

2022

The Twenty-First Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law at the Fordham Corporate Law Center

Matthew Diller
Fordham University School of Law

G. Jeffrey Boujoukos
Morgan, Lewis & Bockius LLP

Ben A. Indek
Morgan, Lewis & Bockius LLP

Allison Herren Lee
Securities and Exchange Commission

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Recommended Citation

Lecture, The Twenty-First Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law at the Fordham Corporate Law Center, 27 Fordham J. Corp. & Fin. L. 425 (2022).

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LECTURE

THE TWENTY-FIRST ANNUAL A.A. SOMMER, JR. LECTURE ON CORPORATE, SECURITIES & FINANCIAL LAW AT THE FORDHAM CORPORATE LAW CENTER†

WELCOME AND OPENING REMARKS

*Dean Matthew Diller**
Fordham University School of Law

*Ben A. Indek***
Morgan, Lewis & Bockius LLP

FIRESIDE CHAT

*Commissioner Allison Herren Lee****
U.S. Securities and Exchange Commission

*G. Jeffrey Boujoukos*****
Morgan, Lewis & Bockius LLP

† The lecture was held virtually on November 10, 2021. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory material with respect to certain statements made by the speakers.

* Matthew Diller is the Dean and Paul Fuller Professor of Law of Fordham University School of Law.

** Ben A. Indek is a partner in Morgan Lewis's Litigation Practice and co-Managing Partner of the New York office.

*** Allison Herren Lee is a Commissioner of the U.S. Securities and Exchange Commission. Commissioner Lee's remarks reflect her own views and not necessarily those of other Commissioners or the Commission staff.

**** G. Jeffrey Boujoukos is a partner in Morgan Lewis's Litigation Practice and leads the firm's Securities Enforcement Practice.

WELCOME AND OPENING REMARKS

DEAN MATTHEW DILLER: I'm Matthew Diller, and I have the honor of being the Dean of Fordham Law School. I want to welcome you to our law school in its virtual extension today for the annual A.A. Sommer Lecture on corporate securities and financial law. This is always one of the high points of our year.

It's an honor to welcome Allison Herren Lee, Commissioner of the United States Securities and Exchange Commission (SEC), in a fireside chat with Morgan Lewis partner Jeffrey Boujoukos. The Sommer Lecture is celebrating 21 years and honors the legacy of former SEC Commissioner and securities law practitioner Al Sommer. He was a leader on the Commission, an outstanding lawyer, and mentor to many scholars and practitioners of securities law. I want to thank the Morgan Lewis firm, especially Ben Indek, a partner at Morgan Lewis, as well as John Peloso, who's now a consultant at Morgan Lewis and was previously a longtime partner, for their leadership in this great series.

John Peloso is a distinguished alum of our law school and was the driving force behind the creation of our Corporate Law Center ("Center") and the establishment of this lecture more than 20 years ago. I want to say a few words about the Fordham Law Corporate Law Center. The Center was established in 2001 as a think tank for research in business and financial law. It was established by then-Fordham Law Dean John D. Feerick. The goal was to bring together scholars, professionals, policymakers, and most importantly students for discussion of and study of business and financial law. The Center focuses on convening public lectures, roundtable discussions, symposia, and other public programming; and it also serves as a resource for Fordham Law students by connecting them to our distinguished alums through our Business Law Practitioner Series, and through other means.

I'm also proud of our initiatives in the area of corporate compliance, including our two degree programs in corporate compliance. We have offered a Master of Laws (L.L.M.) degree in corporate compliance for lawyers, and a Master of Studies in Law (M.S.L.) for non-lawyers. Corporate compliance brings together both our law school's strength and expertise in financial law and corporate law, as well as our deep commitment to ethics, which stems from our Jesuit values and tradition. For more information, please visit the Center's website, which you can find on the Fordham Law website.

I particularly want to thank the faculty director of the Center, Professor Richard Squire. The Corporate Law Center is a key hub of activity for us around business law, and we have a deep commitment to the field. We have leading corporate scholars on our full-time faculty. We have an adjunct faculty that brings leading business law practitioners to the law school to work with our students. We're home to a leading journal in the field, the *Fordham Journal of Corporate & Financial Law*, which is one of the most cited student-edited business law publications. Our Moot Court program hosts the annual Kaufman Competition, which brings together students from across the nation to compete on a problem that is always rooted in and based on securities law. And our corporate courses are incredibly popular with our students. We're one of the only law schools I know of where corporations law is a required class.

