying.

In our view, implementing this prohibition on the use of settlement funds for political purposes should not represent an onerous burden. Enforcement authorities could, for example, require a documentation, signed under penalty of perjury, from the recipient certifying that the funds would not be not used for political activities.

Relatedly, opaqueness about the existence of extraordinary restitution provisions and the distribution of extraordinary restitution amounts also opens the door up to misconduct or at least the appearance of misconduct. Specifically, opaqueness may breed suspicions that settlement funds are being directed to the pet causes, projects, or allies of officials instead of for the public benefit. As a result, we believe enforcement authorities should increase the transparency about when extraordinary restitution provisions are utilized and the amount of settlement funds paid out as extraordinary restitution.

- **Recommendation 13:** Each federal enforcement authority should provide an annual accounting of the amount of settlement funds paid out as extraordinary restitution.

Such an accounting should be on both an aggregate and individual case level. This additional transparency would allow for a more effective evaluation of in what circumstances and matters extraordinary restitution provisions are being included and how much money is being devoted to extraordinary restitution. This disclosure would also provide Congress and members of the public the ability to attempt to track how such funds are being distributed. The added transparency may also result in enforcement officials giving extra thought when determining whether a particular settlement warrants the inclusion of an extraordinary restitution provision.

IV. States' Use of Monetary Sanctions

A. Power of Attorneys General to Allocate Settlement Funds

Unlike federal agencies, certain state attorneys general are not legally constrained in how they can use settlement funds. In such circumstances, extraordinary restitution is not necessary, as there is no requirement that the attorney general deposit settlement money in the state's treasury or general fund.

One prominent example is the Massachusetts Attorney General, who is only required to "account to the state treasurer for all fees, bills of costs and money received by [her] by virtue of [her] office."[145] The discretion of the Massachusetts Attorney General was evident in a 2010 settlement agreement between Massachusetts and Morgan Stanley, which required that Morgan Stanley pay $2 million of the $102 million settlement funds to state non-profit groups.[146]

Another example is the 2008 settlement between Michigan and Countrywide Financial for alleged predatory lending practices. The settlement agreement required that almost $10 million be spent on borrower education programs and neighborhood rehabilitation efforts.[147] In 2009, the Michigan Attorney General allocated $50,000 of the settlement amount to two local parks.[148]

More recently, in 2018 Wells Fargo entered into a settlement agreement with all 50 states and the District of Columbia in which it agreed to pay $575 million in connection with the opening of unauthorized customer accounts and improper charges on mortgage and auto-loan customers.[149] The settlement agreement included an overview of the purposes for which each state attorney general would use his or her state's share of the funds, with many state attorneys general retaining discretion over how to direct the funds.[150] For instance, the attorney general of Iowa directed that

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[145] Mass Gen. Laws ch. 12, § 29.

[146] MA OFF. ATT'Y GEN, *Press Release: Morgan Stanley to Pay $102 Million for Role in Massachusetts Subprime Mortgage Meltdown Under Settlement with AG Coakley's Office* (June 24, 2010), https://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2010-06-24%20Morgan%20Stanley%20to%20Pay%20$102%20Million%20for%20Role%20in%20Massachusetts%20Subprime%20Mortgage%20Meltdown%20U.pdf; see also, e.g., Earnest Settlement https://www.mass.gov/doc/earnest-aod/download ("At her sole discretion, the Attorney General may use or distribute the payment described in the foregoing paragraph in any amount, allocation or apportionment and for any purpose permitted by law...").

[147] Jay Greene, *Countrywide to renegotiate mortgages with 10,000 in Michigan,* CRAIN'S DETROIT BUS. (Oct. 6, 2008), http://www.crainsdetroit.com/article/20081006/FREE/810060271/countrywide-to-renegotiate-mortgages-with-10000-in-michigan.

[148] Jim Harger, *State, local legislators call for reevaluation of Countrywide mortgage settlement funds after surprise parks money*, MICH. LIVE (Mar. 19, 2009), http://www.mlive.com/news/grand-rapids/index.ssf/2009/03/state_local_legislators_call_f.html.

[149] Emily Glazer, *Wells Fargo to Pay States About $575 Million to Settle Customer Harm Claims*, WALL ST. J. (Dec. 28, 2018), https://www.wsj.com/articles/wells-fargo-to-pay-states-about-575-million-to-settle-customer-harm-claims-11546016757

[150] Settlement Agreement Between the Attorneys General of Alabama et al. and Wells Fargo & Company (Dec. 28, 2018), https://www.attorneygeneral.gov/wp-content/uploads/2018/12/Wells-Fargo-Multistate-Settlement-Agreement-12-28-18.pdf.https://www.attorneygeneral.gov/wp-content/uploads/2018/12/Wells-Fargo-Multistate-Settlement-Agreement-12-28-18.pdf

Iowa's $6 million share of the settlement be deposited into a consumer education and litigation fund, to be administered by the attorney general.[151]

In other instances, the ability of a state attorney general to decide how settlement funds are allocated has been contested. The cases detailed in the 2018 Report from the National Mortgage Settlement (described in detail below) remain prominent examples. For instance, when the State of Florida settled the National Mortgage Settlement for $334 million, the Florida Attorney General negotiated the agreement so that $74 million would be transferred to the state general fund as a civil penalty and $260 million would be disbursed at her direction.[152] However, state legislators claimed that all spending decisions required legislative approval.[153] In the end, a compromise was reached, allowing the legislature to appropriate $200 million and spend $55 million on the legislature's budget commission, and permitting the Attorney General to disburse $5 million.[154]

Similarly, in California, where settlement amounts in the same National Mortgage Settlement were supposed to be used "for the benefit of California homeowners affected by the mortgage crisis,"[155] based on the terms of the settlement agreement, the Governor and state legislature used over $330 million to the state's general fund to pay down the state's debt.[156] That decision resulted in litigation in which a state lower court judge ordered the state to place the funds back into an account designated for use to assist homeowners.[157]

B. 2012 National Mortgage Settlement Case Study

The 2012 National Mortgage Settlement continues to offer the most recent useful case study of how states have allocated settlement funds.[158] The National Mortgage Settlement referenced above, was a settlement reached with the five largest mortgage servicers (Citi, J.P. Morgan, Bank of America, Ally Financial, and Wells Fargo) in 2012, in which the servicers agreed to pay approximately $25 billion to settle allegations arising from mortgage loan servicing and

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[151] *Id.*; Iowa Code § 714.16C, https://www.legis.iowa.gov/docs/code/714.16c.pdf.

[152] Consent Judgment, United States v. Bank of America Corp., No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf.

[153] Gary Fineout, *Fla. Attorney General not budging on settlement*, ASSOCIATED PRESS (Oct. 17, 2012), https://www.yahoo.com/news/fla-attorney-general-not-budging-203524697.html.

[154] FLA. S., APPROPRIATION COMM., *SB 1852: National Mortgage Settlement*, https://www.flsenate.gov/Committees/billsummaries/2013/html/1852

[155] Shaila Dewan, *Needy States Use Housing Aid Cash to Plug Budgets*, N.Y. TIMES (May 15, 2012), http://www.nytimes.com/2012/05/16/business/states-diverting-mortgage-settlement-money-to-other-uses.html.

[156] Gretchen Morgenson, *California Has to Repay $331 Million to Homeowners Fund, Court Rules*, N.Y. TIMES (Jun. 15, 2015), https://www.nytimes.com/2015/06/16/business/california-has-to-repay-331-million-to-homeowners-fund-court-rules.html?_r=0.

[157] *Id.*

[158] The settlement terms often directed that the funds would be used in the discretion of the state attorney general. For example, the settlement with Citi specified that the amounts owed to each state were to be used as directed by the attorney general of the state in accordance with purposes set forth in an exhibit to the agreement. *See* Consent Judgment, United States v. Bank of Am. Corp., No. 12-cv-00361-RMC (D.D.C. Apr. 4, 2012), https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_Citibank-4-11-12.pdf.

foreclosure practices.[159] Forty-nine states participated in the settlement and divided $2.5 billion amongst themselves. In addition, $20 billion in consumer relief was paid directly to consumers and roughly $1 billion was sent to the U.S. Treasury.[160]

The National Conference of State Legislatures ("**NCSL**"), an independent group that studies issues relevant to state legislatures, has attempted to track how the 49 states spent the $2.5 billion that they received under the National Mortgage Settlement. The NCSL has been able to at least partially track the settlement funds for 41 states.[161]

The NCSL data shows that eight of the ten states with the largest settlement amounts from the National Mortgage Settlement directed significant amounts of these funds to third-party groups or earmarked the funds for specific government offices or programs. These range from payments to legal aid organizations, to housing charities like Habitat for Humanity, to tuition scholarships, and to funding for state court systems. **Table 13** provides examples of the available information on the amounts provided to these states and how those amounts were spent.

Table 13: Expenditure of State Settlement Amounts

State	Settlement Amount Received	Tracked Expenditures of Settlement Amount
California	$410.6 million	- $41.6 million – Unfair Competition Law Fund - < $11 million – housing and legal aid groups
Florida	$334.1 million	- $35 million – down payment assistance - $10 million – housing counseling - $15 million – legal aid programs - $9.1 million – Florida tuition scholarship program - $36 million – state courts system - $10 million – Department of Children and Families - $20 million – Habitat for Humanity - $50 million – reduced rents on new and existing rental units

[159] Laurie Goodman & Maia Wolluchem, *National Mortgage Settlement: Lessons Learned*, URBAN INSTITUTE (Apr. 15, 2014), https://www.urban.org/sites/default/files/publication/22526/413095-National-Mortgage-Settlement.PDF.
[160] *Id*.
[161] Committee Staff conversations with staff at the NCSL indicate that their data was derived from press releases and public records, and from interviews and conversations with various state officials.

State	Settlement Amount Received	Tracked Expenditures of Settlement Amount
		- $10 million – fund construction or rehabilitation of rental units - $40 million – State Housing Initiative Program - $10 million – grant program for housing homeless persons - $10 million – grant for housing persons with developmental disabilities - $5 million to state attorney general's office for costs - $74 million – general fund
Texas	$134.6 million	- $10 million – Judicial Fund - $124.6 million – General Fund
Illinois	$105.8 million	- $20 million – legal aid organizations - $5 million – foreclosure mediation programs - $4.36 million – Habitat for Humanity - $10.5 million – State and County Housing and Land Authorities - $18.2 million – other third-parties
Georgia	$99.4 million	- $99.4 million – economic development
Arizona	$97.8 million	- $50 million – state general fund - $41 million – assistance to keep consumers in homes and consumer restitution - $5 million – enforcement and monitoring - $5 million – housing counseling - $4 million – legal services - $2 million – outreach, marketing and education
Michigan	$97.2 million	- $7.5 million – restitution

State	Settlement Amount Received	Tracked Expenditures of Settlement Amount
		- $5 million – mortgage and foreclosure assistance to veterans - $6 million to attorney general to investigate and prosecute mortgage-related crimes - $25 million – blight elimination - $20 million – foreclosure counseling - $3.7 million – housing and community development programs - $5 million – homeowner refinancing grants - $15 million – homeowner purchasing assistance - $10 million – education funding for lowest performing schools
Ohio	$92.8 million	- $75 million – grant program for abandoned/vacant property demolition - $20 million – foreclosure assistance - $2 million – Economic Crimes division of attorney general office
New Jersey	$72.1 million	- $72.1 million – General Fund

C. Concerns with States' Use of Settlement Funds

As with many other aspects of the enforcement system, the use of settlement funds by state authorities is not very transparent. Only thanks to the NCSL's independent work is there any centralized data on how the states' portion of the National Mortgage Settlement was spent. Despite those efforts, funds could not be tracked at all by the NCSL for eight states, and for many of the others, it is unclear how significant percentages of the settlement funds were used. Moreover, there are no recent prominent independent studies of how funds from other multistate settlements with financial institutions have been spent.

This lack of transparency is troubling. It undercuts accountability to the public. Accountability is especially important when settlement funds are not allocated through a

legislative process and are used in ways that do not directly remedy misconduct or compensate its victims. If the public cannot easily and readily understand how settlement funds are used, then they are unable to evaluate whether this money is being spent in the public interest. Citizens may reasonably expect that monies received by states will be used to remediate problems caused by the alleged unlawful acts underlying the settlement. Without adequate transparency, citizens do not know if that is the case. Even when settlement amounts exceed the amount required to fully compensate consumers or communities, the public has a right to know whether any excess funds are being used to fund beneficial programs or whether they are being used as slush funds for attorneys general or state legislatures to fund politically active organizations, groups, or other political allies.

- **Recommendation 14:** The states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds from using those funds to engage in political activities.

Chapter 4: Promoting Individual Accountability

Chapter 4: Promoting Individual Accountability

This chapter focuses on the topic of individual accountability, which many have said is the most effective way to deter misconduct.[1] Individual accountability is particularly effective because culpable individuals are forced to directly bear and internalize the cost of punishment, whereas when firms are penalized, the costs are largely borne by shareholders who played no part in the wrongdoing. At the outset, it is critical to understand that enforcement actions against firms do not prevent enforcement agencies from also targeting individuals. Chapter 4 proceeds in four parts.

Part I outlines why it is important to hold both individuals and firms accountable under U.S. law and the relationship between individual and firm liability. We also explain important distinctions between individual and firm liability and note that firms can potentially be liable for a legal violation even if no specific individual at that firm has violated U.S. law.

Part II examines the investigative tools and powers that enforcement authorities have to identify and pursue suspected wrongdoers. We generally find that enforcement authorities can identify bad actors and punish them whether they are individuals or firms, but that there are certain unique challenges to pursuing individuals.

Part III describes the policies and public statements of government authorities regarding individual liability showing that enforcement authorities appear to understand the importance of individual accountability and have recently placed an added priority on it. This is important given the legal and non-legal factors that may make firm-level cases more attractive to enforcement authorities than cases against individuals.

Part IV discusses various legal reforms that the government could adopt in an effort to more readily identify culpable individuals and hold them accountable. First, we consider broadly lowering the legal standard for liability from intentional wrongdoing to negligence. Indeed, the U.K. Senior Manager's regime imposed a negligence standard on high-level officers and directors. Second, we explore the possibility of a strict liability standard, as imposed by government rules requiring clawbacks of executive compensation. We believe that both approaches would encourage excessive government intrusion on business decisions and would impede the recruitment of qualified officers and directors. Instead, we present recommendations that focus on better incentivizing firms and enforcement authorities to work together to identify and prevent individual misconduct.

[1] See, e.g., U.S. SEC. & EXCH. COMM'N, DIV. ENF'T, *Annual Report* (2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

I. The Importance and Establishment of Individual and Firm Accountability

It is important that both culpable individuals and firms be held accountable for wrongdoing. The importance of individual accountability has been highlighted by the press,[2] politicians[3] and even enforcement agencies themselves.[4] Firm accountability is also important because it can incentivize firms to take steps to prevent, identify, and punish wrongdoing by employees. Firms may sometimes also be in the best position to compensate injured consumers or investors. We discuss the rationales for individual and firm liability and then explain how individuals and firms can be held liable for the acts of others.

A. Importance of Individual Accountability

Individual accountability is critical to a successful enforcement system for at least three reasons: (1) deterrence; (2) public confidence; and (3) less collateral damage to innocent third parties.

1. Deterrent Effect of Individual Accountability

Personal liability forces a firm manager or employee to internalize the costs of wrongdoing.[5] Imposing costs on the culpable individuals can offset the personal benefits that motivated an individual to engage in unlawful conduct, such as the prospect of greater

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[2] *See, e.g.,* James B. Stewart, *In Corporate Crimes, Individual Accountability is Elusive*, N.Y. TIMES (Feb. 19, 2015), https://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html?_r=0; William Cohan, *Justice Dept. Shift on White-Collar Crime Is Long Overdue*, N.Y. TIMES (Sept. 11, 2015), https://www.nytimes.com/2015/09/12/business/dealbook/justice-dept-shift-on-white-collar-crime-is-long-overdue.html; David Browdin, *The Big Wells Fargo Picture: Can We Discourage White-Collar Crime Without Jailing the Criminals?*, U.S. NEWS AND WORLD REP. (Nov. 2, 2016), https://www.usnews.com/opinion/economic-intelligence/articles/2016-11-02/what-the-wells-fargo-scandal-teaches-us-about-deterring-white-collar-crime; Jennifer Arlen & Lewis Kornhauser, *Finding the Right Mix of Corporate and Individual Liability to Deter Organizational Misconduct* (Feb. 17, 2025) https://www.promarket.org/2025/02/17/finding-the-right-mix-of-corporate-and-individual-liability-to-deter-organizational-misconduct.

[3] *See., e.g.*, *Sen. Warren slams 'shockingly weak' punishments for corporate crime*, REUTERS (Jan. 29, 2016), https://www.reuters.com/article/us-usa-companies-warren/sen-warren-slams-shockingly-weak-punishments-for-corporate-crime-idUSKCN0V71WU; Matthew Daly, *Senators Call for Criminal Investigation of Wells Fargo*, ASSOCIATED PRESS (Oct. 6, 2016), https://apnews.com/c6e4cc507d7944ccad055ef5478b5e62/senate-democrats-call-criminal-probe-wells-fargo (reporting that fourteen senators called for criminal investigations of bank executives when company opened unauthorized customer accounts); *Senator Warren Unveils Bill to Expand Criminal Liability to Negligent Executives of Giant Corporations* (Apr. 3, 2019), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-unveils-bill-to-expand-criminal-liability-to-negligent-executives-of-giant-corporations; *Welch, Hawley Introduce Bipartisan Bill Increasing Public Transparency and Accountability into Corporate Criminal Settlement Agreements* (Oct. 2, 2024), https://www.welch.senate.gov/welch-hawley-introduce-bipartisan-bill-increasing-public-transparency-and-accountability-into-corporate-criminal-settlement-agreements/.

