Testimony

Before the U.S. House Committee on Financial Services

Subcommittee on Capital Markets

Hearing on "A New Day at the SEC: Restoring Accountability, Due Process, and Public Confidence."

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How to Ensure a Culture of Fairness at the SEC

Chair Wagner, Ranking Member Sherman, and distinguished members of the Subcommittee on Capital Markets, my name is Peter Chan and I am a partner at the global law firm of Baker McKenzie. The views I express in this testimony are my own.

I testify today on how best to ensure a culture of fairness at the U.S. Securities and Exchange Commission ("SEC") through concrete steps that will preserve the good work already begun under the leadership of SEC Chairman Paul Atkins.

My perspective is informed by decades of experience as a securities attorney, including close to 20 years at the SEC's Division of Enforcement.[1] At the SEC, I had the privilege of working alongside Commission staff members who were hardworking, intelligent and absolutely dedicated to the SEC's mission to protect the investing public. And being *fair* has always been part of the ethos of the Staff I worked with at the SEC.

But in recent years, the Commission has lost its way when it comes to fairness. For example, the SEC has engaged in regulation by enforcement by setting de facto rules through enforcement actions without fair notice, as documented by a white paper I co-authored with my friend and former colleague Valerie Mirko for the Financial Services Institute ("FSI White Paper").[2]

A recent example is the SEC's off-channel communications initiative involving the deployment of just about the entire Enforcement Staff to pressure over 100 financial firms to settle to over $2 billion in penalties, even when there was no evidence of bad faith.[3] Ironically, the Commission itself was unable to comply with the same

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[1] I started my legal career as a Baker McKenzie associate working under then partner and former SEC Chairman David Ruder who was also my securities law professor at Northwestern Law. I then served at the SEC's Division of Enforcement for close to 20 years before I returned to private practice. I am also an avid student of the history of the SEC and serve as a trustee of the SEC Historical Society.

[2] Peter Chan and A. Valerie Mirko, Recommendations to the SEC to Modify its Procedural Framework to Prevent Regulation by Enforcement, Financial Services Institute, January 2024 (available at: FSI-Recommendations-to-SEC-prevent-Reg-by-Enforcement-2024-01-25-FINAL.pdf)

[3] "The SEC's approach to enforcing Rule 17a-4 in the context of electronic communications provides another illustrative example of the pitfalls in regulating through enforcement. Instead of issuing clear, prospective guidance or promulgating standards through an APA-compliant notice-and-comment process, the SEC has pursued a series of high-profile enforcement settlements without formal regulatory direction. This approach lacks transparency and leaves market participants without a reliable understanding of what compliance entails. Widespread industry confusion is not an indicator of misconduct, it is a signal of a regulatory gap." Supplemental Letter to SEC Chairman Paul Atkins from the Financial Services Institute, Oct. 31, 2025, attached as **Exhibit A** (also available at: Letter-Regulation-by-Enforcement-Supplement_and_Whitepaper-Atkins-20251031.pdf).

stringent standards that the SEC is enforcing against the industry, as evidenced by the avoidable destruction of text messages of then SEC Chairman Gensler.[4] And there is also the well-documented attempt to use enforcement actions to stifle innovations in digital assets and blockchain technology.[5]

To pressure parties to settle cases where the SEC may not prevail in court, the Enforcement Staff has also engaged in unfair practices, such as threatening burdensome investigative requests or unwarranted outreach to customers, if parties do not agree to settle.[6]

Despite the searing lessons from Madoff, the Enforcement Staff have been incentivized in recent years to pursue cases involving esoteric theories and large penalties that generated headlines, such as the off-channel communications initiative. The Staff thus failed to focus limited SEC resources to detect, prevent or stop at inception traditional intentional fraud schemes, cases that would have garnered little publicity but protected investors.

The SEC should be focusing on getting rid of burdensome regulations that no longer make sense.[7] Instead, the past Commission engaged at a breakneck pace to promulgate rules, resulting in unfair process and bad rules.[8]

Thankfully, Chairman Atkins is righting the ship and returning fairness to the Commission. He has issued key policy statements to reform enforcement.[9] He has also launched initiatives to reduce unnecessary regulatory

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The Off-Channel Communications Initiative, beyond the focus on electronic communications, also reflected an extreme position as to what constitute records that need to be retained. The record keeping rules were originally meant to preserve documents essential to the business of a financial firm. But the expansive interpretation by the Enforcement Staff in the initiative would lead to the absurd scenario in which a financial firm employee who jots down a phone number on a yellow sticky note and later discards it would be in violation of the rules and be subject to enforcement sanctions.

[4] Office of Inspector General, Sec. and Exch. Comm'n, Special Review: Avoidable Errors Led to the Loss of Former SEC Chair Gary Gensler's Text Messages, Report No. 587, (September 3, 2025) (available at: Special Review: Avoidable Errors Led to the Loss of Former SEC Chair Gary Gensler's Text Messages, Report No. 587).

[5] FSI Supplemental Letter at 6. *See also* Jennifer J. Schulp, Testimony Before the U.S. House Committee on Financial Services Subcommittee on Digital Assets, Financial Technology and Inclusion Hearing on "Dazed and Confused: Breaking Down the SEC's Politicized Approach to Digital Assets," Sept. 18, 2024 (available at: HHRG-118-BA21-Wstate-SchulpJ-20240918.pdf).