This lecture is particularly important to us because it really strikes at the heart of our interests and focus as a law school. I'm grateful to the partnership with Morgan Lewis that has made this possible, and I would now like to introduce Ben Indek, partner at Morgan Lewis. Ben, it's been a pleasure to work with you on this lecture series over this year, and I'm excited about today's program and lecture. Please take it away. Thank you, everyone.

BEN A. INDEK: Thank you, Dean. On behalf of Morgan, Lewis & Bockius, I offer my own welcome to the 21st Annual A.A. Sommer Lecture. As many of you know, last year we had to skip this great event due to the pandemic. We are happy to be back, even though in a virtual format. Next year, we hope to be again in person. As we always do, let's take a few moments to recognize Al Sommer.

Al was a Morgan Lewis partner from 1979 until 1994. He then became counsel to the firm. He was a dedicated public servant, an SEC Commissioner in the 1970s, Chairman of the Public Oversight Board, and a public member of the American Institute of Certified Public Accountants. Al was also a scholar, regularly publishing articles and books on a wide range of securities law topics.

Al participated in the first two lectures. He passed away in 2002. We always take special pleasure in having his family with us. This year, we are joined virtually by his son, Ed, his daughters, Susie and Nancy, and their families. And the Sommers report that their mother, Starr, is doing well in Bethesda, Maryland. We are also pleased by the continued support of the SEC Historical Society. Al contributed his time and his papers to the society to help make it an outstanding research resource.

Let me turn to our speaker, SEC Commissioner Allison Lee. Prior to being sworn into office in 2019, Commissioner Lee was a securities law practitioner, teacher, and an SEC veteran, having worked in the Division of Enforcement and as counsel to previous Commissioner, Kara Stein. Though separated by many decades at the SEC, Al Sommer and Commissioner Lee were, and are, engaged on a few common issues. These include materiality and corporate disclosure.

Compare Al's 1975 speech called the *Slippery Slope of Materiality*,¹ with Commissioner Lee's remarks of just a few months ago titled *Living in a Material World: Myths and Misconceptions about "Materiality."*² Al led the Commission's seminal Advisory Committee on Corporate Disclosure in the late 1970s, while Commissioner Lee has spoken widely on the same topic, including on environmental, social, and governance (ESG) disclosure.

Indeed, Al was way ahead of his time on ESG, writing about the intersection of securities law disclosure and social and environmental issues way back in 1978. There's one other connection that spans the decades: Al Sommer's closest SEC colleague and law firm partner was Lloyd Feller. Lloyd who's tuning in this afternoon, served as Al's legal assistant at the Commission. Flash forward to today when Lloyd's son, Andrew Feller, is counsel to Commissioner Lee. It is a small world.

Morgan Lewis is proud of Al Sommer's dedication to the SEC, and we're pleased to work with Fordham in presenting this annual lecture in his honor. I'm delighted to turn the proceedings over to my partner and former director of the SEC's Philadelphia regional office, Jeff Boujoukos, and SEC Commissioner, Allison Lee. Thank you.

FIRESIDE CHAT

COMMISSIONER LEE: Thank you, Ben, for the introduction and thank you for having me today. It is quite an honor to be invited to speak

1. A. A. Sommer Jr., Comm'r, U.S. Sec. & Exch. Comm'n, Speech before the Practicing Law Institute: The Slippery Slope of Materiality, (Dec. 8, 1975), <https://www.sec.gov/news/speech/1975/120875sommer.pdf> [<https://perma.cc/G94M-S4T5>].

2. Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at the 2021 ESG Disclosure Priorities Event Hosted by the American Institute of CPAs & the Chartered Institute of Management Accountants, Sustainability Accounting Standards Board, and the Center for Audit Quality: Living in a Material World: Myths and Misconceptions about "Materiality" (May 24, 2021), <https://www.sec.gov/news/speech/lee-living-material-world-052421> [<https://perma.cc/Y45N-5X9Z>].

at the A.A. Sommer Lecture, and I'm delighted to see so many familiar names in the audience. I wish, like so many of you, that we could all be together for this event, and I really look forward to the day when we can.

I never had the fortune or the opportunity to meet Commissioner Sommer. Around the time that he was wrapping up his term in 1976, I was busy with my final year in high school, with no understanding or even awareness of the securities laws. But I have since had the opportunity to research and consider his remarkable legacy.