[4] U.S. DEP'T JUST., CRIM. DIV., *Memorandum from Head of the Criminal Division on Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime* at 5 (May 12, 2025), https://www.justice.gov/criminal/media/1400046/dl?inline.

[5] *See e.g.*, Steven L. Schwarz, *Excessive Corporate Risk-Taking and the Decline of Personal Blame*, 65 EMORY L.J. 533, 536 (2015); Claire A. Hill & Richard W. Painter, *Why S.E.C. Settlements Should Hold Senior Executives Liable*, N.Y. TIMES (May 29, 2012) (stating that when only a firm is penalized, the individuals responsible for the conduct have little incentive to modify their conduct).

compensation, making the misconduct costlier for them than beneficial.[6] By contrast, when a firm is penalized with a fine, shareholders who were uninvolved in wrongdoing often bear the cost of the punishment. This creates a disconnect between the perpetrators and those bearing the costs. Similarly, the criminal penalty of incarceration and the threat of imprisonment – which can only be levied against individuals – can be more a more effective deterrent than fines on a firm.[7]

B. Public Confidence

Successfully holding culpable individuals accountable for unlawful conduct can also inspire public confidence in the enforcement regime. Commentators have noted that when firms are frequently the only target in enforcement actions and they typically settle cases by paying fines, then the public may view such settlements as simply a cost of doing business.[8] On the other hand, holding individuals accountable demonstrates a commitment to the public to root out wrongdoing and communicates that those who engage in wrongdoing face consequences.

C. Reduced Harm to Innocent Parties

When enforcement authorities hold an individual accountable, there are likely to be fewer costs imposed on innocent third parties. Firm-level sanctions and fines, unlike penalties imposed on culpable individuals, typically fall primarily on innocent third parties, such as stockholders and creditors, rather than on the individuals responsible for the misconduct.[9] Indeed, the prosecution

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[6] Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 345 (2017).

[7] *See e.g.*, John Collins Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 463 (1980) (arguing that among other factors, the risk of incarceration faced by individuals makes the deterrent effect of prosecuting individuals greater than prosecuting firms).

[8] Peter J. Henning, *Guilty Pleas and Heavy Fines Seem to be the Cost of Doing Business for Wall St.*, N.Y. TIMES (May 20, 2015), https://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html ("Banks appear willing to plead guilty as long as the collateral costs are not too heavy. Thus, the potency of a criminal conviction as a deterrent seems to have been dissipated, perhaps to the point that it is just a business expense. In a sense, they have become pleas without the baggage that comes with the acknowledgment of guilt when all that is involved is the payment of fines, something that can be done as well in a civil proceeding."); Dorothy S. Lund and Natasha Sarin, *The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis*, THE CLS BLUE (Mar. 18, 2020), https://clsbluesky.law.columbia.edu/2020/03/18/the-cost-of-doing-business-corporate-crime-and-punishment-post-crisis/ ("[F]or large companies, criminal penalties may be just another cost of doing business—and quite a reasonable cost at that.... [T]he ultimate deterrent effect of fines against corporations and their shareholders may be muted by several factors. For example, although a company's stock price falls after the imposition of the penalty, it usually bounces back very quickly. Therefore, shareholders might not demand an appropriate reduction in activity levels, nor the right amount of firm-wide monitoring, to avoid future instances of crime. In sum, we theorize that an over-reliance on entity-level fines is likely inadequate from a deterrence perspective.").

[9] *See e.g.*, John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1339–40 (2009) (stating that when a company gets fined "it is the owners of the corporation, the shareholders, who incur the penalty" who "have no direct control or knowledge of the behavior of corporate employees who commit criminal offenses"); Albert W. Alschuler, *Two Ways to Think about the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367–69 (2009) (stating that "[i]nnocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too"); John C. Coffee, Jr., *"No Soul to Damn: No*

and conviction of a firm, can lead to its collapse, eliminating shareholder value, harming creditors, and costing employees their jobs. That is why the DOJ's Principles of Prosecution of Business Organizations instruct DOJ prosecutors to consider the consequences of a conviction or indictment in deciding whether to charge a corporation with a crime.[10]

The failure of Arthur Andersen, the accounting firm that acted as Enron's auditor, is a prominent example of the damage such suits can cause. Arthur Andersen was convicted on a single federal criminal count for which it was indicted in the aftermath of Enron's collapse, and as a result, the international firm and employer of 85,000 collapsed, even though its conviction was ultimately overturned on appeal.[11] As a public accounting firm, Arthur Andersen was particularly vulnerable to the reputational stain that a criminal conviction imparted. Karpoff, Lee, and Martin (2017) estimated that in cases involving SEC enforcement actions for financial misrepresentation, market-imposed reputational losses were more than seven times larger than the total legal and regulatory penalties imposed.[12]

D. Importance of Firm Liability

Liability at the corporate entity level dates back to 1909 in the United States, when the Supreme Court decided that if the unlawful actions of employees taken in the course of their employment also benefit the corporation, then the corporate entity can also be held both criminally and civilly liable under the theory of *respondeat superior*.[13] This means that firms are held *strictly liable* (regardless of the firm's intent) for unlawful activities by its employees or agents committed in the course of employment to benefit the corporation.

Indeed, if a firm benefits from illegal conduct, it makes sense to recoup those benefits through fines and disgorgement and to incentivize the firm to develop policies and systems to prevent such wrongdoing. Furthermore, in cases where the harm caused to consumers or investors is very large and cannot be remediated by the culpable individuals, a deep pocketed firm will be in a better position to compensate harmed parties.

Body to Kick," 79 MICH. L. REV. 386, 408–09 (1981) (noting that large corporate fines can injure creditors, shareholders, employees and communities).

[10] U.S. DEP'T JUST., JUSTICE MANUAL, § 9-28.1100.

[11] Mary Ashby Morrison, *Rush to Judgment: the lynching of Arthur Andersen & Co*., 15(3) CRITICAL PERSP. ACCT. 335 (2004).

[12] Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN & QUANTITATIVE ANALYSIS 581 (2008).

[13] New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481, 495–96 (1909). *See also* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1095 (1991). The threat of corporate-level punishment could also incentivize firms to enact compliance policies and proactively discourage misconduct through *ex ante* monitoring and *ex post* sanctions of employees. *See* Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144, 145 (Keith Hylton and Alon Harel, eds., Edward Elgar Publishing, 2012).

Finally, the threat of firm liability "usefully enlists the firm in interdicting and deterring its wayward agents."[14] In other words, to avoid liability, firms will be incentivized to take steps to prevent employee wrongdoing, monitor employees' compliance with the law, and adopt internal accountability mechanisms to punish wrongdoing. Thus, the firm can be used to supplement efforts by the government to prevent wrongdoing and to identify and punish it when it does occur.

E. The Relationship Between Individual and Firm Liability

As an initial matter, *firms* are vicariously liable for the unlawful acts of their employees and agents taken in the course of their employment and for the benefit of their employer. Thus, firm liability is, by definition, related to a particular individual's liability because the firm's liability is derived from an individual's conduct. They are inexorably linked. In most instances, statutory provisions do not impose liability on an individual or firm for merely failing to act (i.e., a negligence-type standard) or by attributing the actions of others to an individual.[15] However, there are a few important exceptions in which liability can be imposed on an individual or firm because of an act committed by others that the individual or firm failed to prevent. We review these exceptions below. In addition, in the context of firm liability the government can potentially rely on a legal theory of *aggregation* in which the government combines the acts, knowledge, and intent of a firm's employees to claim wrongdoing by a firm. We also review this theory as it applies to the relationship between firm and individual liability.

1. Individual Liability for Failure to Stop Wrongdoing by Others

A number of laws impose liability on *individuals* in connection with the acts of others.

For example, the SEC may bring actions against an individual for a failure to reasonably supervise employees. The securities laws permit the SEC to bring these cases against registered investment advisers or broker-dealers.[16] In 2024, the SEC settled with the Chief Compliance Office of Your Source Financial, George R. Collett, for failure to supervise a subordinate that

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[14] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 689 (1997).

[15] We use the term "intentional" broadly to refer to a requirement that the person affirmatively engaged in an act or conduct and/or the person had a required mental state when engaged in the conduct. Examples of laws requiring "intentional" acts as we use the term include 15 U.S.C. §§ 77x (criminal conviction under Securities Act requires "willful" violation), 78u-2 (civil penalties in SEC administrative actions generally require "willful" violation), 78ff (criminal conviction under Exchange Act requires "willful" violation); 31 U.S.C. § 3729 (requiring "knowing" acts to violate False Claims Act); 12 U.S.C. § 1833a(c) (FIRREA predicate violations require the defendant to have engaged in the predicate offense and have had some sort of intent); 12 U.S.C. § 1818(i) (requiring the defendant to itself have violated the law, and for larger penalties, imposing intent requirements); 7 U.S.C. §§ 13 (criminal convictions for violations of Commodity Exchange Act require knowing or willful violations of the law), 13a-1 (requiring CFTC civil actions be brought against those who have engaged in, are engaging in, or are about to engage in an act or practice violation the Commodity Exchange Act).

[16] 15 U.S.C. §§ 78o(b)(4)(E); 80b-3(e)(6).

violated the Advisers Act by disproportionately allocating profitable trades to his favored clients and unprofitable trades to his other clients.[17]

The SEC also has the power under Section 15(a) of the Securities Act and Section 20(a) of the Exchange Act to hold an individual liable for the securities law violations of any person that they control, which is known as control person liability.[18] The scope of this type of vicarious liability is fairly constrained however. For example, some circuit courts of appeal have read a "culpable participant" requirement into the statute, which means that the SEC has to prove that the defendant actually participated in the violation.[19] Furthermore, defendants subject to a control person liability action can avoid liability by establishing that they acted in good faith and did not induce the legal violation.[20]

In addition, as part of the Sarbanes-Oxley Act of 2002 ("**SOX**"), Congress adopted a statutory provision that imposed strict liability on the CEO and CFO public companies in the event that the company had to restate its financial statements due to misconduct by an employee of the company. Specifically, the SEC is authorized to disgorge (i.e., clawback) any "bonus" or "other incentive-based or equity-based compensation" received by an issuer's CEO or CFO.[21] SOX was passed after a series of high-profile public company accounting scandals and in response to President Bush's 10-point plan to protect shareholders, which included a statement that "CEOs or other officers should not be allowed to profit from erroneous financial statements."[22] The law applies to accounting misconduct resulting in a restatement of financial statements and does not permit clawbacks for other types of violations.

Finally, banking regulators can remove a director or officer from his or her position if the individual's failure to act constituted a breach of the duty of care or duty of loyalty that is owed to the corporation, causes loss to the corporation, and demonstrates disregard by the officer or director of the safety and soundness of the bank.[23] Thus, even if the officer or director did not intentionally participate in a legal violation, he or she can still be penalized.

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[17] U.S. SEC. & EXCH. COMM'N, In the matter of George R. Collett, File No. 3-22151 (Sept. 20, 2024), https://www.sec.gov/files/litigation/admin/2024/ia-6715.pdf.

[18] 15 U.S.C. §§ 77o(a), 78t(a). The SEC defines "control" in Rule 405 as the "possession, direct or indirect, of the power to direct or cause the direction of the management or policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

[19] *See* Paul Vizcarrondo, Jr., *Liabilities Under the Federal Securities Laws* at 129–130, WACHTELL, LIPTON, ROSEN & KATZ (Aug. 2013), http://www.wlrk.com/docs/OutlineofSecuritiesLawLiabilities2013.pdf (noting that the Second and Third Circuits follow the test).

[20] 15 U.S.C. § 78t(a).

[21] 15 U.S.C. § 7243.

[22] *The President's 10-Point Plan: Improving Corporate Responsibility and Protecting America's Shareholders*, WALL ST. J. (Mar. 6, 2002), https://www.wsj.com/articles/SB1015460971646141720.

[23] 12 U.S.C. § 1818(e).

F. Firm Liability Resulting from the Conduct of Employees and the Aggregation of Conduct by Multiple Employees

While individuals can generally only be held liable for their own actions, knowledge, and intent (with a few exceptions described above), firms can potentially be held liable for the totality of the actions, knowledge, and intent of all its employees.

As discussed earlier, it is black-letter law that a firm can be held criminally and civilly vicariously liable for the actions of an individual employee done in the course of employment for the benefit of the employer under the doctrine of *respondeat superior*. It provides incentives for firms to monitor and regulate the conduct of employees. It also allows injured parties the ability to obtain compensation and remediation where such damages may not be obtainable from an individual with limited resources.

More importantly and troubling, under an unsettled legal theory, not only can a firm be held vicariously liable when a specific employee commits a legal violation, but the ***aggregated*** (or collective) actions, knowledge, and intent of all of its employees can also be imputed to it. This theory is sometimes referred to as "collective scienter."

The First Circuit Court of Appeals, which endorsed the collective scienter theory, has stated that, "the acts of a corporation are . . . simply the acts of all of its employees operating within the scope of their employment"[24] and thus, "[i]t is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation."[25] In practice, this means that a firm can be held liable for a legal violation resulting from the collective activities of its employees even when no single employee has violated the law.

An illustrative example is useful to understand the concept. Under the aggregation theory, a firm could be held liable for violating disclosure requirements in connection with the sale of securities even if there is no single individual at that firm that directly violated such standards. All that is required for firm liability is that there are individuals that *collectively* violated the standard. Thus, if one individual at a firm knows that the disclosure materials for a security are untrue and another individual at that firm actually markets and sells the security (without such knowledge), then enforcement authorities would aggregate the one individual's knowledge with the others act of marketing and selling the security. The enforcement authority would then take the position that the *firm* was in violation of securities law. This is true even though neither individual is in violation of securities law.

The government appears to have relied on the aggregation theory in many of the largest mortgage-related settlement cases that arose out of the financial crisis. We reviewed the settlements listed in **Table 10** in Chapter 3, which imposed sanctions of more than $85 billion. Each of the settlement agreements was accompanied by a statement of facts. In those statements,

[24] United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987) (citing cases from the Eighth and Tenth Circuit Courts of Appeal for the proposition that corporations can be liable for the collective acts of its employees).
[25] *Id*.

the government did not identify specific employees that were culpable. Instead, the government often did not attribute actions to a specific or identifiable employee, and failed to establish a clear nexus between the knowledge of a particular employee and the subsequent actions of individuals at the firm (i.e., that those engaged in selling the securities knew of the inaccurate information in the disclosures).[26]

However, most recently, Deputy Attorney General Todd Blanche has suggested that the DOJ may move away from using collective scienter, as the new prerogative of DOJ prosecutors is to seek criminal resolutions "only when they can identify one or more culpable individuals whose conduct can be fairly imputed to the company."[27] It is critical to note that the concept of aggregate or collective scienter stands on unsettled and contested legal ground. For example, it runs contrary to traditional principles of agency law. As the Restatement (Third) of Agency makes clear, a principal (in this case a firm) cannot be held liable for fraud if an agent makes a false statement the agent believes to be true simply because a different agent knows different facts that make the statement false.[28] An example is helpful. Assume a car dealership has two employees, A and B. Employee A knows that a certain used car has a mechanical issue that causes the car to breakdown in bad weather. Employee B is unaware of that fact, sells the car to a customer, and in doing so states that the car has no known problems and is in working order. The car dealership is not liable for fraud under normal agency law principles. But under an aggregation theory, the car dealership could be held liable.

Furthermore, decisions by many federal circuit courts of appeals in different circumstances reject or undercut an aggregation theory.[29] For example, the D.C. Circuit Court of Appeals held in

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[26] One commentator said about the J.P. Morgan settlement that it was "anodyne," "glossed over many details," and did not name any bankers. William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, THE ATLANTIC (September 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/. It should be noted, however, that in the Wells Fargo settlement, a specific employee was identified as having engaged in wrongdoing and he simultaneously settled claims with the government. *See* Stipulation and Order of Settlement and Dismissal with Prejudice, United States v. Wells Fargo Bank, N.A., No. 12-cv-7527 (S.D.N.Y. Apr. 8, 2016), https://www.justice.gov/opa/file/839796/download. In addition, the statements of fact in settlement agreement are heavily negotiated and may not contain all pertinent information to allow a complete analysis of the government's legal theory of liability. Moreover, the one trend that has emerged is unsettling. It appears that the SEC is typically seeking admissions from large financial institutions in cases where no individuals are being charged. *See* David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 IOWA L. REV. 113, 117.

[27] Eddie A. Jauregui et al., *DOJ Leaders Affirm New Approach to Corporate Criminal Enforcement and Preview Political Changes*, HOLLAND & KNIGHT (Dec. 10, 2025), https://www.hklaw.com/en/insights/publications/2025/12/doj-leaders-affirm-new-approach-to-corporate-criminal-enforcement.