[6] FSI White Paper, at 10-11. There have also been instances of the Staff violating Commission policies on the Wells Process to deny due process rights for potential defendants to make their best case to the Commission as to why they should not be sued by the SEC.

[7] The SEC's executive compensations rules are examples of such outdated and excessively burdensome SEC regulations in urgent need of reform. Under the current rules, for instance, security provided by the company at a personal residence or during personal travel is automatically considered a perquisite or "perk." In today's unfortunate threat environment, a CEO would dispute the notion that his or her family's need for security protection is a personal benefit as opposed to a burden of the job. Jennifer Broder and Peter Chan, Submission to the SEC's Executive Compensation Roundtable: The Real Life of a CEO: Modern Day Issues Regarding Security, Accessibility and Travel Expectations, June 26, 2025, attached as **Exhibit B** (also available at: 4855-617167-1810434.pdf). *See also*, Stephen Bainbridge, Jennifer Broder and Peter Chan, Revisiting SEC Executive Compensation Rules: Complexity, Clarity, and Reform, Oct. 2025 (video available at: **https://lnkd.in/gNnURdZd**), Executive Perks and SEC Disclosure: Outdated Rules in a Modern World, Oct. 2025 (video available at: **https://lnkd.in/ga_ie-88**) and The Future of SEC Executive Compensation Disclosure: Reform, Relevance, and Investor Impact, Oct. 2025 (video available at: **https://lnkd.in/g9yZkYJd**).

Another potential area to reduce corporate burden is to re-examine the ownership thresholds in SEC Rule 14a-8 to ensure that a proponent of shareholder proposal "has some meaningful economic stake or investment interest in a company." SEC Commissioner Hester M. Peirce, Sheep in the Steep: Remarks before the Northwestern Securities Regulation Institute, Jan. 27, 2025 (available at: SEC.gov | Sheep in the Steep: Remarks before the Northwestern Securities Regulation Institute).

[8] *See e.g.,* Letter to Helen Albert, Acting Inspector General, SEC from Senators John Boozman, Katie Britt, Mike Crapo, Steve Daines and Bill Hagerty, March 16, 2023 (available at: Microsoft Word - Senator Boozman SEC OIG Audit Letter 31623 copy.docx).

[9] *See e.g.,* Chairman Atkins' policy statement on enforcement. Address at the 25th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial, Oct. 7, 2025 (available at: SEC.gov | Keynote Address at the 25th Annual A.A. Sommer, Jr. Lecture on Corporate,

burdens.[10] But it is difficult to correct the course of an aircraft carrier, and there is no guarantee that future leadership will not deviate from the path of fairness.[11]

The Commission should thus establish clear rules to hardwire fairness into the SEC's culture.[12] An independent advisory committee of outside experts, a Wells 2.0 Committee, can help the SEC further identify methods to align Staff incentives to revitalize the SEC's culture of fairness.[13] And better yet, legislation, including legislation currently proposed by members of this subcommittee, can ensure that fairness will always be part of the SEC's DNA.

Thank you again for the opportunity to testify today. I am happy to answer any questions you may have.

Securities, and Financial Law). In his statement, Chairman Atkins specifically criticized the Off-Channel Communications Initiative stating: "We must go after cases of genuine harm and bad acts, but we must view cases of benign or innocent actions differently. In the past, we have seen examples of enforcement actions in areas, such as retention of books and records, that consumed excessive Commission resources not commensurate with any measure of investor harm." Chairman Atkins also recognizes the importance of aligning the enforcement staff's incentive structure, stating: "We also need to make certain that we have the right incentive structure in place for our enforcement staff as they carry out their work to protect investors and safeguard our markets."

Since Chairman Atkins' appointment of Judge Margaret "Meg" Ryan as the Director of the Division of Enforcement, a majority of the SEC enforcement cases filed involved charges of intentional fraud. *See generally*, SEC Litigation Releases (available at: Litigation Releases | U.S. Securities and Exchange Commission).

[10] *See e.g.*, Chairman Atkins' policy statement on reforming Regulation S-K to reduce regulatory burden on public company reporting. Statement on Reforming Regulation S-K, Jan. 13, 2026 (available at: SEC.gov | Statement on Reforming Regulation S-K) and his policy statement on SEC-CFTC harmonization of regulations, Opening Remarks at Joint SEC-CFTC Harmonization Event – Project Crypto, Jan. 29, 2026 (available at: SEC.gov | Opening Remarks at Joint SEC-CFTC Harmonization Event – Project Crypto). Chairman Atkins has also proposed reforms to reinvigorate the US IPO market. Mark Mandel, Steven Sandretto, Jerome Tomas, Peter Chan and Michael Pilo, Decoding the SEC's Plans to Revitalize the US IPO Market, Law360, Jan. 16, 2026 (available at: law360--decoding-the-secs-plans-to-revitalize-the-us-ipo-market.pdf).

[11] For example, the Commission should adopt a formal transition protocol to promptly reassess open investigations, pending enforcement matters, and related litigation for consistency with Commission-level rules, interpretations, and comparable public guidance. This reassessment should prioritize fair notice and reliance interests, favoring prospective clarification where fair notice is lacking, and the results should be made transparent to the public. Such a framework would reduce unnecessary waste of Commission resources while improving predictability and consistency for investors and registrants.