In fact, right around the time I received this invitation, I had a friend and colleague forward to me some of his speeches in connection with an issue that I was working on related to materiality. Ben, the very speech that you mentioned in your introduction, is one that I read. I read other speeches of his, as well as the profoundly interesting oral history recorded at the SEC Historical Society and a number of other tributes to the Commissioner.

Setting aside his obvious deep expertise in securities law, I did find some common values and very interesting connections to him and his work. First, as I've mentioned, I was so gratified to discover our connection through our counsel. I have no doubt that Commissioner Sommer benefited greatly from the counsel that he received from Mr. Lloyd Feller, just as I deeply value the counsel that I now receive from his son, Andrew Feller, who started with me on the day I was sworn in and has become indispensable to me both as a colleague and as a friend. But in addition, as I mentioned, I found common values. There were some recurring themes running through all of these materials. His abiding commitment to the mission of the SEC, his support for the independence of the agency and its staff, and his deep belief in the significance of the work that we do. Those are values that transcend policy differences and that are shared and reflected by the many and very distinguished speakers at this event over the years.

Now, a lot has changed in the world, and in our markets since the 1970s, but the mission is still critical, the staff is still dedicated and immensely talented, and the work is still essential.

I'll finish with one other thing I find that is still consistent. I noted a passage in Commissioner Sommer's oral history, in which he recounts a Wall Street executive admonishing him: "Commissioner, if you and your colleagues persist in this course, you will destroy capitalism throughout

the world.”³ I doubt that he was the first Commissioner to hear that, and I can also tell you with a high degree of confidence that he was not the last. So, with that, I’ll thank you again for having me, and Jeff, I look forward to our discussion.

JEFF BOUJOUKOS: Just tremendous initial remarks, thank you so much for that. Welcome. I want to start off with a more general question as you know there are a number of Fordham Law students who have joined us today and are watching the program. Can you discuss for a moment your career progression and what led you to work for the SEC?

COMMISSIONER LEE: Sure. I went to law school later in my life. I was actually almost 40 when I graduated from law school. I have an undergraduate degree in business, and I worked in the oil and gas industry and the software industry before I went to law school. By the time I got to law school, I found being older and more experienced in business to be a great help to me. But I always knew what I wanted to do, and it was always going to be something either public service oriented or in the nonprofit sector.

Then immediately after law school, I was very fortunate to be able to join a U.S. Agency for International Development project in Armenia, to help the Armenian government at the time write periodic reporting provisions for a new law. They were actually opening their very first stock market, and it opened the day that I arrived in Yerevan, and I got to help them write that. That really opened my eyes to the securities laws and the significance of what they mean to a burgeoning democracy like that.

But still I wanted to get good training. I went first out of law school to a large regional firm and then continued to gravitate toward what I thought was really the most challenging and sophisticated practice they had there, at least in litigation as I was a litigator, which was securities and antitrust. So I did both securities and antitrust work. I ended up loving the securities practice. I was also a member in the early 2000s of the American Bar Association’s then-Public Company Disclosure Committee, and it didn’t hurt too that my husband was a securities law professor, as well as a former SEC staffer in the early 1980s. He also worked as counsel for a Commissioner.

But in any case, after making partner at that firm, I made the leap to the SEC, and I’ve never looked back. It’s the best job I’ve ever had. And

³ Interview by Richard M. Phillips with A.A. Sommer, Jr., Comm’r, U.S. Sec. & Exch. Comm’n (Oct. 1, 2001), at 12-13 (https://www.sechistorical.org/collection/oral-histories/20011001_Sommer_AA_T.pdf) [<https://perma.cc/R334-BH9L>].

that goes for every job I've had at the SEC—as an Enforcement attorney, working as a Special Assistant U.S. Attorney when I was on loan on a detail from the SEC, working as counsel to Commissioner Stein, and now the job that I currently have.

So that was my trajectory, a lot of good fortune, but a tremendous focus on and appreciation for the securities law, despite people, everyone in my family going “what is it?” Sort of the same way I look at tax lawyers where I think “why would you do that?” I do get a little bit of that, but you probably know, Jeff, how interesting and intriguing it is.

JEFF BOUJOUKOS: Well, that is certainly true. It's an interesting story about starting in one direction, and switching into another, and following what interests you, which I think is very difficult for a law student especially to think that they could do that. A lot of people feel like they need to make that decision and they're going to be stuck with that decision forever, and it's a great example of how you can follow what you enjoy.