[28] Restatement (Third) of Agency § 5.03, Comment d(2) (2006) ("[A] principal may not be subject to liability for fraud if one agent makes a statement, believing it to be true, while another agent knows facts that falsify the other agent's statement. Although notice is imputed to the principal of the facts known by the knowledgeable agent, the agent who made the false statement did not do so intending to defraud the person to whom the statement was made.").

[29] *See, e.g.*, U.S. v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1274 (D.C. Cir. 2010) (holding that under the False Claims Act, collective knowledge is inappropriate to establish requisite scienter); In re Apple Computer, 127 F. App'x 296, 303 (9th Cir. 2005) ("A corporation is deemed to have the requisite scienter for fraud only if the individual corporate officer making the statement has the requisite level of scienter at the time that he or she makes the

a False Claims Act case that it would be improper to apply a collective intent theory and noted that in other cases, "we have expressed a good deal of skepticism about corporate intent theories that rely on aggregating the states of mind of multiple individuals."[30] The Second Circuit has also rejected broad aggregation-based theories of scienter, allowing corporate scienter to be inferred without identifying a specific culpable individual only in exceedingly rare cases.[31] Moreover, in the securities litigation context, the Third Circuit has stated that if liability could not be established against a particular individual, then the company could not itself be liable.[32] That is an express rejection of a collective intent theory.

From a practical perspective, the value of such a liability theory is questionable because a firm may not be in a position to track the knowledge of every single employee, and facing the threat of such a liability theory, firms might focus more resources than appropriate on monitoring employees at the expense of other critical corporate functions.[33] For reasons discusses in II.B.2 in this chapter, firms have many reasons to settle and resolve a matter rather than contest it, and as a consequence, the government can still use unsettled legal theories such as collective scienter as a legal basis for enforcement matters. Committee encourages enforcement authorities to consider the uncertain legal soundness of aggregate or collective scienter before brining an enforcement action on this basis.

statement.") However, more recently, the Ninth Circuit has no longer explicitly rejected collective scienter, at least in dicta, *see Loc. 353, I.B.E.W. Pension Fund v. Zendesk, Inc.*, No. 21-15785, 2022 WL 614235, at *2 (9th Cir. Mar. 2, 2022*)* [[E]ven assuming corporate scienter is a viable theory in our circuit...],; Aetos Corp. v. Tysons Food, Inc. (In re Tysons Foods, Inc. Sec. Litig.), 155 F. App'x 53, 57 (3d Cir. 2005) ("Having concluded that there is no primary liability on the part of any of the individual officers, the District Court properly held that Tyson Foods could not itself be primarily liable under the facts of this case.").

[30] Sci. Applications Int'l Corp., 626 F.3d at 1274.

[31] Jackson v. Abernathy, 960 F.3d 94, 99 (2d Cir. 2020) (In exceedingly rare instances, a statement may be so "dramatic" that collective corporate scienter may be inferred.)

[32] Aetos Corp., 155 F. App'x at 57.

[33] Bradley J. Bondi, *Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions*, 6(1) N.Y.U. J. L. & BUS. 1, 6 (2009).

II. The Government's Tools and the Challenges of Holding Individuals Accountable

In this section, we examine the tools that the government has to identify misconduct and punish bad actors, whether they are individuals or firms. We find that there are certain unique challenges to pursuing individuals.

A. Investigative Powers and Tools

U.S. enforcement authorities have extraordinary powers to obtain information necessary to establish criminal and civil cases against individuals suspected of violating the law. Critically, the tools available to investigators are the same regardless of whether the investigative target is an individual or a firm. We describe some of the key tools in criminal and civil matters. While the tools in both types of matters allow the government to compel the production of information and materials, the particular tools differ based on whether the matter is criminal or civil.

In criminal investigations, the DOJ can establish grand juries to compel witnesses to provide testimony to the grand jury or to produce documents.[34] Moreover, the DOJ can seek a search warrant from a federal magistrate judge based on probable cause that a crime has been committed. This enables investigators to obtain documents, records, property, electronically stored information and other evidence of a crime.[35]

In fact, the government has shown a willingness to use all of its evidence gathering capabilities, as illustrated by its expanded use of wiretaps in criminal insider trading matters. In the investigation and 2011 trial of insider trading activities of Raj Rajaratnam and his hedge fund, Galleon, the DOJ used wiretaps in an insider trading case for the first time.[36] Rajaratnam, his hedge fund, and his associates were suspected of having traded on material non-public information from insiders at companies including IBM, Intel, and McKinsey & Co.[37] According to one study, the wiretaps captured 550 individual callers, over 18,000 phone calls and led not only to Rajaratnam's conviction, but also to the indictment of twenty other individuals.[38] In 2025, the Department of Justice reported using extensive technological investigative tools—including analysis of electronic communications, trading records, and cross-border data—to uncover a global insider-trading scheme, notwithstanding efforts by the defendants and their co-conspirators to evade detection through the use of burner or disposable phones, coded language, in-person meetings, and encrypted

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[34] Charles Doyle, *Federal Grand Juries: The Law in a Nutshell*, CONG. RSCH. SERV (May 7, 2015), https://www.congress.gov/crs_external_products/RS/PDF/RS20214/RS20214.11.pdf.

[35] Fed. R. Crim. P. 41.

[36] Peter Lattman, *Rajaratnam Conviction Upheld by Appeals Court*, N.Y. TIMES (June 24, 2013), https://dealbook.nytimes.com/2013/06/24/rajaratnam-conviction-upheld-by-appeals-court/?_r=0 ("For the first time in an insider trading case inquiry, and most prominently in the Rajaratnam case, the authorities used wiretaps – a method typically reserved for drug trafficking and organized crime cases – to record the conversations of traders.").

[37] Howard J. Kaplan et al., *The History and Law of Wiretapping* at 1 (2012), https://www.americanbar.org/content/dam/aba/publications/litigation_news/29-1-history-and-law-of-wiretapping.pdf,

[38] *Id*. at 2, 5.

messaging applications with disappearing or auto-deleting features that they believed were beyond the reach of law enforcement.[39]

Civil enforcement authorities like the SEC, CFTC, CFPB and banking regulators also have powerful tools, albeit slightly different, to compel the production of information and materials in investigations. Specifically, civil enforcement authorities are authorized by statute to issue subpoenas to obtain relevant information in civil investigations,[40] which they can enforce by a court order if necessary. As a result of their legal powers, both criminal and civil investigators can obtain incriminating emails, text messages, and voicemails, and also obtain statements and testimony from witnesses that can help them build cases.

In addition to legal powers to compel the production of facts and evidence, the DOJ and civil enforcement authorities can pressure companies to provide information on culpable individuals by taking into account a company's cooperation in an investigation when determining whether to sanction the company and what sanctions to impose.

1. Remedies

As detailed in Chapter 2, U.S. enforcement authorities have a vast array of remedies available to them to craft the appropriate punishment given the unique facts of each case. These remedies are available against both individual and firm defendants and include monetary sanctions

[39] U.S. DEP'T JUST., *Press release: Eight Members of Global Insider Trading Network Charged with Securities Fraud and Money Laundering Offenses* (Nov. 18, 2025), https://www.justice.gov/usao-ma/pr/eight-members-global-insider-trading-network-charged-securities-fraud-and-money.

[40] *See, e.g.*, 15 U.S.C. §§ 77s(c), 78u(b), 80a-41(b), 80b-9(b); 12 U.S.C. § 1818(n); 12 U.S.C. §§ 5562-65.

like civil monetary penalties,[41] disgorgement,[42] and restitution.[43] They also include non-monetary sanctions such as cease-and-desist orders,[44] and industry bars.[45]

2. Challenges of Making Cases Against Individuals

There are factors that can make it challenging to bring a case against an individual even when an enforcement action has been resolved against a firm. Indeed, in the aftermath of the financial crisis, enforcement agencies reached settlements worth billions of dollars against large financial institutions, but generally did not bring corresponding cases against individuals. That is not because the settlements with institutions barred actions against individuals – they explicitly did not[46] – but rather because there are two practical difficulties enforcement authorities face when bringing cases against individuals. First, it can be more difficult to prove that an individual violated the law, as compared to a firm. Second, there are non-legal resource and political considerations that may drive enforcement authorities to seek settlements with firms in lieu of pursuing cases against individuals.

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[41] The SEC's general authority to seek civil monetary penalties for securities law violations is found in the following statutes: 15 U.S.C. §§77h-1(g), 77t(d), 78u(d), 78u-3(f), 80a-9(d), 80a-41, 80b-9, 80b-3. The CFTC's authority can be found at: 7 U.S.C. §§ 13a, 13a-1. The CFPB's authority can be found at 12 U.S.C. § 5565. FinCEN's authority is at 31 U.S.C. § 5321. OFAC's authority is found within the rules of each sanctions regime, for example at 31 CFR §§701-705 (Sudan sanctions penalties). The banking regulators can assess civil monetary penalties under numerous laws, including the National Bank Act, 12 U.S.C. § 93, laws governing savings associations, 12 U.S.C. § 504, laws governing state-member banks of the Fed, 12 U.S.C. §§ 504, 505, laws governing bank holding companies, 12 U.S.C. § 1847(b), and the Federal Deposit Insurance Act, 12 U.S.C. § 1818(i).

[42] 15 U.S.C. §§ 78u-3, 80a-9, 80b-3; Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, HARV. BUS. L. REV., https://journals.law.harvard.edu/hblr//wp-content/uploads/sites/87/2013/11/Ryan__The-Equity-Fa%C3%A7ade-of-SEC-Disgorgement.pdf; Francesco A. DeLuca, *Sheathing Restitution's Dagger under the Securities Acts*, 33 REV. BANKING & FIN. L. 899, 901 (2013-2014), https://www.bu.edu/rbfl/files/2014/03/RBFL-Vol-33.2_DeLuca.pdf; 7 U.S.C. § 13a-1; 12 U.S.C. §§ 5565, 1818(b)(6).

[43] 12 U.S.C. § 5565 (CFPB); 7 U.S.C. § 13a-1(d) (CFTC); 12 U.S.C. § 1818(b)(6) (authorizing banking regulators to seek restitution in conjunction with a cease-and-desist order where either (a) the depository institution or affiliated party was unjustly enriched in connection with the violation or (b) the violation or practice involved a reckless disregard for the law).

[44] 12 U.S.C. § 1818(b) (banking regulators); 15 U.S.C. §§ 77h-1(a) (SEC cease-and-desist order to enforce the Securities Act), 78u-3(SEC cease-and-desist to enforce Exchange Act), 80a-9(f) (SEC cease-and-desist order to enforce Investment Company Act), 80b-3 (SEC cease-and-desist order to enforce Investment Advisers Act); 7 U.S.C. § 13a (CFTC); 12 U.S.C. § 5565 (CFPB).

[45] 15 U.S.C. §§ 77h-1(f), 77t(e), 78u-3(f), 78u(d), 78o, 80a-9(b); 7 U.S.C. § 13(b). In some instances, some remedies may actually only be available against individuals. For example, banking regulators have the power to remove individuals from officer or director positions at banks. 12 U.S.C. §§ 1829(a), 1818(e). Specifically, the FDIC, Fed, and OCC can remove an officer or director of a bank if that individual broke a law, engaged in or participated in an unsafe or unsound practice, or breached his or her fiduciary duties, if the bank suffers or is likely to suffer a financial loss and the conduct involved personal dishonesty or demonstrated willful or continuing disregard for the safety and soundness of the bank.

[46] U.S. DEP'T JUST., *Press Release: Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement* (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading ("The settlement does not release individuals from civil charges, nor does it absolve Bank of America, its current or former subsidiaries and affiliates or any individuals from potential criminal prosecution.").

i. Difficulties in Proving an Individual's Liability

It can be challenging to impose liability on individuals when knowledge or intent is an element of the offense. This is an especially difficult hurdle to meet in criminal cases. For example, to prove a fraud charge against high-level executives, prosecutors must be able to prove both that the individual knew of the fraudulent activity and, more so, that the individual had fraudulent intent (or *scienter*).[47]

Knowledge and intent can be hard to prove against a particular individual because senior executives in an organization often do not know the details of decisions made by employees. Additionally, senior executives must often make decisions with limited facts and thus intent is often unclear even when senior executives are making decisions related to wrongful acts committed by the firm. For example, a disclosure document could be misleading, but the senior executive signing off on it may not have known the relevant facts making the disclosure misleading.

One method that has been used to try to establish knowledge is the use of certifications. For example, in the aftermath of the Enron and WorldCom accounting scandals, Congress passed the Sarbanes-Oxley Act of 2002,[48] which includes requirements that the CEO and CFO of a public company certify the accuracy and completeness of periodic reports.[49] However, even violations of these provisions condition the certification on the officers' knowledge.[50]

The diffusion of knowledge and information across a firm does not present the same challenge for establishing liability for the firm because of the aggregation theory previously discussed.[51] Under the aggregation or collective liability theory described earlier, a firm's intent can arguably be inferred when one person has knowledge attributable to the firm and another person engages in an act attributable to the firm, as in the car dealership example provided earlier in this chapter. This purported ability to aggregate conduct and knowledge could explain why large financial institutions would agree to large settlements but no individuals would be held accountable. As we discussed earlier, this theory of firm liability stands on questionable legal footing.

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[47] *See, e.g.*, Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/. Intent is also required for establishing criminal liability under the securities laws. 15 U.S.C. §§ 77x, 78ff, 80a-48, 80b-17 (each of the Securities Act, Securities Exchange Act, Investment Company Act and Investment Advisers Act requiring a "willful[]" violation of the law).

[48] Pub L. 107-204, 116 Stat. 745.

[49] 15 U.S.C. § 7241; 18 U.S.C. § 1350.

[50] 15 U.S.C. § 7241(a)(2) (certification as to the completeness of the disclosure and fair presentation of financial information is "based on such officer's knowledge"); 18 U.S.C. § 1350 (imposing criminal penalties for an officer certifying that a periodic report fully complies with the Exchange Act only if the officer signs the certification "knowing" that the report does not comport with the requirements).
See also New England Carpenters Guaranteed Annuity & Pension Funds v. DeCarlo, 122 F.4th 28, 49 (2d Cir. 2024). [Negligence, even in a "heightened form," is not sufficient to allege scienter in a case concerning financial conditions misstatements.]

[51] United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

ii. Non-Legal Considerations

Beyond factors grounded in the law, enforcement officials must make decisions about how to utilize their limited pool of resources and satisfy political pressure to demonstrate results. As a result, enforcement officials may be reluctant to bring anything but the most airtight cases in contested proceedings. And for the reasons described above, cases against individuals will generally be more difficult to prove and more often contested.

As a practical matter, enforcement agency resources are finite. Indeed, in the immediate aftermath of the financial crisis, Congress authorized $70 million for the Department of Justice to spend on pursuing financial fraud cases in 2010 and 2011, but only ended up appropriating $9.3 million in 2010 and $0 in 2011.[52] In fiscal 2024, the SEC had an enforcement budget of $695 million.[53]

The reality of finite resources forces enforcement agencies to choose how to allocate their budgets and staff to maximum effect. And cases against firms tend to be less resource-intensive than actions against individuals.[54] First, the government can exert pressure on firms to conduct internal investigations to demonstrate cooperation with the government to receive better settlement terms, which can save the government money, time, and manpower.[55]

Second, corporations are likely to settle enforcement cases quickly to avoid the loss of investor confidence and business disruption associated with prolonged government investigations and the possibility of prosecution.[56] As we noted earlier, around 90% of lost market value to firms from government enforcement actions can be attributable to reputational harm. A quick settlement that announces charges and simultaneously settles a matter minimizes the number of days the alleged wrongdoing receives attention. Furthermore, if firms were to contest a case, management would likely be distracted for a significant period of time because of the need to formulate a case strategy, continually consult with legal counsel, reassure clients, and prepare to testify at trial. In addition, firms that litigate enforcement actions face great uncertainty risk in the event they lose. For example, as we discussed in Chapter 2, there are frequently few guideposts for determining monetary sanction amounts and a firm could risk an exorbitant penalty were it to lose a litigated case. As well, a loss in a litigated case can have collateral consequences through mechanisms like

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[52] Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 274 (2014).

[53] U.S. SEC. & EXCH. COMM'N, *Fiscal Year 2026 Congressional Budget Justification* https://www.sec.gov/files/fy-2026-congressional-budget-justification.pdf. https://www.sec.gov/files/secfy18congbudgjust.pdf

[54] Richman, *supra* note 52 at 273-74; Samuel W. Buell, *The Limits of Individual Prosecutions in Deterring Corporate Fraud*, 59 WAKE FOREST L. REV. 557, 562 (2024).

[55] Richman, *supra note* 52 at 273.

[56] *See* Steven L. Schwarcz, *Excessive Corporate Risk-Taking and the Decline of Personal Blame*, 65 EMORY L.J. 533, 549 (2015) (describing how firms are more likely to settle "as a cost of doing business"); John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick"*, 79 MICH. L. REV. 386, 403 (1981) (noting that "the accused corporation often cannot afford the time interval necessary to establish its innocence"); Keith A. Preble & Bryan R. Early, *Enforcing Economic Sanctions by Tarnishing Corporate Reputations*, 26 BUS. & POL. (2024) (noting that "Regulatory enforcement actions can tarnish the brands and reputations of corporate violators, and larger firms, especially those with prominent profiles, have more to lose from the negative publicity such incidents generate.").

automatic disqualifications that are easier to resolve through a structured and organized settlement process.