[12] The FSI White Paper recommended a procedural framework for the SEC to detect and prevent regulation by enforcement including:

- Factors the Commission and its staff should consider before any novel enforcement action, such as evidence of prior notice, reasonable alternatives to enforcement action, and the extent of inaction by Commission staff despite awareness of the issue;
- Discussion of these factors in recommendation or advice memos to the Commission;
- Transparency on such deliberation, including references in public releases on prior notices regarding the potential of such novel enforcement actions;
- Incorporation of such procedures in the SEC Enforcement Manual; and
- Periodic fairness audits by the Office of the Inspector General to ensure compliance with such procedures.

FSI White Paper at 31-34. In addition, the FSI Supplemental Letter asks that the SEC codifies such procedures into the Commission's Rules of Practice. FSI Supplemental Letter at 3.

[13] The SEC should also consider establishing an Office of Fairness and Integrity to monitor compliance and conduct training on fairness policies and rules, further preserving due process.

EXHIBIT A

FINANCIAL SERVICES INSTITUTE | VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

Via Email

October 31, 2025

Honorable Paul S. Atkins
Chairman
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090

Re: Update to and Supplemental Submission Regarding Financial Services Institute January 2024 White Paper Recommendations to the Securities Exchange Commission ("SEC" or "Commission") to Modify its Procedural Framework to PREVENT REGULATION BY ENFORCEMENT ("White Paper")

Dear Chairman Atkins,

The Financial Services Institute ("FSI") appreciates the opportunity to present this update to its White Paper referenced above.

I. Introduction

FSI applauds the Commission's efforts under your leadership in promoting fair and efficient markets and capital formation *alongside* investor protection to address all facets of the SEC's tripartite mission. Specifically, with the outstanding appointment of Judge Ryan as the Director of the Division of Enforcement, we thought it would be timely and helpful to provide this supplemental update on how the Commission can detect and prevent the unfair practice of regulation by enforcement.

In particular, the Commission under your leadership has the opportunity to establish processes and procedures to deter future attempts to engage in regulation by enforcement. While SEC leadership has changed since we first submitted the White Paper, it is in the best interests for the markets and market participants that the Commission adopt policies and procedures against this unfair practice. Firms and individuals regulated by the Commission should be aware of the rules, responsibilities, and range of penalties before taking an action, and not be used as examples for creating regulatory policy with unreasonable fines and penalties. Based on recent events, FSI believes it is appropriate for the Commission to review past tactics engaged in by the Enforcement Staff in pressuring unfair settlements, as such tactics have been part and parcel of the method used by the Staff to engage in regulation by enforcement.

We appreciate your attention to this matter, and we look forward to the opportunity to meet with you in person once you and the other Commissioners have had a chance to review the White Paper and this supplemental material.

II. Overview of Proposed Framework to Prevent Unfair Enforcement Practices

In January 2024, FSI, working with our counsels A. Valerie Mirko of Armstrong Teasdale and Peter Chan of Baker McKenzie, released the White Paper and recommended that the SEC adopt a formal procedural framework to identify and prevent unfair enforcement practices.[1] The report emphasized the harmful effects of regulation by enforcement, particularly its tendency to circumvent the formal rulemaking process. Regulation by enforcement, in our view, denies stakeholders the opportunity to provide public comment and risks eroding the SEC's credibility by fostering perceptions of arbitrary or unfair treatment.

To address these concerns, the White Paper proposed a procedural framework centered on promoting fairness and transparency in the SEC's enforcement approach. Key elements of the framework include evaluating the specific factual context before initiating novel enforcement actions, such as whether there was prior public notice, whether SEC Staff had previously declined to act, and whether alternative approaches were available. This evaluation should be documented in internal memoranda and explicitly referenced in public communications related to the enforcement action. The framework we proposed additionally recommends codifying these procedures in the SEC Enforcement Manual and establishing regular fairness audits to be conducted by the Office of the Inspector General.

III. Continued Support for Procedural Reform

FSI has been encouraged by your stated views on the risks associated with regulation by enforcement in recent months, including since your transition into your current leadership role. For example, on July 2, 2025, you acknowledged during an interview with CNBC's Squawk Box the chilling effect unclear regulations can have on innovation, noting:

> ". . . tokenization is an innovation, and we at the SEC should be focused on how do we advance innovation in the marketplace. And so, I would argue here over the last several years, the SEC has been standing athwart efforts to innovate in the marketplace because things have been unclear. The rules have not been clear. We've had regulation through enforcement. That day is over."[2]

Similarly, during testimony before the U.S. Senate on June 3, 2025, you emphasized:

> "How we implement regulations at the SEC is crucial; it is one thing to write a regulation, quite another for it to achieve its intended goal. Regulation should be

[1] The Financial Services Institute, *Recommendations to the SEC to Modify its Procedural Framework to Prevent Regulation by Enforcement* (Jan. 2024), available at https://financialservices.org/wp-content/uploads/2024/01/FSI-Recommendations-to-SEC-prevent-Reg-by-Enforcement-2024-01-25-FINAL.pdf and attached here as Appendix A.

[2] *SEC Chairman Paul Atkins on Public vs. Private Markets*, CNBC SQUAWK BOX (July 2, 2025), available at https://www.youtube.com/watch?v=j80nXUWbPPU.