But you mentioned you're a former member of the Enforcement staff, and I know when you came out to Philadelphia to meet with the Philadelphia staff, that was something that was very interesting and intriguing to them, because it is somewhat unique. From my perspective, you have a unique perspective on enforcement at the Commission having been on the front line in a number of investigations and litigations. I'd love to hear your thoughts on a couple of enforcement hot topics that always seem to come up with our clients and certainly are things on the mind of the staff at the SEC.

Cooperation credit—from your perspective, where is it appropriate? What are you looking for when you're considering a recommendation?

COMMISSIONER LEE: I would start from this premise, and you know this well, modern finance is just deeply complex. It spans the globe. It's fast-evolving technology. It's very difficult for Enforcement to keep up, and the job of Enforcement lawyers who have to span every different aspect of our markets, every nook and cranny, is hard.

I think what that essentially means is that high quality cooperation is extremely important, and it can really play an important role in allowing us to find conduct and address it in a timely fashion, with context we might not have otherwise seen. If that cooperation is real and substantive, we can save resources, we can detect conduct that is concealed, that we might not have otherwise found, and we can find culpable individuals, which I think is really important. So, all of that should be rewarded, but there needs to be a give and take for something like that. You may have

seen our new Enforcement Director, Gurbir Grewal, made some remarks in late October about cooperation.⁴ I agree with him on that. He says it has to be more than just what you are legally compelled to do. I know this well from the many investigations I conducted.

One of the first things you hear from counsel is “we want to cooperate.” I appreciate that at the outset. But what I did like to make sure I said at the time was that “I appreciate that, I will take you at your word, let’s talk about what that means.” Because it doesn’t mean just producing witnesses and responding to subpoenas, you’re required to do that legally. It means more than that. I do find that many companies need help in understanding what that means, and I think it’s a really good question.

But in my view, the kind of cooperation that warrants credit at the end, if there is an end or if we do bring a case, is the kind that really moves the investigation forward and demonstrates a real commitment to assisting the staff. So, if you help us find witnesses that we might not know are relevant to an investigation, maybe you do an investigation of your own and you give it to us and save us a lot of time. You help us figure out who’s culpable. There are any number of ways.

I would add that what I used to do in my investigations many times, depending on the nature of the investigation, would be to set up a weekly call to talk with counsel and just talk about where are we. Where are we in the investigation? What are you waiting on from me? What am I waiting on from you? Let’s collaborate and let’s move this thing quickly. I think it’s the kind of discussion that should be had early in an investigation because companies want to cooperate, but they may not know what that means.

I think staff attorneys, Associate Directors, and the like need to communicate directly on what that means, and also communicate when they think it’s breaking down so that there are no surprises. If they think that things are slowing down or cooperation that had been going well isn’t going well, be very clear about that and have that exchange so they can have the opportunity to improve.

It has to be based as on the kind of particular facts and circumstances of any case. But I think it’s appropriate only when it comes to penalties in terms of the credit. In other words, I don’t view cooperation as

4. Gurbir Grewal, Dir., Div. Enf’t, U.S. Sec. & Exch. Comm’n, Remarks at PLI Broker/Dealer Regulation and Enforcement 2021 (Oct. 6, 2021), <https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621> [<https://perma.cc/F2ZL-NTVX>].

applicable so much to prophylactic remedies; those remedies are intended to protect investors—bars and the like—for the most part. But penalties is the big place where I think we have a lot of room, and we should use those to help reward good, real cooperation.

JEFF BOUJOUKOS: Again, you're making this easy on me. I have a segue into penalties. Obviously, Commissioner Crenshaw, for example, came out pretty early in her tenure to talk about civil penalties.⁵ Gurbir Grewal, Director of Enforcement, has commented recently on this.⁶ Can you give us your view on the use of civil penalties in the context of enforcement actions, and in particular with regard to public companies?

COMMISSIONER LEE: Sure. It's a critical tool for the program, and it serves a lot of purposes, not just to punish of course, but to deter. And I think that's where it has the most potential impact in the market. So, I agree with Commissioner Crenshaw on the points that she made, especially the notion that it doesn't make sense to limit penalties to situations where we can identify a quantifiable corporate benefit. And she made a really good point there. First, measuring the benefit can be extremely difficult, and we run the risk of drastically underestimating the actual benefits, some of which are intangible, that flow from potential misconduct. They serve a different function from disgorgement. I think limiting penalties to a corporate benefit wouldn't really serve as an effective deterrent because it would just put the company back where it was before, if we're just trying to measure it along that scale. I think we need to do more than that and I agree with her on that.