Third, as we detailed earlier, firms are pressured to settle criminal matters to prevent failure of the business and are pressured to settle civil matters to avoid the untenable position of antagonizing supervisory regulators.

Finally, enforcement officials also face political pressure from Congress and the public to produce results that can justify the funding that they receive,[57] which can influence enforcement priorities. For example, charging an individual defendant that is willing to go to trial can be politically risky because juries often desire a compelling narrative and blatant evidence of culpability.[58] Moreover, in certain instances when lower-level employees engage in clear wrongdoing, politics and optics could motivate agencies to target the firm rather than middle-class Americans.

[57] Margaret H. Lemos & Max Minzer, *For Profit Public Enforcement*, 127 HARV. L. REV. 853, 875-82 (2014); John C. Coffee, Jr., *SEC Enforcement*: *What Has Gone Wrong?*, THE CLS BLUE SKY BLOG (Jan. 2, 2013) (stating that the SEC needs to use metrics to justify its budget); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J. L. PUB. POL'Y 639, 643–45 (2010) (noting that the SEC is largely evaluated on the performance of the Enforcement Division, which focuses the agency on its enforcement statistics).

[58] Richman, *supra* note 52, at 270 [In the [corporate] finance cases, only 13 prison sentences were imposed out of nearly 60 [individual] criminal actions.].

III. U.S. Enforcement Authorities' Emphasis on Individual Accountability

Although there are real challenges that enforcement officials face in identifying and penalizing illicit conduct by individuals, U.S. enforcement authorities have recognized the importance of individual accountability as is evident in the emphasis that they have placed on this issue in formal policies and public statements.

In this section, we first discuss the evolution of the DOJ's efforts to leverage the threat and risk of firm liability to build cases against culpable individuals and to emphasize individual accountability. We then explain the SEC's policy on prioritizing individual accountability. Finally, we present data showing that enforcement actions against individuals constitutes a significant portion of overall enforcement actions.

A. The DOJ's Internal Policies Target Individuals

The DOJ has used its internal policies on the prosecution of corporations to develop ways to leverage the liability exposure of firms to gather evidence against individuals. Over time, DOJ internal policies have evolved to include explicit instructions to DOJ attorneys that in every case they should be seeking to develop a case against individual defendants. As the following discussion will show, the DOJ has always recognized the importance of prosecuting individuals, has revised its policies over time to enhance the ability of prosecutors to build cases against culpable individuals, and in 2015 made it expressly clear that individual accountability is its primary goal. We then provide prominent examples – including cases relating to foreign exchange manipulation, LIBOR rigging, commodities spoofing, and digital asset firms – in which the DOJ appears to have made an effort to prosecute individuals where misconduct occurred within financial institutions.

The first pertinent DOJ guidance was issued in 1999 by then-Deputy Attorney General Eric Holder (the "**Holder Memo**").[59] It emphasized to DOJ lawyers the value of holding corporations accountable for wrongdoing, but also made clear that corporate prosecutions would *not* take the place of individual prosecutions. Specifically, the memo stated that while "[c]orporations should not be treated leniently," prosecution of a corporation is not a "substitute" for the prosecution of criminally culpable individuals.

The Holder Memo sought to have DOJ lawyers use the threat of corporate liability to obtain information that could implicate culpable individuals. The Holder Memo detailed eight factors that prosecutors were to consider in deciding whether to charge a corporation: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's history of similar conduct; (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation; (5) the existence and adequacy of the corporation's compliance program; (6) the corporation's remedial actions; (7) the collateral

[59] U.S. DEP'T JUST., *Memorandum from Deputy Attorney General on Bringing Criminal Charges Against Corporations* (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

consequences of criminal charges; and (8) the adequacy of non-criminal remedies against the corporation.[60]

Two of the above factors could be used to incentivize a corporation to help the DOJ build cases against culpable individuals. First, to determine the extent of a corporation's cooperation in the fourth factor, the Holder Memo stated that prosecutors should take into account whether the corporation willingly identified the individual wrongdoers and disclosed the results of any internal investigation, including whether the corporation waived attorney-client and work product privileges in doing so.[61] The DOJ would also consider whether the corporation appeared to protect culpable employees by, among other things, advancing attorneys' fees or providing them information through a joint defense agreement.[62] Thus, the DOJ could exert pressure on corporations to assist the DOJ in uncovering culpable individuals and building a case against those individuals. Second, in the remediation (sixth) factor, corporations could be given credit for internally disciplining wrongdoers because "[e]ffective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees."[63] This factor demonstrates that the DOJ focused not only on public retribution and punishment of individuals, but also accountability within the corporation.

In 2003, the Bush Administration issued a memo to replace the Holder Memo, which is referred to as the Thompson Memo, and put an even greater emphasis on individual accountability.[64] For example, while the Thompson Memo reiterated the view that corporate prosecutions were appropriate, it directed that only "rarely should provable individual culpability not be pursued," even when a corporation is held accountable.[65] In addition, the Thompson Memo added a ninth factor to consider in deciding whether to criminally charge a corporation – "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance" – though it did not elaborate any further on that factor.[66] This additional factor, however, implied that individual prosecutions could be sufficient and obviate a need for a corporate prosecution.

As discussed in the Committee's 2006 report on improving U.S. capital markets, the Holder and Thompson Memos were criticized for putting pressure on corporations to waive attorney-client and work product privileges and for interfering with the ability of employees to receive legal defense funding from their employers.[67] The Thompson memo was therefore revised by two

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] U.S. DEP'T JUST., *Memorandum from Deputy Attorney General, Larry D. Thompson, on Federal Prosecution of Business Organizations* (Jan. 20, 2003).
[65] *Id.*
[66] *Id.*
[67] U.S. DEP'T JUST., *Memorandum from Deputy Attorney General, Paul J. McNulty, on Principles of Federal Prosecution of Business Organizations* [hereinafter *the McNulty Memo*]; COMM. CAP. MKT. REGUL, *Interim Report of the Committee on Capital Markets Regulation* at 84-86 (Nov. 2006), https://capmktsreg.org/wp-content/uploads/2022/11/Interim-Report-of-the-Committee-on-Capital-Markets-Regulation-1.pdf.; John Power, *Show Me the Money: The Thompson Memo, Stein, and an Employee's Right to the Advancement of Legal Fees Under*

memos issued in quick succession in 2006 and 2008 that rightly sought to address those concerns while still allowing prosecutors to pressure corporations to help identify culpable individuals.

The 2006 memo, referred to as the McNulty Memo, primarily revised guidance on how prosecutors should weigh a corporation's cooperation in an investigation. It limited the ability of prosecutors to request that attorney-client and work product privileges be waived by the corporation to instances where a "legitimate need" exists and required approval from the U.S. Attorney or the Deputy Attorney General to do so.[68] It also forbade prosecutors from taking into account whether the corporation advanced attorneys' fees to employees when assessing the firm's cooperation.[69]

The 2008 memo, known as the Filip Memo, made further revisions in the same areas. Specifically, the memo provided that the DOJ's evaluation of a firm's cooperation would not consider whether the firm waived privilege or not, but would instead focus solely on whether the firm provided relevant information and evidence and identified culpable individuals.[70] As a result, these were balanced changes that continued DOJ efforts to leverage corporate liability to build cases against individuals while protecting attorney-client and work product privileges.

The DOJ again issued guidance in a 2015 memorandum by Deputy Attorney General Sally Yates, which for the first time squarely instructed DOJ attorneys to make individual accountability the department's top priority. The Yates Memo instructed its attorneys: (1) to focus investigations on individuals from their inception; (2) to establish plans for resolving cases against individuals *before* a case against a corporate defendant is resolved; (3) in civil cases, to look beyond an individual's ability to pay when deciding whether to bring a case to seek civil penalties; and (4) only offer cooperation credit to companies that identify all individuals involved in or responsible for the misconduct and all facts relating thereto.[71] The U.S. Attorney Manual guidelines were revised in November 2015 to reflect the contents of the Yates Memo and now require investigations to "focus on wrongdoing by individuals from the very beginning of the investigation" and to consider whether "charges against the individuals responsible for the corporation's malfeasance" will satisfy prosecutorial objectives before bringing charges against a corporation.[72] This policy has been left in place by subsequent administrations.

The DOJ's policies on individual accountability have continued to evolve in recent years. First, in 2018, Deputy Attorney General Rod Rosenstein announced a partial retreat from the Yates Memo. Most notably, DOJ attorneys were instructed to offer cooperation credit based on whether a company identified all individuals "substantially" involved in or responsible for the misconduct

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the McNulty Memo, 64 WASH. & LEE L. REV. 1205, 1207 (2007) (noting the controversy created by the Thompson Memo's position that the advancement of legal fees could be a factor in charging a corporation).

[68] McNulty Memo, *supra* note 67, at 9–11.

[69] *Id*. at 11.

[70] U.S. DEP'T JUST., *Memorandum from Deputy Attorney General, Mark Filip, on Principles of Federal Prosecution of Business Organizations*, at 7-11 (Aug. 28, 2008).

[71] U.S. DEP'T JUST., *Memorandum from Deputy Attorney General, Sally Quillian Yates, on Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015).

[72] U.S. DEP'T JUST., Justice Manual §§ 9-28.010, 9-28.1300.

and were again authorized to consider an individual's ability to pay in deciding whether to pursue a civil case.[73] Deputy Attorney General Rosenstein further instructed that corporate resolutions should not protect individuals from criminal liability absent extraordinary circumstances.[74]

A 2021 memo issued by Deputy Attorney General Lisa Monaco reinstated the Yates Memo requirement that to qualify for cooperation credit, a company must identify *all* individual wrongdoers and provide all nonprivileged information in connection therewith.[75] Deputy Attorney General Monaco announced further refinements to the DOJ guidance on individual accountability in a 2022 memo, which clarified that to receive full cooperation credit, a corporation's provision of information must be *timely*.[76] Further, prosecutors must attempt to complete investigations into individuals and seek charges prior to or simultaneously with resolving a corporate case, and, for individuals being prosecuted in a foreign jurisdiction, prosecutors must determine that there is a "significant likelihood" of "effective prosecution" abroad before declining a prosecution in the U.S.[77]

Guidance from the current administration issued in May 2025 has reiterated that "[t]he [DOJ]'s first priority is to prosecute individual criminals," and stated that "[t]he Criminal Division will investigate these individual wrongdoers relentlessly to hold them accountable."[78] Deputy Attorney General Todd Blanche also issued a memo in June 2025 on DOJ enforcement of the FCPA, stating the prosecutors will focus on cases tied to misconduct by individuals and will "not attribute nonspecific malfeasance to corporate structures."[79]

Prominent examples—including cases relating to foreign exchange manipulation, LIBOR rigging, commodities spoofing, and digital asset firms—demonstrate that the DOJ is indeed prioritizing individual accountability in addition to firm liability.

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[73] Deputy Attorney Rod J. Rosenstein, *Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

[74] Id.; U.S. DEP'T JUST., Justice Manual 9-28.210

[75] U.S. DEP'T JUST., *Memorandum from Deputy Attorney General, Lisa O'Monaco, on Corporate Crime Advisory Group and Revisions to Corporate Criminal Enforcement Policies Individual Accountability* (Oct. 28, 2021), https://www.justice.gov/archives/dag/file/1173651-0/dl?inline; *see also* Deputy Attorney General, Lisa O'Monaco, *Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

[76] U.S. DEP'T JUST., *Memorandum from Deputy Attorney General, Lisa O'Monaco, on Further Revisions to Corporate Criminal Enforcement Policies* (Sept. 15, 2022), https://www.justice.gov/archives/opa/media/1245451/dl?inline.

[77] *Id.*

[78] U.S. DEP'T JUST., CRIM. DIV., *Memorandum from Head of the Criminal Division on Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime* (May 12, 2025), https://www.justice.gov/criminal/media/1400046/dl?inline.

[79] U.S. DEP'T JUST., *Memorandum from Deputy Attorney General, Todd Blanche, on the Guidelines for Investigations and Enforcement of the FCPA* (Jun. 9, 2025), https://cdn.lawreportgroup.com/acuris/files/ACR-New/2025_06_10%20DAG%20Memo%20on%20FCPA%20Enforcement.pdf.

In May 2015, the DOJ obtained guilty pleas from five large financial institutions for conspiring to manipulate the price of the U.S. dollars and euros exchanged in the foreign currency exchange spot market resulting in criminal fines of more than $2.5 billion.[80] The banks acted in concert by using an electronic chat room and coded language.[81] They manipulated the market in at least two ways. First, they coordinated trading efforts to manipulate the benchmark rates set at 1:15pm and 4:00pm that are used to price orders for many large customers.[82] Second, they would agree at certain times not to buy or sell, to avoid moving prices in a direction adverse to the other conspirators.[83] In addition to guilty pleas from the five institutions, the DOJ obtained guilty pleas from two former traders from Citigroup and Barclays,[84] the conviction of a former JP Morgan trader,[85] and indicted an additional three traders, one each from JP Morgan, Citigroup and Barclays, who were subsequently acquitted.[86] A seventh trader from UBS assisted prosecutors to build their cases.[87]

The DOJ has also pursued criminal charges against individuals in the LIBOR rigging matter. LIBOR is a benchmark rate that reflects the rates at which banks make unsecured loans to each other.[88] It is used as a base rate for setting interest rates that consumers and businesses pay on term loans, auto loans, and mortgages.[89] LIBOR is set by a panel of global banks that submit their cost of borrowing to Thompson Reuters data collection service at 11:00am each morning.[90] In the LIBOR rigging matter, the rate was manipulated by the submission of false borrowing costs to the data collection service.[91] Global fines by regulators around the world against banks totaled more than $9 billion, and the DOJ indicted at least 16 individuals.[92]

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[80] U.S. DEP'T JUST., *Press Release: Five Major Banks Agree to Parent-Level Guilty Pleas* (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

[81] *Id*.

[82] *Id*.

[83] *Id*. The traders referred to themselves as "The Cartel."

[84] Suzi Ring & David McLaughlin, *FX 'Cartel' Traders Said to Inch Closer Toward Deal to Face U.S. Trial*, BLOOMBERG (Jun. 1, 2017), https://www.bloomberg.com/news/articles/2017-06-01/fx-cartel-traders-said-to-inch-toward-deal-to-face-u-s-trial.

[85] U.S. DEP'T JUST., *Press Release: Former Trader for Major Multinational Bank Convicted for Price Fixing and Bid Rigging in FX Market* (Nov. 20, 2019), https://www.justice.gov/archives/opa/pr/former-trader-major-multinational-bank-convicted-price-fixing-and-bid-rigging-fx-market.

[86] ANALYSIS GRP., *Insights on United States v. Richard Usher, et al.*, https://www.analysisgroup.com/Insights/cases/united-states-v.-richard-usher-et-al.
https://www.analysisgroup.com/Insights/cases/united-states-v.-richard-usher-et-al

[87] Ring & McLaughlin, *supra* note 84.

[88] James McBridge, *Understanding the Libor Scandal*, COUNCIL ON FOREIGN RELS. (Oct. 12, 2016), https://www.cfr.org/backgrounder/understanding-libor-scandal.

[89] *Id*.

[90] *Id*.

[91] *Id*.

[92] *Id*. The DOJ's conviction of two traders, Anthony Allen and Anthony Conti, was recently overturned by the Second Circuit Court of Appeals because the conviction hinged, to a large measure, on testimony by a witness who had been exposed to coerced statements made by the defendants in the United Kingdom. The appeals court held that on the facts of the case, the defendants' Fifth Amendment right against self-incrimination was violated. *See* United States v. Allen, No. 16-898, slip. op. (2nd Cir. July 19, 2017).

More recently, the DOJ has placed significant emphasis on prosecuting commodities "spoofing," a manipulative practice in which a trader places orders he or she intends to cancel before execution.[93] The 2010 Dodd-Frank Act amended the CEA to explicitly prohibit spoofing in futures and derivatives markets, making it both a civil and criminal offense.[94] Beginning in 2014, the DOJ began criminally charging individuals for violating the anti-spoofing provision.[95] In January 2018 the DOJ announced spoofing charges against seven individuals, six of whom had been employed at large commodities trading firms or global financial institutions.[96] In many of these cases, the DOJ also alleged commodities fraud, wire fraud or other misconduct in connection with the underlying spoofing. The DOJ has continued to bring charges against individuals, ultimately securing convictions or guilty pleas for spoofing-related conduct from former traders of firms, including Deutsche Bank. J.P, Morgan, and Merrill Lynch.[97] The DOJ has also pursued institutions in connection with crimes relating to spoofing, announcing the first such corporate resolutions in 2019.[98] However, pursuant to its cooperation policies and the CEP, the DOJ has not prosecuted certain firms that assisted with DOJ investigations of individuals. For instance, in 2019 the DOJ entered into a NPA with Merril Lynch relating to spoofing activity by certain former traders, recognizing Merrill Lynch's cooperation in providing the DOJ with all known relevant facts about the individuals involved.[99] And in September 2025, the DOJ announced that pursuant

[93] See, e.g., Laura Magyar & Tim Tian, *Spoofing Enforcement Cases and Steps to Protect Your Firm*, PATOMAK GLOB. PARTNERS (Oct. 14, 2025) https://patomak.com/2025/10/14/spoofing-enforcement-cases-and-steps-to-protect-your-firm/.