> smart, effective, and appropriately tailored within the confines of our statutory authority."[3]

Finally, though we do not expect this to be your last word on the subject, in your recent interview with the Financial Times in Paris you addressed the market perception of the Commission going after technical violations as opposed to bad actors:

> "Especially in more recent years [SEC enforcement] was not grounded in precedent [or] predictability. It would shoot first and then ask questions later . . . What I am trying to address is a market perception that . . . there was a lack of due process, a lack of notice, a lack of rule of law. . . . That's not how a regulator should have acted." [4]

Calls for thoughtful and smart regulations go beyond the financial services industry as well. Recent White House Executive Orders reflect a renewed emphasis on regulatory fairness and accountability across all federal enforcement actions. For example, Executive Order 14215 directs agencies to clearly identify officials responsible for major enforcement decisions, aiming to enhance transparency and personal accountability in regulatory actions.[5] Executive Order 14219 also reinforces the current administration's policy of promoting responsible governance by discouraging unjustified or inconsistent enforcement and emphasizing due process protections for regulated entities.[6] These directives highlight a growing concern with regulatory overreach and demonstrate the need for the SEC, among other agencies, to ensure enforcement practices are fair, consistent and transparent.

We respectfully reaffirm our recommendation that the SEC adopt formal policies and procedures to detect and prevent unfair or improper practices rooted in regulation by enforcement. Upon further analysis, we additionally recommend that the SEC consider promulgating a rule to codify such procedures in the SEC Rules of Practice to ensure consistent application and true long-term accountability. We believe that embedding these protections in the SEC Rules of Practice is essential to not only uphold due process and transparency, but also to help establish a lasting culture of fairness that endures beyond the tenure of the current Commission.

IV. Recent Case Studies and Initiatives Underscore the Need for Reform

Recent enforcement actions further illustrate the urgent need for the procedural remedies outlined in FSI's white paper and reaffirmed above. These settlements and litigation continue to reflect the systemic issues of regulation by enforcement, particularly in the absence of clear, prospective guidance and fair procedural safeguards.

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[3] Paul S. Atkins, Chairman, Sec. and Exch. Comm'n, Testimony Before the U.S. Senate Appropriations Subcomm. on Fin. Servs. and Gen. Gov't (June 3, 2025), available at https://www.sec.gov/newsroom/speeches-statements/testimony-atkins-060325.

[4] *See* Stefania Palma and Philip Stafford, *Donald Trump's new SEC appointee scraps aggressive enforcement agenda*, Financial Times, (Sept. 15, 2025).

[5] Exec. Order No. 14215, Ensuring Accountability for All Agencies, 90 Fed. Reg. 10447 (Feb. 18, 2025).

[6] Exec. Order No. 14219, Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative, 90 Fed. Reg. 10583 (Feb. 19, 2025).

a. Lack of Due Process in Settlement

The recent enforcement action against Commonwealth Equity Services exemplifies how the SEC's current approach can blur the line between plausible legal interpretation and regulatory overreach.[7] At issue in *Commonwealth* was whether the firm failed to adequately disclose conflicts of interest related to investment choices—a claim rooted in the SEC's evolving interpretation of materiality. The First Circuit ultimately determined that the question of materiality, which was central to the SEC's theory, was not suitable for summary judgment and should instead be decided by a jury due to the numerous factual and causation complexities involved. The court criticized the SEC's "inadequately supported assumptions" regarding materiality, highlighting the unstructured and subjective nature of the SEC's interpretation.[8]

Most firms cannot feasibly risk such extreme penalties simply to assert a legal defense, creating enormous pressures to settle, even where the enforcement theory is novel, weak, or legally unsettled. Although the court ultimately rejected the SEC's theory, Commonwealth operated for many months facing potential disgorgement liability exceeding $90 million. As a result, this case further exposed serious concerns about due process in the SEC's settlement posture.

Lack of due process forces a dynamic that chills legitimate conduct and punishes firms before regulatory clarity is established. We saw the same dynamic in the SEC's Share Class Share Disclosure Initiative where few firms challenged the SEC's charges around mutual fund share class disclosure.

In the few instances where firms did challenge the SEC regarding share class matters, the SEC achieved mixed results. For example, in the *Ambassadors* litigation, the court granted the Commission's motion for summary judgment as to its Section 206(4) and Rule 206(4)-7 allegations but denied the Commission's motion for summary judgment as to its Section 206(2) allegations.[9] Nearly two years after the SEC filed its original complaint, a jury reached a verdict in favor of the SEC and Ambassador ultimately incurred a civil penalty of $622,642. This amount, however, is likely less than what the SEC initially sought, further underscoring the broader concern of settlement fairness and firms feeling pressured to settle for higher figures regardless of the strength of the claims against them.