I agree with Director Grewal and the remarks that he made as well. I think the size of penalties needs to have a relationship of some kind to the real-world harm that's caused by corporate misconduct—the harm, to investors and to markets and to the public. For example, in the insider trading regime, there's this notion you can get a penalty up to three times the profits made or losses avoided. What's the reason for that? They've got to make sure that there's deterrence, and they've got to make sure that it doesn't pay to engage in that kind of conduct. Getting penalties right is a very critical part of the program.

I think one of the things that Director Grewal pointed out was that we have to look at it both in terms of specific deterrence and general. The

5. Caroline A. Crenshaw, Comm'r, U.S. Sec. & Exch. Comm'n, *Moving Forward Together – Enforcement for Everyone* (Mar. 9, 2021), <https://www.sec.gov/news/speech/crenshaw-moving-forward-together> [<https://perma.cc/E5N9-5DZH>].

6. Grewal, *supra* note 3.

need to deter the company at issue, that's the specific piece, and then the need for a penalty to deter other companies that might commit the same infraction. He suggested that it may be appropriate to assess higher penalties over time for comparable conduct if it appears there's not been a sufficient message from the prior action. In other words, rather than to simply calibrate in exactly the same way over time, if we are not seeing sufficient deterrence in the market, that might militate in favor of increasing those penalties in order to try to get to the place that we need to be.

I think that we've got to make sure that we focus companies on compliance. Penalties are one of the most useful tools that we have for that. It's a difficult one, and as I'm sure you know from your cases, it can be a bit of a dart board when you're trying to figure out where to land. But that doesn't mean we shouldn't continually try to get it right because it is such a critical piece of what we do.

JEFF BOUJOUKOS: We're talking about remedies, and I'm sure you remember your time in Commissioner Stein's office, and waivers under Section 9(c) of the Investment Company Act. That was a focus she wrote on in dissent on a couple of occasions.⁷ Recently, the Commission granted 9(c) relief in a case subject to certain conditions,⁸ and without obviously talking about that case, can you discuss your general views on

7. See, e.g., Luis A. Aguilar and Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Dissenting Statement in the Matter of Oppenheimer & Co., Inc. (Feb. 4, 2015), <https://www.sec.gov/news/statement/dissenting-statement-oppenheimer-inc> [<https://perma.cc/5RGP-GQCP>]; Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Dissenting Statement in the Matter of Deutsche Bank AG, Regarding WKSI (May 4, 2015), <https://www.sec.gov/news/statement/dissenting-statement-deutsche-bank-ag-wksi> [<https://perma.cc/VE8P-H8PB>]; Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Dissenting Statement Regarding Certain Waivers Granted by the Commission for Certain Entities Pleading Guilty to Criminal Charges Involving Manipulation of Foreign Exchange Rates (May 21, 2015), <https://www.sec.gov/news/statement/stein-waivers-granted-dissenting-statement> [<https://perma.cc/QFD4-9AW4>].

8. See Press Release, U.S. Dept. of Justice, Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution (Oct. 19, 2021), <https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global> [<https://perma.cc/EW8J-JBZB>]; Press Release, U.S. Sec. & Exch. Comm'n, "Credit Suisse to Pay Nearly \$475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings" (Oct. 19, 2021), <https://www.sec.gov/news/press-release/2021-213> [<https://perma.cc/DJ92-2KN3>].

Section 9(c) or other types of waivers and specifically what purpose conditions can serve from your perspective?

COMMISSIONER LEE: Sure. This is an issue I've given a lot of thought to, and I've got to say, I so appreciate the leadership that Commissioner Stein showed when it came to having us all take a look more closely at how these waivers were operating at the Commission.

And as you know, there's several types of automatic disqualifications. There's 9(c), which is the one you mentioned, and comes up perhaps a little bit less frequently than some of the other ones. There are the 'bad actor' bars that occur under Regulation D, which is one of the biggest, most common ones. Under Regulation A. Now under Crowdfunding. Even some obscure ones like Regulation E, which people may not even know about, but there are a lot of these automatic disqualifications.

In each of these instances, the entities have become subject to an automatic disqualification that arises by virtue of a violation of the securities laws. One of the things to think about carefully here is this: these are automatic disqualifications. The violator-entities must then apply to us and say that good cause has been shown as to why the disqualification shouldn't apply. It's not the other way around. It isn't as though when we're bringing a case, we look at the case and say "should a disqualification arise from this?" The laws say, and in the case of 9(c) since 1940, that the disqualification is automatic. That suggests to me that we should give careful thought to when we decide that good cause has been shown.