[94] 7 USC 6c(a)(5); 7 U.S.C. § 13(a)(2)

[95] Elisha Kobre, *Spoofing Market Manipulation Cases Set Stage for More Enforcement*, BLOOMBERG LAW (Nov. 30, 2023), https://news.bloomberglaw.com/us-law-week/spoofing-market-manipulation-cases-set-stage-for-more-enforcement; FBI, *First Federal Spoofing Prosecution* (Aug 12, 2016), https://www.fbi.gov/news/stories/trader-sentenced-in-spoofing-case-involving-market-manipulation.

[96] U.S. DEP'T JUST., *Press Release: Eight Individuals Charged with Deceptive Trading Practices Executed on U.S. Commodities Markets* (Jan. 29, 2018), https://www.justice.gov/archives/opa/pr/eight-individuals-charged-deceptive-trading-practices-executed-us-commodities-markets; *see generally* William J. Stellmach, Sohair Aguirre & Paul J. Pantano, Jr., *To Spoof or Not to Spoof? The DOJ Answers the Question*, 39 Future & Derivatives L. 1 (2019), https://www.willkie.com/-/media/files/publications/2019/01/to_spoof_or_not_to_spoof.pdf.

[97] U.S. DEP'T JUST., *Press Release: Two Former Deutsche Bank Traders Convicted of Engaging in Deceptive and Manipulative Trading Practices in U.S. Commodities Markets* (Sept. 25, 2020), https://www.justice.gov/archives/opa/pr/two-former-deutsche-bank-traders-convicted-engaging-deceptive-and-manipulative-trading; U.S. DEP'T JUST., *Press Release: Former J.P. Morgan Traders Convicted of Fraud, Attempted Price Manipulation, and Spoofing in a Multi-Year Market Manipulation Scheme* (Aug. 10, 2022), https://www.justice.gov/archives/opa/pr/former-jp-morgan-traders-convicted-fraud-attempted-price-manipulation-and-spoofing-multi-year; U.S. DEP'T JUST., *Jury Convicts Two Former Wall Street Bankers of Wire Fraud* (Aug. 5, 2021), https://www.justice.gov/archives/opa/pr/jury-convicts-two-former-wall-street-bank-traders-wire-fraud-0.

[98] See, e.g., PAUL WEISS, *Anti- Spoofing Enforcement: 2019 Year in Review* (Jan. 28, 2020), https://www.paulweiss.com/insights/client-memos/anti-spoofing-enforcement-2019-year-in-review.

[99] U.S. DEP'T JUST., CRIM. DIV., *Non-Prosecution Agreement with Merrill Lynch Commodities, Inc* (Jun. 25, 2019), https://www.justice.gov/archives/opa/press-release/file/1177296/dl?inline=.

to the CEP, it was declining to prosecute BofA Securities for spoofing by two former employees where BofA voluntarily self-disclosed and cooperated with the DOJ.[100]

The DOJ has also secured the guilty pleas or convictions of executives at numerous digital asset firms in recent years on various theories, including: the 2023 guilty plea of Binance founder and CEO Changpeng Zhao for BSA violations;[101] the 2023 conviction of FTX founder and CEO Samuel Bankman-Fried for defrauding customers and investors;[102] the 2024 guilty plea of Celsius founder and CEO Alexander Mashinsky for commodities and securities fraud;[103] and the 2025 guilty plea of Terraform Labs co-founder and CEO Do Kwon for fraud.[104] Binance, the only of these firms still in operation, also pleaded guilty to certain criminal violations and agreed to pay a criminal fine of $1.8 billion.[105]

Other prominent cases where the DOJ has pursued individual accountability include the 2022 convictions of Elizabeth Holmes and Ramesh Balwani, executives at defunct blood testing company Theranos, for investor fraud.[106] Each received sentences of more than 11 years in prison. Also in 2022, Roger Ng, a former managing director at Goldman Sachs, was convicted for his participation in a money laundering and bribery scheme involving payments to high-ranking government officials in Malaysia and Abu Dhabi.[107] Ng was sentenced to 10 years in prison. In a 2020 DPA with the DOJ, Goldman Sachs also received a criminal fine of over $2.3 billion in relation to the same misconduct.[108] Goldman had not voluntarily self-disclosed the misconduct and

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[100] U.S. DEP'T JUST., *Press Release: BofA Securities Inc. Resolves Criminal Investigation with Justice Department Pursuant to Part I of the Criminal Divison's Corporate Enforcement and Voluntary Self- Disclosure Policy*, (Sept. 18, 2025), https://www.justice.gov/opa/pr/bofa-securities-inc-resolves-criminal-investigation-justice-department-pursuant-part-i.

[101] U.S. DEP'T JUST., *Binance and CEO Plead Guilty to Federal Charges in $4B Resolution*, (Nov. 21, 2023), https://www.justice.gov/archives/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution

[102] U.S. DEP'T JUST., *Samuel Bankman-Fried Sentenced to 25 Years for His Orchestration of Multiple Fraudulent Schemes* (Mar. 28, 2024), https://www.justice.gov/archives/opa/pr/samuel-bankman-fried-sentenced-25-years-his-orchestration-multiple-fraudulent-schemes.

[103] U.S. DEP'T JUST., *Celsius Founder And Former CEO Alexander Mashinsky Pleads Guilty To Multi-Billion Dollar Fraud And Market Manipulation Schemes* (Dec. 3, 2024), https://www.justice.gov/usao-sdny/pr/celsius-founder-and-former-ceo-alexander-mashinsky-pleads-guilty-multi-billion-dollar

[104] U.S. DEP'T JUST., *Do Known Pleads Guilty to Fraud* (Aug. 12, 2025), https://www.justice.gov/usao-sdny/pr/do-kwon-pleads-guilty-fraud.

[105] Plea Agreement, United States v. Binance Holdings Ltd., No. 23-cr-178 (W.D. Wash. Nov. 21, 2023), https://www.justice.gov/archives/opa/media/1326901/dl?inline

[106] U.S. DEP'T JUST., *Elizabeth Holmes Sentenced To More Than 11 Years For Defrauding Theranos Investors Of Hundreds Of Millions* (Nov. 18, 2022) https://www.justice.gov/usao-ndca/pr/elizabeth-holmes-sentenced-more-11-years-defrauding-theranos-investors-hundreds; U.S. DEP'T JUST., *Theranos President Sentenced To More Than 12 Years For Fraud That Jeopardized Patient Health And Bilked Investors Of Millions*, (Nov. 18, 2022), https://www.justice.gov/usao-ndca/pr/theranos-president-sentenced-more-12-years-fraud-jeopardized-patient-health-and-bilked

[107] U.S. DEP'T JUST., *Former Goldman Sachs Managing Director Sentenced to 10 Years in Prison for His Role in Massive Bribery and Money Laundering Scheme* (Mar. 9, 2023), https://www.justice.gov/usao-edny/pr/former-goldman-sachs-managing-director-sentenced-10-years-prison-his-role-massive

[108] Deferred Prosecution Agreement, United States v. The Goldman Sachs Group, Inc., No. 20-cr-437 (E.D.N.Y. Oct. 22, 2020), https://www.justice.gov/criminal/criminal-fraud/file/1329926/dl?inline.

received only partial credit for cooperating with the DOJ due to significant delays in producing relevant information.[109]

1. The SEC's Emphasis on Individuals

In 2006, the SEC adopted guidelines stating that penalizing the responsible individuals as opposed to the company is preferable where penalizing the company will not increase the deterrent effect of the enforcement action.[110] Such a prioritization is consistent with a statement that then-Chair White made in a 2016 speech that individual accountability is a "core pillar" of an enforcement system and is a priority of the agency.[111] The SEC has continued to focus on enforcement against individuals in recent years. In 2022 then-Director of the Division of Enforcement Gurbir Grewal stated that "holding individuals accountable is... critical to our efforts," and noting that, as in years past, more than two-thirds of stand-alone enforcement actions in the prior year had involved at least one individual.[112] And in March 2025 then-Acting Director of the Division of Enforcement Sam Waldon indicated that under the current administration the SEC will place even greater emphasis on holding individuals accountable.[113]

Like the DOJ, there are prominent examples of the SEC pursuing charges against individuals where it has also targeted a firm. One such example is the SAC Capital case, which the SEC dubbed as potentially the largest insider trading scheme ever pursued. In that matter, the SEC alleged that a professor at the University of Michigan Medical School, who was a consultant for an expert network, tipped off a hedge fund run by CR Intrinsic Investors (an affiliate of Steven a. Cohen's SAC Capital) ahead of negative news about a drug trial.[114]

The SEC sued the hedge fund, the professor, and Mathew Martoma, a portfolio manager at the hedge fund.[115] The SEC settled with both the professor (the tipper) and CR Intrinsic Investors, including a civil penalty of $601.7 million against the hedge fund. A final judgment was entered against Martoma in 2020 enjoining him from future violations of the securities laws and in 2021 the SEC settled follow-on proceedings against Martoma barring him from association with

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[109] *Id*. at 4.

[110] U.S. SEC. & EXCH. COMM'N, *Statement Concerning Financial Penalties* (Jan. 4, 2006), https://www.sec.gov/news/press/2006-4.htm.

[111] Chair Mary Jo White, Chair, *Speech*: *A New Model for SEC Enforcement: Producing Bold and Unrelenting Results* (Nov. 18, 2016), https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html.

[112] Gurbir S. Grewal, Director of Division of Enforcement, *Remarks at Securities Enforcement Forum* (Nov. 15, 2022), https://www.sec.gov/newsroom/speeches-statements/grewal-speech-securities-enforcement-forum-111522.

[113] *SEC to Focus on Traditional Cases under New Leadership, Acting Director Says*, REUTERS (Mar. 24, 2025), https://www.reuters.com/world/us/sec-focus-traditional-cases-under-new-leadership-acting-director-says-2025-03-24/.

[114] Steve Goldstein, *SEC Alleges Largest-Ever Insider-Trading Scheme*, MARKETWATCH (Nov. 20, 2012), http://www.marketwatch.com/story/sec-alleges-largest-ever-insider-trading-scheme-2012-11-20.

[115] U.S. SEC. & EXCH. COMM'N, *Litigation Release 23133* (Nov. 14, 2014), https://www.sec.gov/litigation/litreleases/2014/lr23133.htm.

any investment adviserin 2021.[116] The SEC also settled with Steven A. Cohen by prohibiting him from managing money other than his own for approximately two years.[117] Martoma was also criminally indicted by the DOJ in 2012, was convicted by a jury in 2014 and was sentenced to nine years in prison.[118] Martoma appealed his conviction, which was upheld by a Second Circuit panel in 2017.[119]

More recently, in 2022, the SEC obtained final judgments imposing approximately $184 million in disgorgement against Kevin Merrill, Jay Ledford, and multiple entities they controlled, in connection with a $345 million Ponzi-like scheme that defrauded more than 230 investors nationwide. In parallel criminal proceedings brought by the U.S. Attorney's Office for the District of Maryland, Kevin Merrill, Jay Ledford, and Cameron Jezierski pleaded guilty, were sentenced to significant prison terms, and were ordered to pay more than $230 million in restitution.[120]

B. Data Shows that the Government Does Target Individuals

Data trends analyzed by the Committee Staff show that enforcement authorities take individual accountability seriously, although it is not possible to make normative conclusions from the data about whether enforcement authorities are optimally prioritizing cases against individuals.

1. Independent Data Analysis of Civil Regulator Enforcement Actions

The Committee Staff's collection and analysis of case-level enforcement action data from 2000 until 2024 demonstrates that regulators have brought a significant portion of their cases against individuals and there appears to be a trend in the past seven to eight years of an increasing percentage of cases being brought against individuals.

As **Figure 10** shows, the percentage of enforcement actions brought by both capital markets (SEC and CFTC) and banking regulators (FDIC, OCC, Fed, and CFPB) against individuals has markedly increased in recent years. Collectively, the proportion of enforcement actions targeting individuals rose steadily beginning in 2010, with the exception of the last two years, and reached its peak in 2022. **Figure 10** also shows that the percentage of enforcement actions that capital markets regulators have brought against individuals, not firms, has increased throughout our data period and was at its highest point in 2021. A similar trend is evident among banking regulators, where the share of actions against individuals more than doubled—from under 20 percent in 2010 to approximately 50 percent in 2024.

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[116] U.S. SEC. & EXCH. COMM'N,, In the Matter of Mathew Martoma, Administrative Proceeding File No. 3-20219 (Feb. 4, 2021), https://www.sec.gov/files/litigation/admin/2021/ia-5679.pdf. https://www.sec.gov/files/litigation/admin/2021/ia-5679.pdf

[117] U.S. SEC. & EXCH. COMM'N, *Press Release: Stephen A. Cohen Barred from Supervisory Hedge Fund Role* (Jan. 8, 2016), https://www.sec.gov/news/pressrelease/2016-3.html.

[118] Matthew Goldstein, *Martoma Starts Serving 9-Year Sentence for Insider Trading*, N.Y. TIMES (Nov. 21, 2014), https://dealbook.nytimes.com/2014/11/21/martoma-starts-serving-9-year-sentence-for-insider-trading/?_r=0.

[119] Alexandra Stevenson, *Mathew Martoma's Insider Trading Conviction is Upheld*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/business/dealbook/mathew-martoma-insider-trading-conviction-upheld.html

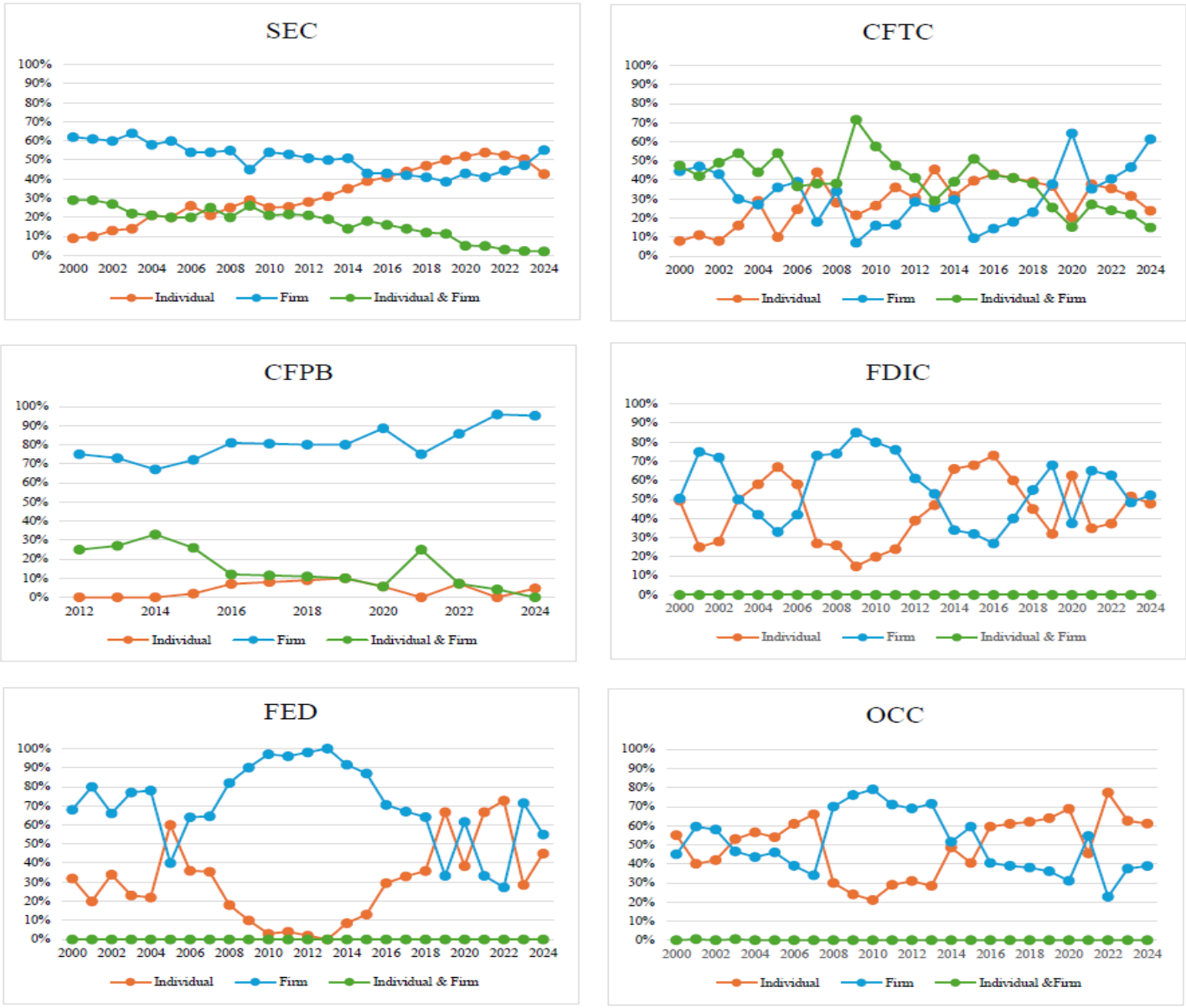
[120] U.S. SEC. & EXCH. COMM'N, *Litigation Release 25561: SEC Obtains Nine Final Judgments in $345 Million Ponzi-Like Scheme* (Oct. 18, 2022), https://www.sec.gov/enforcement-litigation/litigation-releases/lr-25561.