On the other hand, in the *CapWealth* litigation, the SEC was unable to convince the jury that the firm breached its fiduciary duty despite allegations consistent with the factual basis for other

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[7] *Sec. and Exch. Comm'n. v Commonwealth Equity Services, LLC*, 24-1427, 2025 WL 971681 (1st Cir. Apr. 1, 2025).
[8] The First Circuit vacated the *Commonwealth* summary judgment on the breach of fiduciary duties and policies and procedures claims. That court appropriately determined that any disgorgement needed to be based off of an amount that is a reasonable approximation of profits causally connected to the underlying violation, and the SEC's standard that "at least some" investors were harmed or would have changed advisers were insufficient grounds for the $65 million disgorgement. FSI submitted an amicus brief discussing disgorgement at length and reasonable approaches the enforcement staff could take after meeting the appropriate evidentiary requirements. *See Brief for Financial Services Institute as Amicus Curiae Supporting Commonwealth,* Securities and Exchange Commission, Plaintiff-Appellee, v. Commonwealth Equity Services, LLC, d/b/a Commonwealth Financial Network, Defendant-Appellant, 2024 WL 3935208.
[9] *SEC v. Ambassador Advisors, LLC, et al.,* No. 5:20-cv-02274 (E.D. Pa. filed May 13, 2020).

settled actions.[10] As with *Ambassadors*, from the date the SEC filed its complaint, *CapWealth* took over one year and eleven months to go to trial. While CapWealth ultimately prevailed, the pressure to settle with the Commission to avoid the cost of litigating through trial remains omnipresent.

These cases illustrate fundamental due process concerns, and the structural imbalance smaller firms face when confronting SEC enforcement actions. In these instances, the financial and procedural disparity between the SEC and the firm created immense pressure to settle, regardless of the strength of the respondents' underlying legal claims. The outcomes in these matters additionally reflect the unpredictability and inconsistency of regulation by enforcement. Such variability underscores the risks of pursuing policy through enforcement and litigation rather than through clear, uniform rulemaking.

b. Off-Channel Communications Initiative

The SEC's approach to enforcing Rule 17a-4 in the context of electronic communications provides another illustrative example of the pitfalls in regulating through enforcement. Instead of issuing clear, prospective guidance or promulgating standards through an APA-compliant notice-and-comment process, the SEC has pursued a series of high-profile enforcement settlements without formal regulatory direction. This approach lacks transparency and leaves market participants without a reliable understanding of what compliance entails. Widespread industry confusion is not an indicator of misconduct, it is a signal of a regulatory gap. As Commissioners Peirce and Uyeda have previously noted, there is an industry-wide problem here that cannot be solved through enforcement.[11] The industry will experience foot faults and growing pains in adapting to new approaches and technology, but the guidance and penalties cannot be handed down in a way that stifles innovation (i.e. regulation by enforcement).

We note the irony and inherent unfairness in using enforcement actions to deal with what is essentially a technology issue from which the Commission itself is not immune. When the former chairman of the regulator charged with policing these violations "inadvertently destroys" eleven month's worth of text messages covering substantive SEC agency/federal records, the Commission Office of Inspector General issues a special report.[12] When similar records are inadvertently destroyed by a representative or firm, i.e., a technical violation, the firm should not be in fear of the SEC rushing to judgment with an enforcement action and six to seven-figure penalties from the Commission.[13] As noted by members of the House Financial Services Committee, "It appears that former Chair Gensler held companies to a standard that his own agency did not meet", citing

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[10] *How a $1.3bn RIA beat the SEC in a 12b-1 fee trial,* CITYWIRE (Nov. 16, 2022), https://citywire.com/pro-buyer/news/how-a-1-3bn-ria-beat-the-sec-in-a-12b-1-fee-trial/a2402598.

[11] *A Catalyst: Statement on Qatalyst Partners LP*, (Sept. 24, 2024), https://www.sec.gov/newsroom/speeches-statements/statement-peirce-uyeda-qatalyst-09242024.

[12] Office of Inspector General, Sec. and Exch. Comm'n, *Special Review: Avoidable Errors Led to the Loss of Former SEC Chair Gary Gensler's Text Messages*, Report No. 587, (September 3, 2025), https://www.sec.gov/files/sec-oig-review-587-2025.pdf.

[13] *Id.*

firms for over $400 million in settled charges in 2023 while experiencing his own significant "record keeping failure".[14]

When neither individuals nor firms can reasonably discern the boundaries of lawful behavior, enforcement becomes arbitrary. FSI shares your sentiment from a speech last year in which you compared the off-channel communications issue to a schoolteacher with a ruler wrapping it on the table.[15] If every firm is struggling to interpret and comply with the same requirements, the issue lies not with the industry but with the rule itself.

Furthermore, the absence of a limiting principle on penalties has led to sweeping and inconsistent sanctions. Since December 2021, the SEC's off-channel communications initiative has produced enforcement settlements with over one hundred firms, resulting in more than $2 billion[16] in penalties.[17] These settlements frequently require firms to retain compliance consultants, whose recommendations must be approved by SEC enforcement personnel. This practice effectively outsources regulatory policymaking to third parties through settlement terms, not through the formal rulemaking process Congress intended.[18]

c. Parallel Challenges in Crypto

The challenges posed by the SEC's enforcement-driven approach to off-channel communications closely parallel the issues currently unfolding in the crypto and digital asset space. In both instances, market participants are grappling with rapid technological and cultural shifts, whether in communication practices or financial innovation, without clear, prospective regulatory guidance.

Just as the widespread use of modern messaging platforms has outpaced legacy compliance frameworks, blockchain-based technologies and tokenization represent novel paradigms that do not fit neatly into existing regulatory schemes. Responding to these developments with enforcement rather than rules to develop an appropriate regulatory framework, risks stifling innovation, creating confusion, and diminishing the SEC's credibility. Enforcement is not the appropriate or sustainable substitute for rulemaking when addressing such foundational shifts in market behavior and technology.