Now you asked about the conditional waivers. I've been so happy to see the introduction of these and there have been a few over the years. You mentioned one recently, but there have been a few over time, going back to Commissioner Stein's tenure. The reason I think they are so helpful and important is that for many years at the Commission, waivers have been considered in the context of a binary decision: a "yes" or "no," an on/off switch. And when it's just a binary decision, first of all, we aren't introducing the nuance that we have at our disposal in order to get compliance; but secondly, we're going to naturally gravitate toward "yes," because of the profound impact of a "no." With a conditional waiver, they can be conditioned on any number of things, and we have any number of potential ways in which we could issue these waivers. That allows us to calibrate this very powerful tool and not have to have it just be a simple "yes" or "no" exercise.

And we can take, for example, in the one case you mentioned recently, we can take the specific circumstances that arose in the specific case, we can ask ourselves what is it that they have told us that makes us feel comfortable so that they should potentially get a waiver, and what can we do to ensure that that stays true over time. So, you might say, for example, as we did in the recent one, each year come back and tell us what progress you've made on these assertions that you've made here, so that we can feel like we have a window into what you're doing. The C-suite at this company can have some involvement from senior level executives in the ongoing compliance and representations they make about how they're going to ensure this doesn't happen again. There's an endless number of ways to use it, but it allows us a lot of flexibility and allows us to use what is a very powerful tool in a very nuanced way.

JEFF BOUJOUKOS: That's very interesting, and it was certainly something that got a lot of attention from the staff also. It's an area that's certainly developing, and so we'll look to see what happens next in this regard.

Just shifting gears, a little bit. In October of 2021 at the PRI, LSEG Investor Action on Climate Webinar, you stated the following:

The quantity and quality of climate disclosure has increased significantly in the last decade or so, in large part because of the efforts of investors in seeking that disclosure, issuers in responding to investor demand, and voluntary framework and standard setters—like PRI and others—in their efforts to facilitate that interchange. We are fortunate that we can build from these efforts, this work has evolved significantly, and has now reached a point at which regulatory involvement can truly help to optimize results.⁹

I won't burden you with further reading from that. But many are going to point to this extensive voluntary disclosure that you're describing in this area, driven by the markets and investors, and ask, "what does the SEC add to that?" "Why is SEC involvement there necessary?" I know that that's been a focus of your time as Acting Chair after appointment by the President, and there's been a lot of discussion since then. Maybe you

9. Allison Herren Lee, Comm'r, U.S. Sec. Exch. Comm'n, Remarks at the PRI/LSEG Investor Action on Climate Webinar (Oct. 20, 2021), <https://www.sec.gov/news/speech/lee-remarks-prilseg-investor-action-climate-webinar-102021> [<https://perma.cc/ZC3H-V94P>].

could talk about what role you think the SEC plays there, and why it needs to be involved?

COMMISSIONER LEE: Sure. I'll start by saying it's actually been a focus of mine since before I was sworn in. I've been watching this develop especially as it relates to the risks and opportunities presented by climate change. But I've been watching the entirety of it and researching it, and the very first statement I made after being sworn in was a focus on the fact that we declined to address climate risk when we were updating Regulation S-K in 2019.¹⁰

But just to back up a little bit, I'll say this, you know as well as I do how important disclosure is—what an important part it is of what we do at the Commission, and what it means to markets. Getting that information into the markets, that's how they function well, that's how investors price risk accurately, or at least better, and that's how they make informed decisions on how to allocate capital. So, that is our bread and butter, and that is the area where we are expected to assist the markets in making sure that is done correctly.

Now, I agree with you that there's been an amazing amount of voluntary disclosure. Well, maybe I'm saying I agree with me, because you read what I wrote. So let me not put words in your mouth. But it is the case that a lot of work has been done in this space, and we benefit from that. Was there a time where it was too soon for the SEC to be involved? Yes, I think there was. I don't think that's where we are right now, and I'll explain why. We've gotten to the place where I think we've come as far as we can in a voluntary market. There are still really big gaps in the data. There are plenty of companies that just don't disclose any information at all. There are companies that do disclose, but do so inconsistently from period to period, depending on how they choose to go about it. And then, there are real questions around how reliable the data that is being disclosed is: who's validating that data, is it audited, and the like. We know from companies how hard it is for them to know what they're supposed to do.