Figure 10: Percentage of Enforcement Actions Initiated Per Year by Defendant Type

Breaking out the case-level data even further on an agency-by-agency basis further illustrates this trend as shown in **Figure 11**. For example, the percentage of SEC cases involving individual defendants has steadily risen from roughly 40 percent in 2002 to approximately 55 percent in 2022. A similar pattern is evident at the Fed, which in 2022 brought more than 70 percent of its formal enforcement actions against individuals—the highest share observed over the 2001–2024 period and a sharp increase from levels below 10 percent during 2010–2014. The proportion of OCC enforcement actions against individuals has also increased in recent years: actions against individuals accounted for roughly 20 percent of OCC cases in 2010 but rose to a record high of

approximately 80 percent in 2022. Actions against individuals remained elevated in 2024, at more than 60 percent.

Figure 11: Percentage of Enforcement Actions Initiated Per Year by Defendant Type



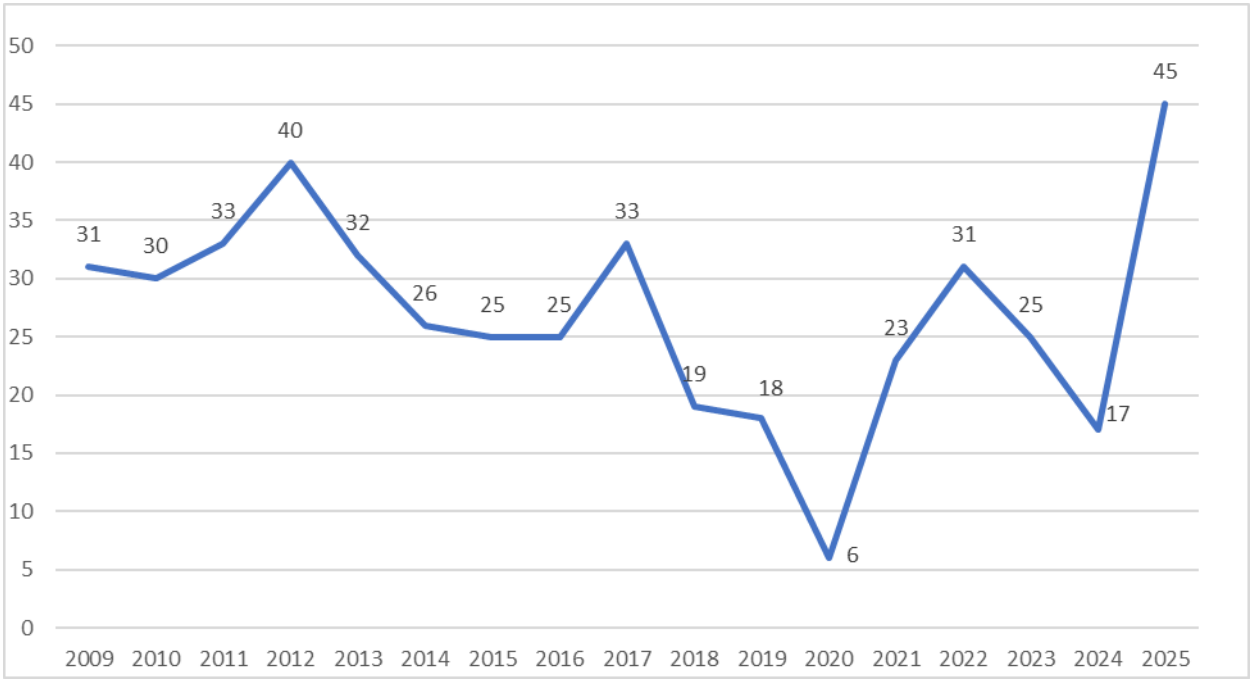
2. Additional Data on DOJ Enforcement

Although the DOJ does not produce annual statistics on the proportion of criminal or civil cases it brings against individuals or firms in the areas of the law relevant to this Report, a review

of insider trading enforcement activity shows that the crime, which almost always involves the prosecution of individual defendants,[121] has remained a focus of the DOJ over time.

The Committee Staff searched DOJ and U.S. Attorney press releases archived online and developed a data set on insider trading from 2009 to the present.[122] **Figure 12** shows that in the aftermath of the financial crisis, the DOJ steadily brought more insider trading cases (all against individuals) from 2009 through 2012. **Figure 12** also shows a sharp decline in insider trading cases brought by the DOJ and U.S. Attorneys in 2020, likely reflecting disruptions associated with the COVID-19 pandemic. The increase observed in 2025 appears to reflect a greater number of cases involving multiple defendants, as illustrated by cases brought by U.S. Attorneys in the District of New Jersey[123] and District of Massachusetts.[124]

Figure 12: Number of Insider Trading Indictments Per Year



To allow the public to better understand the extent to which the DOJ prosecutes individuals for crimes pertinent to the capital markets and financial system, the DOJ should provide more

[121] Indeed, in the Committee Staff's review of DOJ press releases of insider trading cases from 2009 through 2025 found only three cases involving firm defendants rather than individual defendants.

[122] Prior to 2009, DOJ and U.S. Attorneys' Offices do not appear to reliably issue or post press releases online.

[123] *See, e.g.*, U.S. DEP'T JUST., *Press Release: Six Individuals Charged in $41 Million Insider Trading and Market Manipulation Scheme Involving Cancer Drug and Opioid Treatment Companies* (Dec. 19, 2025), https://www.justice.gov/usao-nj/pr/six-individuals-charged-41-million-insider-trading-and-market-manipulation-scheme.

[124] *See, e.g.,* U.S. DEP'T JUST., *Press Release: Eight Members of Global Insider Trading Network Charged With Securities Fraud and Money Laundering Offenses* (Nov. 18, 2025), https://www.justice.gov/usao-ma/pr/eight-members-global-insider-trading-network-charged-securities-fraud-and-money.

useful information to the public. Current annual reports released by the Executive Office of the U.S. Attorneys provide an annual number of "white collar" cases brought, but that is comprised of numerous sub-categories of crimes such as "bankruptcy fraud," "insurance fraud," "securities fraud," and "tax fraud" that could have been committed by an ordinary person, a high-level executive, or even a corporation.[125] No distinction is made between cases brought against financial professionals or high-ranking business officials and "Joe Smith's" fraudulent tax return filing or cases brought against firms.

- **Recommendation 15:** The DOJ should publish annual statistics analyzing trends of criminal actions against individual financial professionals. Useful data would disclose the annual number of cases brought and average and median penalties imposed in categories of white-collar crimes committed by officers and directors of firms and gatekeepers such as lawyers and accountants.

[125] *See, e.g.,* U.S. DEP'T JUST., *Annual Statistical Report (FY 2024)*, at 12. https://www.justice.gov/usao/media/1399686/dl?inline

IV. Promoting Individual Accountability through Effective Compliance Programs

We believe that it is appropriate to consider if there are ways to allow the government to better prevent individual misconduct and to bring more effective cases against culpable individuals. Indeed, we agree with former SEC Chair White's suggestion that "we have to think outside the box of our current laws."[126]

First, we consider proposals to lower the standard of liability. Specifically, we explore a possible expansion of liability for executives and directors mirrored on the U.K. Senior Manager's Regime, which imposes personal liability on high-level officers and directors who act negligently in ensuring legal compliance within their firms. We also explore proposals to expand the use of compensation forfeiture or recovery mechanisms beyond existing requirements, such that senior executives would bear a more significant portion of the costs associated with corporate wrongdoing. We identify concerns that those proposals would result in excessive government intrusion on business decisions.

Instead, we propose that enforcement authorities adopt an affirmative compliance defense for firms that adopt adequate compliance programs, fully disclose individual wrongdoing, and cooperate with government investigations of individuals. We believe such a policy should help prevent misconduct and increase the probability of the government being able to build a strong case against culpable individuals and conserve limited enforcement resources.

A. Expanded Liability Mirrored on the U.K. Senior Managers Regime

Former SEC Chair White has said that the U.S. should carefully study the U.K.'s recently implemented regime known as the Senior Managers Regime.[127] We agree. The U.K. Senior Managers Regime is notable because it imposes a *negligence*-based standard for culpability, which means that it considers whether an individual has acted *reasonably*. Other than some exceptions that we detailed earlier in the chapter, U.S. law generally applies an intent standard for individual culpability.[128]

The Senior Managers Regime currently governs the U.K. operations of U.K. banks and covers the U.K. operations of all U.K. domiciled financial services companies, including U.K. subsidiaries of U.S. or E.U. bank holding companies.[129] The Regime is civil in nature[130] and

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[126] Chair Mary Jo White, *A New Model for SEC Enforcement: Producing Bold and Unrelenting Results* (Nov. 18, 2016), https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html (stating that the U.S. should "at a minimum" closely monitor the U.K.'s new Senior Manager Regime).

[127] *Id*.

[128] *Id*.

[129] *Id*. The regime was extended to insurers in December 2018 (*see* FCA, *Milestone for Insurers as They Come under the Senior Managers and Certification Regime* (Dec. 10, 2018), https://www.fca.org.uk/news/news-stories/milestone-insurers-they-come-under-senior-managers-and-certification-regime).

[130] One exception is in the event of a failure of a financial institution. If a financial institution fails, senior executives could be criminally prosecuted if the executive is aware that he made a decision that could cause the institution to fail where the executive's conduct falls "far below what could reasonably be expected" of a person in his position, and the implementation of the decision did cause the institution to fail. *See* HOGAN LOVELLS, Criminal Liability for Bank

violation of the law can result in financial penalties, as well as public censure and suspension of an individual from the industry.[131] The Senior Manager Regime has three key components.

First, the U.K. law identifies those individuals who are "senior managers," including a firm's chief executive officer, chief risk officer, and chief financial officer, as well as certain board members, such as the lead independent director and chairman of the board.[132] Second, the law identifies certain responsibilities that the firm must assign to one of the senior managers of the firm.[133] These include responsibilities such as the management and allocation of the firm's capital, the firm's treasury management function, and the production and integrity of the firm's financial information.[134] Third, the senior manager who is assigned to a particular responsibility must take "reasonable steps" to prevent regulatory breaches in the area or areas of responsibility that they have been assigned.[135] If they do not take reasonable steps, and a regulatory breach occurs in a senior manager's area of responsibility, he or she is subject to civil liability.

For example, in 2023 the PRA imposed a civil penalty on the former Chief Information Officer ("**CIO**") of TSB Bank in connection with a major IT incident involving the bank's outsourcing arrangements. The PRA concluded that a senior manager must take reasonable steps to identify and mitigate risks and to ensure that the firm's operating procedures and systems support compliance with regulatory standards, and that the former CIO's over-reliance on unverified third-party confirmations fell outside the range of reasonable responses for a senior manager in his position.[136]

The Committee is concerned about the consequences of following the path the U.K. has adopted.

One concern is that adoption of the U.K. approach would place government officials in the role of second-guessing business decisions about the appropriate investment of time or resources by a senior manager to supervise a particular function of the firm. In other words, the government would be able to impose liability for simply disagreeing with a manager's considered judgment. That would run contrary to the historical U.S. approach, to defer to corporate boards and officers. In the corporate law context, for example, the business judgment rule usually governs, which provides that a court presumes directors and officers act on an informed basis and in good faith.

Directors? A Look at the United Kingdom and South Africa (2015), https://www.hoganlovells.com/en/publications/criminal-liability-for-bank-directors-a-look-at-the-united-kingdom-and-south-africa.

[131] *See* FIN. CONDUCT AUTH., *Decision Procedure and Penalties Manual*, §§ 6.1–6.7, 6A.1–6A.4, (Aug. 2017), https://www.handbook.fca.org.uk/handbook/DEPP.pdf.

[132] *See* SHEARMAN & STERLING LLP, *Implementation Issues Arising from the Revised UK Senior Manager and Certification Regime* 2, 10 (2015), https://www.mondaq.com/uk/financial-services/442228/implementation-issues-arising-from-the-revised-uk-senior-manager-and-certification-regime.

[133] *Id*.

[134] *Id*. at 8.

[135] *Id*.

[136] BANK ENG., PRUDENTIAL REGUL. AUTH., *Final Notice to Carlos Abarca: Monetary Penalty Imposed for Failure to Comply with Senior Manager Conduct Rule 2* (Apr. 13, 2023), https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/regulatory-action/final-notice-from-pra-to-former-tsb-bank-plc-cio.pdf.

So long as the presumption is not rebutted, a director or officer is insulated from liability to the corporation for a business decision if the decision had a rational business purpose.[137]

The U.K.'s negligence standard, by contrast, imposes liability even if the manager acted in an informed manner and in good faith, but did not act *reasonably*. This would give officials with vast prosecutorial discretion the ability to second-guess business decisions. Managers might feel compelled to extensively document the rationale for their business decisions or to seek opinion of legal counsel in connection with ordinary business matters, to stave off possible future second guessing by government authorities. Either could negatively impact business decision-making. Indeed, in practice, U.K. financial regulators have set a high bar for enforcement and have applied this standard sparingly, bringing only three enforcement actions out of 52 investigations as of September 2024.[138]

Another concern is that imposing broader negligence-like liability would also likely make it difficult for companies to find qualified individuals to serve as officers and directors.[139] Moreover, U.S. shareholders have repeatedly expressed a desire not to expand liability of directors and officers, as they have consistently voted to amend corporation's constituent documents to eliminate director liability.[140]

These dynamics are also reflected in ongoing regulatory reform efforts under the U.K. "Leeds Reforms," where U.K. financial regulators have proposed streamlining the Senior Managers Regime—for example by reducing administrative burdens, narrowing and rationalizing the number of roles formally designated as senior managers, and giving firms greater flexibility in senior manager approvals—as part of a broader effort to make the regime more proportionate, support competitiveness, and avoid deterring qualified individuals from senior leadership roles.[141]

B. Subjecting Executive Compensation to Clawbacks

Another possible approach to increasing individual accountability is to require that executives and directors directly bear the cost of misconduct within their firms by subjecting their compensation to forfeiture in the event the firm pays a penalty for wrongdoing within the firm. This could be accomplished by mandating that companies clawback executive or director

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[137] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Am. Soc'y for Testing & Materials v. Corrpro Cos., 478 F.3d 557, 572 (3d Cir. 2007).

[138] DELOITTE, *Financial Accountability Regime: Lessons from UK Enforcement Cases* (Apr. 2025), https://www.superannuation.asn.au/wp-content/uploads/2025/06/FAR-Lessons-from-UK-Enforcement-April-2025.pdf

[139] *See, e.g.*, Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors* at 15, JOHN M. OLIN CTR. L., ECONS., AND BUS. (2007), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_Hamdani_578.pdf.

[140] *See* Lawrence Hamermesh, *Why I Do Not Teach Van Gorkom*, 34 GA. L. REV. 477, 490 (2000) (finding that when surveying 100 Fortune 500 companies, 98% incorporated in jurisdictions allowing for exculpatory provisions in the corporation's charter adopted such provisions).

[141] HM Treasury, *Reforming the Senior Managers & Certification Regime* (July 2025), https://assets.publishing.service.gov.uk/media/687635c0352c290d20dcae75/Reforming_the_Senior_Managers__Certification_Regime_Consultation_2025.pdf; EVERSHEDS SUTHERLAND, *UK: Reform of the Senior Managers & Certification Regime* (Aug. 12, 2025), https://www.eversheds-sutherland.com/en/united-states/insights/reform-of-the-senior-managers-and-certification-regime.

compensation in light of a triggering event, such as the payment of a penalty by the firm. In effect, doing so would impose a form of strict liability on the executives or directors covered by a clawback policy because they could be forced to pay back compensation even if they were not in any way involved with the legal violation.

As discussed earlier in this chapter, the SEC is authorized to clawback incentive compensation of CEOs and CFOs if a public company restates financial results because of a material error in the financial statements resulting from misconduct by someone within the company. In addition, pursuant to Section 954 of the Dodd-Frank Act, the SEC has adopted rules requiring listed companies to develop and enforce policies providing for the recovery of erroneously awarded incentive-based compensation from current and former executive officers in the event of an accounting restatement. Unlike the Sarbanes-Oxley provision, recovery under these rules is mandatory, issuer-enforced, and does not depend on any finding of misconduct or fault. However, the rule applies only to incentive-based compensation received by executive officers during the three fiscal years preceding the restatement and is triggered solely by accounting restatements, rather than by corporate wrongdoing or the payment of regulatory penalties more generally.[142]

A related concept to a clawback is the requirement that executives and directors post part of their compensation as a bond that would be subject to forfeiture to pay for penalties incurred by their institution. William Dudley, for example, suggested that a component of executive compensation should be deferred for around a decade and be used as a type of "performance bond" that could be drawn upon to pay portions of monetary sanctions imposed in enforcement actions for unlawful activity at the firm.[143]

We agree that clawbacks or forfeiture of compensation can play a valuable role in deterrence by incentivizing executives and directors to prioritize compliance within the firm. To a limited extent, it could also help reduce the cost of any wrongdoing to innocent shareholders by requiring executives or directors to bear some of the cost of the penalty themselves. However, we do not believe the government should be granted broader powers at this time to mandate clawbacks or compensation forfeiture beyond existing requirements.