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[14] House Comm. on Fin. Servs., *Letter to Hon. Paul Atkins, Chair, U.S. Sec. & Exch. Comm'n, Regarding Oversight of the SEC's Office of Information Technology and the Loss of Former Chair Gary Gensler's Text Messages* (Sept. 30, 2025), *available at* https://files.constantcontact.com/9f2b5e3d701/210f231c-f3ba-465b-8155-ee69285f9a56.pdf.

[15] Transcript: Twelfth Annual Executive Branch Review Conference, held by The Federalist Society (Apr. 16, 2024), https://fedsoc.org/conferences/twelfth-annual-executive-branch-review-conference-ebrxii#agenda-item-luncheon-panel-u-s-financial-regulation-principles-opportunities-and-challenges.

[16] *See* SEC Press Release 2024-186 (Nov. 22, 2024), https://www.sec.gov/newsroom/press-releases/2024-186.

[17] *See Testimony of the Securities and Exchange Commission Before the United States House of Representatives Committee on Financial Services*, September 24, 2024. Congresswoman Wagner asked "Why did the SEC wait and play gotcha after the fact with enforcement actions" instead of issuing a regulation or policy. Commissioner Peirce responded that "a lot of this probably did stem from the fact that COVID changed the world and the way we do things, and that's why we should have taken a regulatory approach first" and off channel communication enforcement "certainly has become a cash cow for the SEC, and so the typical case is not based on fraud or any evidence of a problem other than a record keeping problem… That's a serious problem, but I think we need to address it not through enforcement first, but through regulatory work."

[18] *See, e.g., In the Matter of Stifel, Nicolaus & Company, Inc.*, Exchange Act Release No. 101144 (Sept. 24, 2024).

V. Conclusion

Thank you for your attention to the above as well as our White Paper. We have previously had the opportunity to meet with Commissioner Uyeda and Commissioner Peirce, and members of the Staff, and we welcome the opportunity to meet with you, Judge Ryan, and others at the Commission as well to discuss these matters further.

Dale E. Brown
President & CEO

CC: Commissioner Hester M. Peirce
Commissioner Caroline A. Crenshaw
Commissioner Mark T. Uyeda
Margaret Ryan – Director, SEC Division of Enforcement
A. Valerie Mirko – Partner, Armstrong Teasdale LLP
Peter Chan – Partner, Baker McKenzie LLP

EXHIBIT B

Submission to the SEC's Executive Compensation Roundtable

The Real Life of a CEO: Modern Day Issues Regarding Security, Accessibility and Travel Expectations

Jennifer Broder
Baker McKenzie

Peter Chan
Baker McKenzie

June 26, 2025

I. Introduction.

We are making this submission to the Securities and Exchange Commission (the "Commission" or the "SEC") in response to the Commission's request for comment on the existing executive compensation disclosure rules. We commend the Commission for initiating this retrospective review of the rules and whether they are achieving their objectives of providing a clear and complete picture of the compensation earned by a company's named executive officers. The authors of this submission, Peter Chan and Jennifer Broder, are both partners of Baker McKenzie. Mr. Chan served at the SEC's Division of Enforcement for close to twenty years. Ms. Broder is a transactional lawyer whose practice encompasses matters of corporate governance and securities regulation. We have worked with many companies, boards and CEOs on applying the executive compensation disclosure rules, and we have developed insights as to ways in which the perquisite disclosure requirements have not kept pace with the realities of the environment in which CEOs and other senior executives operate.

We limit our comments to the following question posed by the Commission, specifically as it relates to (1) personal security for executives, and (2) travel costs for executives who have an approved working location that is not the official company headquarters:

> ***9. What has been companies' experience in applying the two-part analysis articulated by the Commission in 2006 with respect to evaluating whether perquisites for executive officers must be disclosed? How do disclosure requirements resulting from the test, and whether a cost constitutes a perquisite, affect companies' decisions on whether or not to provide a perquisite? For example, how has the application of the analysis affected evaluations relating to the costs of security for executive officers? Are there types of perquisites that have been particularly difficult to analyze? How do investors use information regarding perquisites in making investment and voting decisions?***

We welcome the Commission's interest in this question. The existing perquisite disclosure regime was adopted nearly two decades ago in 2006, in a different world in terms of the demands on senior executives, the publicity, safety and security concerns facing executives, and workplace flexibility. (For context, in 2006, the Blackberry device was only seven years old; Facebook was two years old; GPS and wireless integration were only then becoming common in cell phones; and the iPhone had not yet been released.)

Today, CEOs are increasingly public figures. Their pictures, and pictures of their families, are available online. Their home addresses easily can be found by members of the public. There are websites devoted to tracking certain CEO flight schedules. Without question, this increased level of publicity presents heightened security concerns. In addition, we live in a particularly charged business and political climate. CEOs are expected to weigh in on topics that have become cultural flashpoints, such as diversity, equity and inclusion programs, and the role of artificial intelligence in the workplace and its impact on a company's labor force. CEOs receive the blame for the actions of their organizations. As we saw with the tragic murder of the UnitedHealthcare CEO, it is a business necessity for organizations to assess whether their CEOs and other senior executives are or may become targets and to implement appropriate security protocols to address any such risks.