And what I will say is in the time that I've been in this role, I believe I've seen a tipping point with the issuer community. Where in the beginning there was a lot of skepticism about potential regulatory

10. Allison Herren Lee & Robert J. Jackson Jr., Comm'rs, U.S. Sec. Exch. Comm'n, Joint Statement of Commissioners Robert J. Jackson, Jr. and Allison Herren Lee on Proposed Changes to Regulation S-K (Aug. 27, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-lee-082719> [<https://perma.cc/PP8W-CD95>].

involvement, setting aside what that involvement would look like, we're now at a place where I now have had dozens of conversations with issuers large and small, who are saying "please weigh in here, we are being sort of assaulted from all sides by these raters, by any number of information aggregators and the like who want this information. We can't keep taking every test and spending all these resources, can we agree on a sort of a uniform baseline?"

So, I think for all of those reasons, now is the point where there can be a real value-add from regulators, which is to try to get to a baseline of consistent comparable, reliable, disclosures. We would not be able to do that from scratch and we don't have to, thankfully, because of all the work that's been done by these voluntary standard setters, by issuers, by investors having this dialogue back and forth. But I think we've reached the limits of that effort at this point. And that's not to presuppose exactly what our involvement should look like, and we're in the process of trying to figure that out right now. But I do think we as regulators can add value at this point in the process.

JEFF BOUJOUKOS: And do you see the Commission stepping into the role that these rating services are providing and setting standards? I know you speak for yourself and not for any other Commissioner. But is there going to be a continued role for the rating services, or do they get pushed aside with uniform standards now?

COMMISSIONER LEE: On the ESG ratings, my belief is that we will see a continued role there, because markets and competition being what it is, data aggregators and others are going to want to be in this space and they're going to want to look for ways to add value.

But what I think and hope we will also see is more uniformity around what's being scored or rated because these firms will be using more uniform data that's available to everyone from the firms and the products they rate. So, what I hope we'll see is better transparency, better consistency in how they're doing what they're doing. Because they will have access to the same data as everyone else. Now, can they still call companies and ask for further information? Yes, they can. But can companies better afford to say to them "just look to my disclosures"? Hopefully, yes.

JEFF BOUJOUKOS: I'm going to change gears here for a second again and get a little wonky for everybody else on this presentation. And talk a little bit about Section 12(g) of the Exchange Act, which as you know from being in Enforcement, is something that Enforcement attorneys are constantly focused on.

At this year's *SEC Speaks*, you raised the specter of private markets and the lack of transparency to question whether Section 12(g) of the Exchange Act, particularly as it relates to the way we count shareholders for the purposes of application of exceptions and otherwise, needs to be recalibrated.¹¹ I found the discussion to be very interesting and a perspective that I hadn't heard before. But maybe you could, for those that are not wonky like us and aren't following *SEC Speaks*, maybe you could talk for a moment about your concern there, and why you think there may need to be a new look at 12(g)?

COMMISSIONER LEE: Sure. Here's where it arises from. I have been and I continue to be very interested in looking at the balance in our markets between capital that's raised in public markets and capital that's raised in the private markets, and how those boundaries are drawn between the two. Because the policy choices that we make influence that balance every single time. Over time, we've steadily made changes to our laws, we've removed limitations and investor protections in the private market, and we've done a lot of work in this area without necessarily looking at the big picture of how that's impacting both markets.

One thing we know is that for at least 10 years now, there's been more capital raised in the private markets than the public markets—for the first time ever, but now for 10 solid years—and that's growing exponentially. So, that has implications, and we need to make sure we're thinking about that. And one of the things I think we need to think about is how we look at Section 12(g).

For the non-wonky securities lawyers in the audience, 12(g) is a statute that was enacted by Congress. The statute essentially says you have to count up the number of shareholders of record and when you get to a certain number—which has now been increased in the JOBS Act, which happened back in 2012—but when you get to a certain number, then that company has to become subject to periodic reporting requirements going forward.¹²

So then the question is, how do you count shareholders of record? And that has come to be completely disconnected from the actual number

11. Allison Herren Lee, Comm'r, U.S. Sec. Exch. Comm'n, Remarks at The SEC Speaks: Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy (Oct. 12, 2021), <https://www.sec.gov/news/speech/lee-sec-speaks-2021-10-12> [<https://perma.cc/3T9K-NXPK>].