First, doing so would pose the same problems identified with the U.K. Senior Managers Regime. The government could be involved in second guessing business decisions. A regime that conditions liability on whether a clawback policy has been "appropriately" implemented could invite regulatory scrutiny of inherently discretionary board decisions, such as whether pursuing recovery is advisable in a particular case. By contrast, the SEC clawback rule adopted pursuant to the Dodd-Frank Act was deliberately designed to avoid this problem by relying on a narrow,

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[142] U.S. SEC. & EXCH. COMM'N, *Listing Standards for Recovery of Erroneously Awarded Compensation*, 87 FED. REG. 73,076 (Nov. 28, 2022), https://www.federalregister.gov/documents/2022/11/28/2022-23757/listing-standards-for-recovery-of-erroneously-awarded-compensation; LATHAM & WATKINS, *SEC Clawback Rules: Practical Considerations and FAQs* (Oct. 20, 2023), https://www.lw.com/admin/upload/SiteAttachments/SEC-Clawback-Rules-Practical-Considerations-and-FAQs.pdf.

[143] William C. Dudley, *Enhancing Financial Stability by Improving Culture in the Financial Services Industry*, FED. RSRV. BANK OF N.Y., (Oct. 20, 2014), https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html.

objective trigger—an accounting restatement—and by making recovery mandatory when that trigger occurs, rather than subject to ex post regulatory evaluation of board discretion. More open-ended mandates could also deter qualified individuals from serving as officers or directors, particularly if compensation were subject to forfeiture based on regulatory judgments about oversight or risk-taking.

Second, clawback policies are inherently complex and the government is not well positioned to dictate specific terms of clawback arrangements. Clawback issues include: what compensation should be subject to clawback; what actions might trigger a clawback; exactly which officers and directors should be subject to a clawback in specific scenarios; and what discretion the board should have to waive its right to seek a clawback. Given the numerous details that must be worked out in each instance, the extent to which executive compensation should be subject to clawback is a matter most appropriately left to shareholders, directors, and management. Indeed, empirical studies of corporate governance practices indicate that many public companies voluntarily adopt clawback policies that go well beyond the minimum requirements of the SEC's rule. In particular, surveys of large-cap firms show that a majority maintain clawbacks that extend beyond accounting restatements to cover broader categories of misconduct, apply to a wider group of executives or employees, and reach forms of compensation not covered by the SEC's mandatory regime. These findings suggest that, in practice, private ordering has often produced more expansive clawback frameworks than those imposed by federal securities regulation.[144]

Leaving the issue of clawbacks to boards, management, and shareholders would allow for a diversity of approaches across firms and experimentation rather than a top-down, one-size fits all approach. Thus, we believe the marketplace should dictate how clawback policies are adopted, implemented, and enforced.

C. Promoting Individual Accountability Through an Affirmative Defense

The Committee believes that individual accountability can be promoted by encouraging and incentivizing firms to develop robust compliance programs that seek to prevent, identify, disclose and punish individual wrongdoing. We believe that this would help the government identify culpable individuals and build cases against them, while allowing the government to conserve and more efficiently use the finite enforcement resources at its disposal.

- **Recommendation 16:** An affirmative compliance and cooperation defense should be established in the United States to further promote effective compliance programs and harness their strengths to help identify and prevent individual misconduct. A successful application of the defense should require that the firm establish that the compliance procedures meet a baseline of reasonableness; and the firm promptly, transparently, and wholly disclosed known violations and all non-

[144] DEBEVOISE & PLIMPTON, *Rethinking Clawback Policies for the 2025 Compensation Season* (Nov. 20, 2024), https://www.debevoise.com/insights/publications/2024/11/rethinking-clawback-policies-for-the-2025; Stephen Hom, Erin Bass-Goldberg & Emma van Beek, *Clawback Provisions that Go Beyond SEC Requirements Are Prevalent Among Large-Cap Companies* (Jul. 11, 2024), https://boardmember.com/wp-content/uploads/2025/02/FWC-07-11-24-Clawblack-Provisions-that-Go-Beyond-SEC-Requirements-are-Prevalent-Among-Large-Cap-Companies.pdf.

privileged relevant information uncovered during an internal investigation or review.

This section will: (1) explain that such a policy arises naturally out of the government's focus on compliance and voluntary disclosure; (2) discuss why compliance and disclosure programs can help hold individuals accountable; and (3) lay out some of the key attributes of the affirmative defense.

1. The Proposal Flows Naturally Out of the Government's Emphasis on Compliance Programs and Voluntary Disclosure

Effective compliance programs and firm cooperation with regulators already play a critical role in the U.S. public enforcement regime and in determining the legal consequences that a firm will face due to an employee's misconduct.

The "presence or absence of compliance programs" is one of the thirteen factors that the OCC, FDIC, Fed, and NCUA are expected to consider when evaluating the appropriateness of civil monetary penalties.[145] This factor is also incorporated into certain of these agencies' penalty matrices, so that it is expressly taken into account in calculating the penalty that is assessed in a given situation.[146]

Similarly, several of the "factors to be considered" by prosecutors in determining whether to charge a corporate defendant under the DOJ's Principles of Federal Prosecution of Business Organizations relate to the adequacy of a firm's compliance program. These include: (1) "the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management"; (2) " the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision"; and (3) "the corporation's remedial actions, including... any efforts to implement an adequate and effective corporate compliance program or to improve an existing one…."[147]

A firm's cooperation with investigators and voluntary disclosure of wrongdoing are also factors that some authorities consider in determining whether to bring a case or the appropriate penalty to impose if a case is brought. The FFIEC policy statement, for example, identified as relevant factors both "[t]he failure to cooperate with the agency in effecting early resolution of the problem" and "voluntary disclosure" of the violation.[148]

For its part, FinCEN's public guidance on enforcement of the Bank Secrecy Act notes that self-disclosure, remediation, and cooperation, including "as to potential wrongdoing by its

[145] *See* Chapter 2, II.B.3, *supra*.
[146] *See, e.g.*, *id*.
[147] U.S. DEP'T JUST., *Justice Manual* § 9-28.300.
[148] FED. FIN. INST. EXAMINATION COUNCIL, *Assessment of Civil Monetary Penalties*, 63 FED. REG. 30,226 (Jun. 3, 1998), https://www.gpo.gov/fdsys/pkg/FR-1998-06-03/pdf/98-14611.pdf.

directors, officers, employees, agents, and counterparties" are factors that the bureau will take into account when determining the appropriate disposition of a case.[149]

As discussed in detail in Part I, the DOJ considers the extent of a firm's cooperation in deciding whether to bring charges in criminal matters. Under the Principles of Federal Prosecution of Business Organizations, the DOJ may decline to bring a case against a corporation if the corporation provides the DOJ with "all relevant facts" with respect to culpable individuals.[150] The DOJ also has a corporate cooperation policies in the civil context, under which maximum credit requires voluntary self-disclosure of the wrongdoing and "identifying all individuals substantially involved in or responsible for the misconduct."[151] These policies thus leverage corporate resources to assist in prosecuting the persons responsible for unlawful acts.

Additionally, as discussed in Chapter 2, in February 2025, the CFTC's Division of Enforcement released an Enforcement Advisory on self-reporting, cooperation, and remediation of wrongdoing and the "mitigation credit" companies and individuals can anticipate if they meet the criteria under the advisory.[152] The CFTC believes that the Updated Advisory promotes two objectives: (1) promoting compliance with the law; and (2) ensuring the accountability of violators.[153]

Under the CFTC's advisory, the Division of Enforcement will assess the quality of a business organization or individual's "self-reporting" on a three-tier scale, with the greatest credit given to those who self-reported to the appropriate CFTC division, notified the Commission of the potential violation, included all material information related to the potential violation, and provided information that allowed the Division to conserve resources in the investigation.[154] The Division will separately assess the quality of the entity's "cooperation" on a four-tier scale, with maximum credit reserved for those with "significant completion of remediation," among other criteria.[155] The CFTC will then evaluate the entity's self-reporting and cooperating under a matrix to determine the presumptive "mitigation credit" the entity will receive, which is applied to reduce the initial monetary penalty calculated by the Division.[156] For example, those meeting the highest tiers of self-reporting and cooperation will receive a presumptive mitigation credit of 55% off the initial monetary penalty.[157]

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[149] FIN. CRIMES ENF'T NETWORK (FinCEN), *Statement on Enforcement of the Bank Secrecy Act* (Aug. 18, 2020), https://www.fincen.gov/system/files/shared/FinCEN%20Enforcement%20Statement_FINAL%20508.pdf.

[150] U.S. DEP'T JUST., *Justice Manual* § 9.28-700; *see also* U.S. DEP'T JUST., *Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy*, at 7 (May 12, 2025), https://www.justice.gov/criminal/media/1400031/dl?inline.

[151] U.S. DEP'T JUST., *Justice Manual* 4-3.100; 4-4.112.

[152] COMMODITY FUTURES TRADING COMM'N, *Advisory on Self-Reporting, Cooperation, and Remediation* (Feb. 25, 2025), https://www.cftc.gov/media/11821/EnfAdv_Resolutions022525/download.

https://www.cftc.gov/media/11821/EnfAdv_Resolutions022525/download

[153] *Id*. at 1.

[154] *Id*. at 7.

[155] *Id*. at 12.

[156] *Id*. at 13.

[157] *Id*.

In addition, the SEC has a 2001 policy which has been incorporated into its Enforcement Manual setting forth factors it will consider in giving credit to companies potentially subject to enforcement proceedings, which include the company's compliance procedures and voluntary disclosure and remediation of the wrongdoing.[158] At a May 2025 conference, SEC enforcement staff announced a recommitment to granting cooperation credit to parties that self-report and fully remediate, including the potential that the SEC may decline to bring an enforcement action against the cooperating party.[159] The SEC updated its Enforcement Manual in February 2026 to include additional guidance on the factors for granting cooperation credit to companies.[160]

Finally, the DOJ has implemented compliance and cooperation defenses that apply in corporate criminal cases. As described in Chapter 2, under the Corporate Enforcement and Voluntary Self-Disclosure Policy (the "**CEP**") the DOJ will decline to prosecute a corporation where it voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, provided there are no aggravating circumstances.[161] Appropriate remediation includes the "[i]mplement[ation] [of] an effective compliance and ethics program" and appropriate discipline of culpable employees.[162] Moreover, in cases where a company would otherwise qualify, but its good-faith self-report is not "voluntary," or where there are aggravating circumstances, the DOJ may offer a NPA and reduce any fine by at least 50% but not more than 75% off the low end of the U.S. Sentencing Guidelines range. Where a company does not qualify for a declination or NPA under the CEP, it may still receive greater penalty reductions for full cooperation and remediation. In addition, in 2023 the DOJ announced a separate safe harbor provision for companies in the mergers and acquisitions context, whereby the DOJ will presumptively decline prosecution of companies that "voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated misconduct uncovered as a result of due diligence."[163]

2. *Compliance Programs, Voluntary Disclosure and Cooperation, and an Affirmative Compliance Defense Can Promote Individual Accountability*

Effective corporate compliance programs, including cooperation with regulatory investigations, can play a vital role in preventing and holding culpable individuals accountable for wrongdoing. These programs can educate employees on rules and regulations, establish ethical

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[158] U.S. SEC. & EXCH. COMM'N, *Release No. 44,969* (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm; U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, *Enforcement Manual* § 6.1.2. (Feb. 24, 2026).

[159] DECHERT, *Under New Leadership, SEC Articulates Changes to Enforcement Program* (Jun. 9, 2025), https://www.dechert.com/knowledge/onpoint/2025/6/under-new-leadership--sec-articulates-changes-to-enforcement-pro.html; *see also* U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, *Enforcement Manual* § 6.2.5 ("The Division may recommend that the [SEC] forgo seeking civil penalties, or seek reduced civil penalties, against an entity in consideration of any self-policing, self-reporting, remediation, and cooperation by the entity.").

[160] U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, *Enforcement Manual* § 6.1.2.

[161] U.S. DEP'T JUST., *9-47.120 - Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy* (May 12, 2025), https://www.justice.gov/criminal/media/1400031/dl?inline

[162] *Id*. at 6-7.

[163] U.S. DEP'T JUST., *Press Release: Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions* (Oct. 4, 2023), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self; U.S. DEP'T JUST., *Justice Manual* 9-28.600 and 9-28.900

norms that drive employee behavior, and ensure that management and directors remain engaged on compliance matters. Effective compliance programs also include oversight mechanisms that enable firms to promptly detect, cease, report, and remediate individual misconduct.

Indeed, an effective compliance system allows aberrant acts of individual noncompliance to be uncovered and addressed by both the firm and government. For example, an act of noncompliance may be addressed with direct intervention by the employee's supervisor, who can take disciplinary action against or terminate the employee. With effective compliance programs, firms can promptly uncover and remediate, as well as report, wrongdoing. That also increases the probability that culpable individuals will be held accountable for misconduct. A robust compliance program could allow a firm to promptly document which employees were involved in wrongdoing, and what employees had particular information that could help the government establish knowledge and intent.

Moreover, an effective compliance program that is coupled with reporting of misconduct to enforcement authorities and ongoing cooperation with any official investigation can increase the overall efficiency of the public enforcement system. Enforcement authorities can spend fewer resources on particular investigations or cases. More efficient use of enforcement resources can allow enforcement authorities to use remaining resources to pursue more matters or devote resources to more complicated and sophisticated cases.

Currently, a firm could be subject to liability even if it operated a reasonable compliance program and cooperated with investigators. For example, an asset manager could have a sophisticated insider trading compliance program in place. The system could include the review of emails and message apps, the supervision of calls by compliance officers, regular training, audits of trading activity, and processes for reporting suspected insider trading and termination of culpable employees. However, even with such a system, a portfolio manager could decide to engage in insider trading and go to great lengths to avoid detection for a time. Because the employee committed insider trading, the company could be vicariously liable and subject to enforcement actions. While the SEC could consider the firm's compliance program and any disclosure to and cooperation with the SEC in making a decision about whether to pursue a case, it would be left to the SEC's discretion about whether to bring a case. The unpredictability about the benefit the company will receive from adopting and implementing a compliance program and cooperating with the government in any investigation or proceeding is problematic because it underincentivizes investments in costly compliance programs and procedures.

3. Operation of the Compliance and Cooperation Affirmative Defense

An affirmative defense would require the firm to bear the burden of proof and persuasion that it has an effective compliance program. Specifically, firms must notify an enforcement agency that the firm will assert such a defense and detail the evidence it would present at a trial or administrative hearing. The agency should then determine whether the corporation has sufficient evidence to establish the defense. If the firm's evidence is sufficient and cannot be rebutted, agency policies should prohibit the filing of an enforcement action. If an enforcement authority decides to

file an enforcement action, the firm should be able to assert and argue its defense before a court or administrative law judge in an effort to avoid liability.

We defer to Congress on the particular details about what internal policies and conduct would be sufficient to establish a compliance and cooperation defense, as well as the specific violations for which the defense should apply. However, we believe that there are certain key features that the defense should include.

First, as an *affirmative* defense, the burden should be on the company to prove that it had an adequate system in place, and the defense should be available even when a violation of law by an employee has been found. A successful application of the defense should also require that: (1) the compliance procedures meet a baseline of reasonableness; and (2) the corporation promptly, transparently, and wholly discloses known violations and all non-privileged relevant information uncovered during an internal investigation or review. Thus, a court or administrative law judge considering the defense would analyze the adequacy or reasonableness of the firm's policies and procedures.

The reasonableness inquiry into a firm's policies and procedures differs from the U.K. Senior Manager Regime's reasonableness standard described earlier. Under the affirmative compliance defense, the court would decide if the firm acted reasonably such that the firm should be *shielded from liability* it would otherwise incur. That is much different than the U.K. "reasonableness" analysis, which second guesses the actions of particular senior managers to determine if *liability should be imposed* on the senior manager where none previously existed. It makes sense for the government to carefully scrutinize the activities of a firm seeking the benefit of an affirmative compliance defense when the firm would otherwise be vicariously liable for the actions of its employees. In that circumstance, the government is not creating uncertainty for business decisions nor discouraging qualified individuals from pursuing a particular job or career. By contrast, the U.K. reasonableness inquiry creates uncertainty by increasing the threat of liability through government second-guessing of decisions.

Congress and other policymakers should be cognizant of potential issues in creating an affirmative defense. Certain legal violations might result in harm to consumers, investors, market participants, or others, and only the potential corporate defendant may have the resources to provide remedial compensation through restitution payments. Therefore, lawmakers should consider the extent to which an adequate compliance program should provide for the remediation of harm caused to consumers, investors, and other victims of illicit conduct. Second, repeat violations of the same or related legal provisions by different employees may be evidence of an ineffective compliance program.

D. Promoting Individual Accountability by Enhancing Transparency Surrounding Criminal and Civil Violations and Implementing Industry Wide Bans

As discussed in Chapter 1, the U.S. public enforcement system is highly decentralized. One negative consequence of this fragmented enforcement structure is the incompleteness and disorganization of information about the outcomes of enforcement actions, including how each

case was resolved and the sanctions imposed. Access to comprehensive, publicly-available, case-level data on *all* enforcement actions brought against companies and individuals is critical for policymakers and the public to monitor and analyze the enforcement system and its effectiveness and should be made available in a centralized, searchable database as detailed earlier. However, presently, a single database with the names and details of individuals that have been held liable for criminal or civil sanctions for financial wrongdoing does not exist.[164]

Instead, investors must navigate disparate online resources maintained by different organizations to find this critical information about the professionals that they hire. Given the complex landscape of U.S. enforcement authorities, their research may involve separately searching criminal records at the state and federal levels, databases of enforcement actions brought by federal agencies like the SEC and CFTC, and SRO disciplinary records. Considering the number of state and federal enforcement authorities, it is easy to see how an investor seeking comprehensive information regarding civil or criminal judgments against a particular individual could fail to accomplish their goal.