The demands of the CEO position have also increased. With the improvements in technology that enable executive accessibility at all times, a CEO is understandably expected to be available on a 24/7 basis and to work at any hour and at any place when a business need arises.

Technological developments in communication and connectivity tools have also enabled the dramatic shift in workplace office culture that we have seen proliferate post-pandemic. Senior executives, including CEOs, can be based anywhere in the country and not necessarily where the company's official headquarters is located. This creates competitive advantages for companies looking to hire the best talent. More fundamentally, the concept of a single headquarters where all executive decision-making occurs on a centralized basis is outdated. It should no longer be expected that a CEO must work out of the corporate headquarters in order to perform his or her job. A company may have an official headquarters selected for tax or other business purposes, yet key business operations and decisions are implemented across the country or in different regions of the world. Some companies may be entirely remote. And regardless of where any particular office is located, executives routinely spend a significant amount of time working from their personal residence or during business or personal travel.

As executive working habits have evolved, so too have the needs of companies from a cybersecurity perspective. Companies now need to ensure the IT security of employees not only in the controlled setting of the office, but also at employees' personal residences and on their personal devices that are used for company business.

Under the guidance set forth in the 2006 adopting release governing executive compensation disclosure (the "Adopting Release"), the Commission set forth the two-part test for determining whether an item is a perquisite. Under the first part of the analysis, an item is not a perquisite "if it is integrally and directly related to the performance of the executive's duties."[1] If an item is not integrally and directly related to the performance of the executive's duties, an item is a perquisite if "it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, unless it is generally available on a nondiscriminatory basis to all employees."[2] The Commission declined to adopt a bright-line definition as to what constitutes a perquisite, yet in its guidance it defined several categories of items as *per se* perquisites, including "security provided at a personal residence or during personal travel" and "commuting expenses (whether or not for the company's convenience or benefit)."[3] The guidance does not define "commuting" expenses and, to our knowledge, the Commission has not expressly addressed how to apply the guidance to travel expenses for executives with approved remote or other alternative working arrangements.

We believe this is an opportunity for the Commission to modernize its approach to the treatment of personal security and executive travel expenses in light of today's workplace realities. As the Commission itself recognized in the Adopting Release, "different forms of [perquisites] continue to develop, and thus a definition would become outdated."[4] This statement is not a one-way ratchet. Expenses that may at one point have been seen as compensatory in nature are, in the current environment, legitimate and necessary business expenses in furtherance of an executive's job performance. Conflating such expenses with compensation, in our view, distorts the true earnings of a company's executives and provides inaccurate information to investors. It also has the real-world consequence of influencing a board's decision whether or not to provide resources to its executives, even when doing so would be in the company's interest.

II. Personal security for executives.

a. Personal security for executives is not a perquisite.

Under the SEC's current guidance, security provided by the company at a personal residence or during personal travel is automatically considered a perquisite, whereas security provided by the company at business locations or during business travel is not. We believe this is an artificial distinction. The company's business justification to protect the health and safety of its executives does not end when the executive returns home from the office. If anything, risks to executives and their families may be heightened at their personal residences, where they are generally alone and may be in more vulnerable situations (such as sleeping). The current Commission guidance appears to be premised on the notion that an executive somehow ceases to wear their executive "hat" when not in the office, and thus any costs borne by the company to keep that executive safe anywhere other than at work locations or on business travel are remunerative rather than for the company's benefit. Unfortunately, this is not the reality that we live in today. Executives no longer have the option of

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[1] Executive Compensation and Related Person Disclosure, Release No. 8732A (Sept. 8, 2006).
[2] *Id.*
[3] *Id.*
[4] *Id.*

anonymity. They do not choose to be the subject of a security threat, and threats to an executive do not disappear because the executive is at home or on personal travel. A CEO would dispute the notion that his or her family's need for security protection is a personal benefit as opposed to a burden of the job.

Executive security serves important business objectives. Companies should be able to determine that executive security programs, regardless of the executive's location at the time the security is provided, is directly and integrally related to the performance of the executive's duties. An executive cannot perform his or her job if injured, kidnapped, or worse, or if the executive is distracted by security concerns. Similarly, a company should be able to determine that the provision of security to an executive's family is also directly and integrally related to the performance of the executive's duties, as those who are looking to inflict harm on the executive may choose to do so through attacks on his or her family.

We support a specific safe harbor that would expressly permit companies to treat as a business expense (and not a perquisite) personal security expenses for an executive and his or her family where the security is being provided in accordance with a security program approved by the company's board of directors, taking into account the existence of business-related security concerns or risks.

b. Executive security is not just a matter of physical security, but also cybersecurity.

CEOs and senior executives are expected to work from the office, while at home and while traveling. Consequently, executives are no longer working solely from a controlled office environment but rather on many different devices, platforms and networks. At the same time, the threat and sophistication of cybersecurity risks have also grown. In light of geopolitical upheavals and the importance of certain companies to global industries, bad actors throughout the world may spend significant resources to try to breach the cybersecurity of certain organizations (consider a chip company) to access sensitive intellectual property and other high-value confidential information. Lowering the risk of unauthorized surveillance devices targeted at CEOs is no longer a matter of fiction but a reality being considered by boards of many companies. For that reason, it is of critical importance for organizations to ensure the security and reliability of the IT and physical environments in which their CEOs and senior executives are working.