12. Jumpstart Our Business Startups Act of 2012, Pub. L. No. 112-106, 126 Stat. 306.

of shareholders. Congress was clear when it adopted 12(g) that the metric it wanted to use in order to determine whether a company should be subject to ongoing reporting was the number of shareholders. And if that's true, then we have to look at how we're doing that now, and ask ourselves has how we count shareholders of record become completely untethered from the actual number of shareholders? In my view, the answer is yes. And the reason is because, what is a shareholder of record? Well, as you know and most of us wonky security lawyers know, it usually just means one shareholder: Cede & Co., who is the nominee of the clearinghouse Depository Trust & Clearing Corporation (DTCC).

Now the staff has also issued guidance that says when we're looking at shareholders of record, when we're counting up these shareholders, we're going to look through Cede & Co., but only as far as the banks and brokers. So, we will count Merrill Lynch, and J.P. Morgan, and UBS, and the banks and broker dealers, but not the actual beneficial owners who hold their accounts with those banks and broker dealers. I think increasingly, considering back in the 1960s when they passed 12(g), people didn't hold in street name the way they do now. Now almost everyone, without exception, holds in street name. So, they're not counted, just the broker or bank is counted. So, is there a really a meaningful connection between the number of shareholders in the corporation and their requirement to do ongoing reporting? I would submit there is not. I think it's time for us to take a look at that and ask ourselves whether—and we have the ability to define what shareholder of record means—we ought to at least consider whether there's a way to make that tie more meaningful.

JEFF BOUJOUKOS: And that satisfies all of the law students' teachable moment requirement for tonight. Thank you for that explanation. I promised your staff that I wouldn't go on for hours with you, although I definitely could. Thank you so much for your time.

I know this has been asked and discussed over and over, but I'd love to get your perspective on what's been the most difficult thing in this pandemic being a Commissioner, and how have you overcome it? What have you seen from the staff? Just generally, how have you all adapted? You've always been somewhat remote, and I think the SEC was uniquely prepared for that through its telework program. But what have you struggled with? How has the staff overcome it? And what are your general perceptions of the staff's performance over this difficult period?

COMMISSIONER LEE: Boy, it has been a journey, and really, just deepened my respect for the staff more than it already was. But it's

important to say up front as a Commissioner that whatever challenges I've faced pale by comparison to the struggles of others, the physical, the mental health struggles, the employment and childcare challenges, housing and security. There's a wealth of problems and issues that folks have faced both on our staff and elsewhere. And so I'm keenly aware of how fortunate I've been in light of what people have had to deal with.

I think at the beginning, we all struggled a little bit with the transition to a virtual environment. The SEC immediately invested in an IT infrastructure, and I thought did an amazing job of ensuring that we were able to immediately have the bandwidth to operate remotely. To have everybody operating from home, or almost everybody with some very minor exceptions, I don't think you've seen a slowdown. I mean, if anything, the staff has been prolific and it's not just in its sort of regular everyday business, but also in its response to issues arising from the pandemic. I have been just profoundly impressed with not just the resilience, but the devotion and the dedication of the public servants at the agency. They've shown resilience and creativity. It's been very gratifying.

I would say it has had a rough side, and we all know there's no such thing as office hours when you just live in your office, and that's hard to sort of figure out how to draw those lines. You can do both. You can adapt. You can have flexibility that arises from being able to put your kids to bed and then finish your work schedule after that. But at the same time, you just don't have the sort of rhythm that comes from work a regular workday and then going home. So I think that's been rough.

One of the bright spots I think here though has been what we've learned about how well virtual environments work and how that expands our horizons in terms of who we hire. I have, for example, had the luxury when I'm hiring counsel of looking through the SEC offices over the entire country without requiring anyone to move to DC. I think doing that opens up a lot of possibilities and we should be able, I think, to improve diversity. I think the broader the base you have to choose from, hopefully, the more diverse a workforce you can recruit. So, I think there have been some upsides, but I don't want to sound too Pollyanna, because I know how difficult this has been for so many people, and I'm deeply grateful for the work of our staff. And honestly, I'm awed by the work that they've done during this pandemic as well. Before that as well, but certainly watching them through the pandemic has deepened my respect.

JEFF BOUJOUKOS: OK, Andrew Feller will march down to my office in Philadelphia if I ask you any more questions, so I've reached my

limit. But Commissioner Lee, thank you so much for joining us today. And again, thank you for the very kind words about Commissioner Sommer and his legacy at the Commission. It's been great to hear your perspective on some of these cutting-edge issues that are before the Commission right now, and we wish you the best. And again, thank you so much for joining us.

COMMISSIONER LEE: Thank you, Jeff. Thank you for having me. It was a pleasure.