The absence of a centralized database of this information[165] directly undermines individual accountability for wrongdoing as bad actors may evade reputational or professional consequences of their actions. Yet it is appropriate, and necessary for investor protection.

- **Recommendation 17:** Enforcement authorities should coordinate to compile a single, publicly-available resource that aggregates information on final judgments or orders imposing criminal or civil sanctions against financial professionals and present it in a user-friendly format.

[164] We are aware that those formally charged or convicted of a crime have a "rap sheet" that can be accessed as part of a background check. However, a "rap sheet" does not include civil enforcement matters. Moreover, a public database would make access to such information easier for those, like consumers, who may not run a formal background check on someone.

[165] We note that this recommendation would not require firms or the industry to compile a database or publish names of bad actors. Rather, the database would be based on government enforcement actions and compiled by the enforcement authorities themselves.

Report Appendices

Appendix A: List of Report Recommendations

Chapter 1: The Structure of the U.S. Enforcement System – Improving Coordination

1. Each enforcement authority should develop formal, written policies, subject to public notice and comment, that detail how the enforcement authority will coordinate with other enforcement authorities in conducting investigations, requesting access to documents and witnesses, and negotiating settlements.

2. Federal enforcement authorities should collaborate with one another on the development of their coordination policies.

3. Enforcement authorities should consider the sanctions that other enforcement authorities, including foreign enforcement authorities, have imposed or are about to impose when setting sanctions in their own enforcement actions. Enforcement authorities should explain how they have taken sanctions by other enforcement authorities into consideration.

Chapter 2: Rationalizing the Setting of Sanctions

4. Enforcement authorities should adopt publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties. FSOC should establish these principles or guideposts and they should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. Enforcement authorities should explain how the guideposts were applied in each enforcement action.

5. The DOJ should establish publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties in DOJ civil matters under FIRREA and the FCA. They should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. The DOJ should explain how the guideposts were applied in each enforcement action.

6. Each enforcement authority should establish an easily accessible, searchable, centralized database of its enforcement actions.

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

7. Enforcement authorities should provide an annual accounting that discloses the amount of monetary sanctions assessed through orders, judgments, and settlements, and the amount of such monetary sanctions collected.

8. Each federal enforcement authority should provide an annual accounting of how monetary sanctions imposed in their enforcement actions are used. The accounting should include: (1) the amount of monetary sanctions that the enforcement authority collected and

deposited with the Treasury; and (2) the amount of monetary sanctions that the enforcement authority directed to Congressionally authorized programs (itemized by program)

9. The SEC should publicly disclose annually the amount of funds distributed through its Fair Funds authority and the amount of money in Fair Funds that remains available for distribution (on both an aggregate and individual fund basis).

10. The CFPB should conduct a retrospective analysis of the Civil Penalty Fund that evaluates whether: (1) the Civil Penalty Fund is effectively compensating injured consumers; (2) victims are being adequately identified; and (3) there should be a cap on the total amount of money that can remain in the Civil Penalty Fund (with the balance distributed to the Treasury) to encourage efficient distribution of funds to injured consumers, rather than allowing the CFPB to retain the funds indefinitely.

11. The DOJ Three Percent Fund should be reformed so that: (1) the DOJ can only use money from the Three Percent Fund on activities to collect existing delinquent debts; and (2) the DOJ provides a public annual accounting of the amount of money deposited into the Three Percent Fund, the amount of money distributed from the Three Percent Fund, and how money distributed out of the Three Percent Fund was spent.

12. Third parties that receive settlement funds from extraordinary restitution should be prohibited from using those funds to engage in political activities. Federal enforcement authorities should adopt policies and guidelines to effectively implement the ban.

13. Each federal enforcement authority should provide an annual accounting of the amount of settlement funds paid out as extraordinary restitution.

14. The states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds from using those funds to engage in political activities.

Chapter 4: Promoting Individual Accountability

15. The DOJ should publish annual statistics analyzing trends of criminal actions against individual financial professionals. Useful data would disclose the annual number of cases brought and average and median penalties imposed in categories of white-collar crimes committed by officers and directors of firms and gatekeepers such as lawyers and accountants.

16. An affirmative compliance and cooperation defense should be established in the United States to further promote effective compliance programs and harness their strengths to help identify and prevent individual misconduct. A successful application of the defense should require that the firm establish that the compliance procedures meet a baseline of reasonableness; and the firm promptly, transparently, and wholly disclosed known violations and all non-privileged relevant information uncovered during an internal investigation or review.

17. Enforcement authorities should coordinate to compile a single, publicly-available resource that aggregates information on final judgments or orders imposing criminal or civil sanctions against financial professionals and present it in a user-friendly format.[1]

[1] This recommendation differs from recommendation number 6 because the Committee is recommending that enforcement actions against financial professionals that impose civil or criminal sanctions be provided by all the enforcement authorities in one accessible location as part of a comprehensive database. In recommendation 6, the Committee is recommending that each enforcement agency develop its own searchable database of all enforcement action outcomes against any type of defendant.

Appendix B: Summaries of National Mortgage Settlement and Bank of America Settlement Referenced in Chapter 1

1. 2012 National Mortgage Settlement

The 2012 National Mortgage Settlement resolved claims of unlawful and abusive mortgage servicing and foreclosure practices and imposed $25 billion in total sanctions, and involved over 50 state and federal enforcement authorities.

Enforcement authorities began investigations into the widespread use of "robo-signed" affidavits in foreclosure proceedings in October 2010. Robo-signing refers to the practice of allowing bank employees to sign affidavits in support of foreclosure despite not actually reviewing the supporting documents. As a result, a bank could foreclose on homes that were not actually in default or that the bank does not in fact own.

These investigations into robo-signing practices were conducted by the DOJ, including the U.S. Attorney's Offices for the Eastern and Southern Districts of New York, the District of Colorado, the Western District of North Carolina, and the District of South Carolina, as well as state attorneys general and/or state banking regulators from 49 states, with assistance from the CFPB, OCC, Fed, and other federal regulators.[2] The investigations targeted five leading mortgage servicers: Bank of America, JPMorgan Chase, Wells Fargo, Citibank and Ally Financial.

The multiple investigations by state and federal regulators resulted in one global settlement agreement that required the five mortgage servicers to collectively provide $20 billion in financial relief for consumers and to pay $5 billion to various federal and state authorities.[3] Of that $5 billion, $4.25 billion was divided among the 49 states, and $750 million was paid to the DOJ to resolve potential civil claims under FIRREA.[4]

2. 2014 Bank of America Settlement (Residential Mortgage-Backed Securities)

A $16.65 billion settlement between Bank of America, the DOJ, SEC, FDIC, and six states related to practices involving the underwriting and securitization of residential mortgage-backed securities represents one of the largest single settlements in history.[5] In this case, the DOJ, SEC, FDIC and six states alleged that Bank of America sold billions of dollars of residential mortgage-backed securities without disclosing key facts about the quality of the securitized loans to

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[2] U.S. DEP'T JUST., *Press Release*: *Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses* (Feb. 9, 2012), http://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest.

[3] NAT'L ASS'N OF ATTORNEYS GENERAL, *Press Release: Feds Reach $25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs* (Feb. 9, 2012), http://www.naag.org/naag/media/naag-news/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php.

[4] *Id*.

[5] *See* U.S. DEP'T JUST., *Settlement Agreement with Bank of America* (Aug. 20, 2014), https://www.justice.gov/iso/opa/resources/339201482914115038524 1.pdf.

investors. The enforcement authorities also alleged that Bank of America made misrepresentations about the quality of those loans to Fannie Mae and Freddie Mac, two quasi-government agencies.[6]

A multitude of federal and state authorities investigated Bank of America's residential mortgage-backed securities practices. These included members of the residential mortgage-backed securities working group, such as the DOJ, 10 U.S. Attorneys' Offices, the FBI, the SEC, HUD, HUD's Office of Inspector General, the Federal Housing Finance Agency, the Office of the Special Inspector General for the Troubled Asset Relief Program, the Fed, the Recovery Accountability and Transparency Board, FinCEN, and more than 10 state attorneys general.[7]

Bank of America's settlement agreements arising from the investigations resulted in penalties of $16.65 billion to be paid to three different federal agencies (DOJ, SEC and FDIC) and six states, including New York and California.[8] The breakdown of the payments is provided in the table below:[9]

Table 14: Bank of America Settlement Payment Amounts

Recipient of Relief	Dollar Amount
DOJ	$5 billion
SEC	$135 million
FDIC (private securities fraud claims on behalf of failed banks as receiver)	$2.83 billion
California	$300 million
Delaware	$45 million
Kentucky	$23 million
Maryland	$75 million
New York	$300 million
Illinois	$200 million
Consumer Relief overseen by Monitor	$7 billion

[6] U.S. DEP'T JUST., *Press Release: Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis* (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.
[7] *Id*.
[8] *Id*.
[9] *Id*.

Appendix C: OCC Civil Monetary Penalty Matrix for Institutions

Factors	0	1	2	3	4	Factor Weight
Intent(1)[10]	None		Should have known	Disregarded red flags or other warnings	Clear intent or clearly disregarded the law or consequences to the bank	7
Continuation after notification(3)	Violation ceased before notification	Violation ceased immediately upon notification	Bank took timely steps to correct violation, but violation continued after notification	No timely corrective action; violation continued for short period of time after notification	Violation still continuing or continued for long period of time after notification	5
Concealment(5)	None, or self-disclosure of violation	Disclosure of relevant facts upon request	Incomplete disclosure of relevant facts or materials	Purposely complicated transaction to make it difficult to uncover	Actively took steps to conceal misconduct or relevant facts	6
Financial gain or other benefit as a result of violation(7)	None	Minimal indirect gain to bank or related interest	Indirect gain or benefit to bank or related interest	Direct gain or benefit to bank or related interest	Substantial direct benefit to bank or related interest	4
Loss or risk of loss to the bank(6)	No loss and no risk of loss	Minimal actual loss or minimal risk of loss	Moderate risk of loss	Moderate actual loss or substantial risk of loss	Substantial actual loss	4
Impact or harm other than financial loss to the bank(6)	No impact or harm to bank	Minimal impact or minimal harm to bank	Some impact or some harm to bank	Moderate impact or moderate harm to bank	Substantial impact or substantial harm to bank	4
Loss or harm to consumers or the public (consumer law or BSA violations)	No loss and no harm	Minimal loss or minimal harm	Moderate loss or harm to moderate number of consumers or	Moderate loss or harm to substantial number of consumers or	Substantial loss or harm to substantial number of consumers or	5

[10] Parenthetical numbers refer to the numbered interagency factors listed in the FED. FIN. INST. EXAMINATION COUNCIL, "Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies," 63 FED. REG. 30,227 (Jun. 3, 1998).

Factors	0	1	2	3	4	Factor Weight
			portion of the public	portion of the public	portion of the public	
Previous concern or administrative action for similar violation(10)(13)	None	Concern in any matters requiring attention (MRA) for related deficiency or violation	Repeat or past due concern in an MRA for related deficiency or violation	Concern in an informal enforcement action intended to prevent the violation	Concern in a formal enforcement action intended to prevent the violation	5
History of violations and tendency to engage in violations(9)(12)	No prior related violations or minimal history of unrelated violations	Prior unrelated violations	Prior unrelated repeat or recurring violations	At least one prior related violation	Prior related repeat or recurring violations	3
Duration and frequency of violations before notification(2)	Isolated violation	Violation continued for up to 6 months	Several violations, or violation continued for up to 1 year	Frequent violations, or violation continued for 1-2 years	Pattern or practice, or violation outstanding for more than 2 years	3
Effectiveness of internal controls (IC) and compliance program (CP)(11)	Strong ICs and CP	Generally effective ICs and CP with relevant weaknesses	ICs and CP have moderate weaknesses	Minimal, ineffective ICs and CP	ICs and CP are substantially lacking	4
Subtotal 1						
Self-identification(5)	Inadequate or no self-identification		Meaningful or significant self-identification		Self-identification of all main deficiencies; full and timely disclosure; proactive further investigation	5
Remediation/corrective action(4)	Inadequate or no remediation		Meaningful or significant remediation		Timely and complete remediation of root cause as well as like	5

Factors	0	1	2	3	4	Factor Weight
					conduct or deficiencies	
Restitution, if applicable(8)	Inadequate or no restitution		Meaningful or significant restitution		Timely and complete restitution	3
Subtotal 2						

Total Matrix Score (subtract subtotal 2 from subtotal 1)

Suggested Action Based on Total Matrix Score and Total Assets of Bank

Total Matrix Score	Total assets up to $250 million	Total assets $250 million+ to $1 billion	Total assets $1 billion+ to $5 billion	Total assets $5 billion+ to $15 billion	Total assets $15 billion+ to $50 billon	Total assets $50 billion+ to $100 billion	Total $100 billion+ to $500 billion	Total assets $500 billion+ to $1 trillion	Total assets over $1 trillion
0-40	No Civil Monetary Penalty ("CMP")	No CMP	No CMP	No CMP	No CMP	No CMP	No CMP	No CMP	No CMP
41-60	Up to $10,000	Up to $100,000	Up to $500,000	Up to $2 million	Up to $4 million	Up to $7 million	Up to $15 million	Up to $20 million	Up to $40 million
61-80	Up to $25,000	Up to $250,000	Up to $1 million	Up to $4 million	Up to $8 million	Up to $14 million	Up to $30 million	Up to $40 million	Up to $80 million
81-100	Up to $50,000	Up to $500,000	Up to $2 million	Up to $8 million	Up to $16 million	Up to $28 million	Up to $60 million	Up to $80 million	Up to $160 million
101-120	Up to $75,000	Up to $1 million	Up to $4 million	Up to $14 million	Up to $28 million	Up to $49 million	Up to $105 million	Up to $140 million	Up to $280 million
121-140	Up to $100,000	Up to $2.5 million	Up to $7 million	Up to $20 million	Up to $40 million	Up to $70 million	Up to $150 million	Up to $200 million	Up to $400 million

141+	Over $100,000 but less than 1 percent of total assets	Over $2.5 million but less than 1 percent of total assets	Over $7 million but less than 1 percent of total assets	Over $20 million but less than 1 percent of total assets	Over $40 million but less than 1 percent of total assets	Over $70 million but less than 1 percent of total assets	Over $150 million but less than 1 percent of total assets	Over $200 million but less than 1 percent of total assets	Over $400 million but less than 1 percent of total assets

Appendix D: Data Collection Efforts

In Chapter 2, data gathered by the Committee Staff on monetary sanctions and trends over time with respect to enforcement actions and monetary sanctions are presented. Data on the number of enforcement actions, aggregate monetary sanctions, and mean and median defendant-level monetary sanctions are derived from the case-level collected of data. So too is data presented in the Report on the proportion of monetary sanctions comprised of civil monetary penalties, disgorgement and restitution, and consumer relief; the percent of SEC, CFTC, and CFPB cases brought in federal court and administrative proceedings; and the proportion of DOJ criminal matters against financial institutions resolved through NPAs, DPAs, or plea agreements. The following describes how the data used in those analyses were obtained.

1. Case-Specific Enforcement Action Data Gathered from Agency Spreadsheets and Tables

The Fed, FDIC, OCC, and OTS provide downloadable spreadsheets or tabular information on their websites, which provide detailed information on specific enforcement actions. For those agencies, the Committee Staff pulled the data from the relevant agency website for the period from January 1, 2000 through December 31, 2024.[11]

2. Case-Specific Enforcement Action Data Gathered by Hand from Individual Orders

The NCUA, OFAC, FinCEN, CFPB, and NY DFS post all their enforcement action orders in one central and accessible portion of their websites. For those agencies, each enforcement order was downloaded and hand reviewed to collect data. These actions date as far back as January 2000 and through December 31, 2024.[12]

3. Case-Specific Enforcement Action Data Gathered from Third-Party Databases

Data on DOJ civil and criminal actions against financial institutions was gathered using two distinct methods. Data on *criminal* actions against institutions was gathered through the University of Virginia Corporate Prosecutions Project database, which provides monetary sanction information and the method of resolution for each case in spreadsheet form. Information on DOJ *civil* cases was gathered by downloading all press releases from the DOJ's website and each of the 93 U.S. Attorneys' Office websites. Press releases were searched for the names of the 50 largest financial institutions and then hand reviewed to determine if they were relevant and to gather pertinent information on monetary sanctions. The Committee Staff also searched for any references to FIRREA and included those matters in the data if the matter was against a financial institution.

[11] The Committee Staff excluded voluntary terminations of deposit insurance from its data, as well as notices from banking regulators to banks that they had become aware that certain individuals were no longer permitted to be affiliated with the bank unless approved by the regulator.

[12] OFAC cases are available only back to 2003 and NY DFS back to 2001. The CFPB was established in 2011 and so it does not have any enforcement actions until 2011. The OTS was merged into the OCC in 2011, so OTS data is through 2011.

134 Mount Auburn Street, Cambridge, MA 02138
www.capmktsreg.org