For example, a board may conclude that, for both physical and cybersecurity reasons, its CEO must travel on private aircraft to enable the CEO to continue to conduct business while traveling in a technologically secure setting. In these situations, company expenditures related to such travel have been determined to be necessary to protect the safety and the security of the CEO and the company's confidential information. Under such circumstances, the costs associated with such travel are integrally and directly related to the performance of the executive's job responsibilities. We encourage the Commission to revisit its previous guidance that expressly rejected the notion that an item provided for the security of the executive should not affect the conclusion that such item is a perquisite.[5]

III. Executive travel.

a. Travel between an executive's approved working location and corporate headquarters is not a commute.

The widespread adoption of flexible working arrangements represents a fundamental shift from corporate expectations in 2006. The traditional concept of a single corporate headquarters where all senior executives work five days a week no longer holds for many companies. Some organizations may not even have a headquarters, or they may have several office locations from which equally important business operations are conducted. It has become increasingly common for CEOs and other senior executives to be based out of a location that is not the company's official headquarters. In these situations, it is customary and expected for the company to cover the

[5] *Id.*

cost of the executive's travel for business purposes. The rules do not address how commuting costs should be applied in circumstances where the executive has an approved working location that is not the corporate headquarters. In light of the lack of clear guidance, our experience is that many companies believe there is a nearly irrebuttable presumption that a CEO must be discharging his or her duties from the company's headquarters (notwithstanding what the reality might be). Consequently, *any* business travel by the CEO to and from the company's headquarters is by definition a commute and subject to perquisite reporting.

Companies should be entitled to make business decisions about the primary working locations of their CEOs and other executives without incurring a disproportionate perquisite disclosure burden. The post-pandemic era has shown us that companies can establish a variety of workforce arrangements based on what works best for their employee base and business needs. These business decisions should be respected.

b. Travel between an executive's approved working location and corporate headquarters is not a perquisite.

Regardless of whether such travel is labeled as a commute for SEC purposes, travel between an executive's approved working location and the company's headquarters (or the portion of any other business travel attributable to such increment) should not be categorically deemed a perquisite. As noted above, under the existing guidance, an item is not a perquisite "if it is integrally and directly related to the performance of the executive's duties."[6] A company should be entitled to determine that an executive's business travel, regardless of the point of departure, is integrally and directly related to the performance of his or her duties. If an executive is traveling for a board meeting or a company-sponsored event, or for team or customer meetings, such travel is integrally and directly related to the performance of the executive's duties.

Relatedly, it is expected that executives will be accessible at all times while out of the office, including while traveling. A company may therefore determine that it is an integral and direct part of the executive's duties to continue to conduct business while traveling, including by being available to take meetings or calls. Such determination may include a requirement that a CEO travel by private aircraft in order to conduct business efficiently and in a secure, controlled, and safe environment. The Commission recognized in the Adopting Release that determining whether an item is directly and integrally related to the performance of an executive's duties would need to account for advancements in technology that enable executives to perform their work outside of the office. As an example, the Commission stated that:

> "An example of such an item [that is directly and integrally related to job performance] could be a "Blackberry" or a laptop computer if the company believes it is an integral part of the executive's duties to be accessible by e-mail to the executive's colleagues and clients when out of the office. Just as these devices represent advances over earlier technology (such as voicemail), we expect that as new technology facilitates the extent to which work is conducted outside the office, additional devices may be developed that will fall into this category."[7]

We encourage the Commission to recognize the technological developments that enable executives to work in a manner that is consistent with business and market demands. We suggest that the Commission permit companies to treat as a business expense (and not a perquisite) the costs related to executive travel for the purpose of the executive's performance of his or her job responsibilities, including travel from and to approved working locations, pursuant to a board approved travel policy.

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[6] *Id.*
[7] *Id.*

IV. Investors should receive accurate and consistent disclosures.

We support the Commission's goal of ensuring that investors have material information with respect to the named executive officers' total compensation, and material in-kind personal benefits should be part of that disclosure. However, personal security and business travel expenses are not a matter of discretion or lifestyle enhancement. They represent necessary – and in some cases clearly unwanted – parts of the job. We believe that labeling these costs as perquisites is a mischaracterization and distorts the true information as to how executives are compensated. In addition, the lack of clear guidance on the treatment of travel costs results in companies taking different disclosure positions based on similar facts, making it difficult for investors to compare reported information across peer companies.

Requiring companies to report these costs as perquisites has actual consequences. Boards face pressure to manage the total compensation figures for their named executive officers and are put in the difficult position of determining whether and to what extent to provide resources to their executives that they otherwise believe are necessary for the performance of their job responsibilities.

At minimum, we encourage the Commission to permit companies to exclude these expenses from the total compensation number, even if the amounts are disclosed elsewhere in the proxy statement, such as under Item 404 (subject to any revisiting of this Item the Commission determines to be appropriate to align with any changes to the executive compensation disclosure rules resulting from the Roundtable).

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We appreciate the Commission's consideration of our comments and would be pleased to discuss any of the subjects addressed above in more detail or to provide any additional observations on the topic of perquisites. Please do not hesitate to contact either Peter Chan (312-861-2875) or Jennifer Broder (310-616-5532) should the Commission have any questions.