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SEC REGIONAL OFFICES

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In recent years, scholars of federalism and administrative law have identified “regional” variations in how administrative agencies implement policies, as staff in regional offices translate and enforce national rules to reflect local norms. A growing number of legal scholars consider federal regions to be promising sites to mediate between national administration, on the one hand, and state and local governance, on the other.

Drawing from a novel data set and qualitative sources, this Article contributes to this literature by surfacing the historical and contemporary enforcement work of the regional offices of the U.S. Securities and Exchange Commission (“SEC”). The SEC—consistent with leading examples in the literature—is not a monolith. SEC regional offices today, as they have historically, vary in how they investigate and enforce violations of the federal securities laws across the different geographic areas of the country.

Our data of SEC regional offices’ securities enforcement (FY 2010–FY 2020), however, suggests a more nuanced role for the regional offices than is typically found in the literature: today, geography does not necessarily determine which SEC office investigates or enforces a particular matter. A range of hypotheses might explain this geographic detachment, including advances in technology. In particular, however, we consider structural changes imple-

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mented recently by the SEC—including a matrix-reporting structure—which empowered SEC regional offices to develop specialized subject matter expertise. In short, SEC regional offices today may act not merely as local monitors but also as dispersed laboratories for theories of securities enforcement, with implications not only for improved securities enforcement, but, more broadly, regional administration.

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INTRODUCTION

How much discretion should federal agencies allow their staffs in regional field offices? The question implicates the majority of the federal government: 85% of federal employees do not work in Washington D.C., and most administrative agencies are comprised of regional offices located at strategic locations across the United States.¹ This Article considers how the U.S. Securities and Exchange Commission (“SEC” or “Commission”), which has wrestled with how much autonomy to empower its regional staff throughout its history, designed its regional offices to investigate and enforce violations of the federal securities law.

Until very recently, regional offices of federal agencies were understood as homogenous outposts that administered federal law within a particular geographic area.² However, this

1. Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 61 (2016).

2. *Id.* at 78 (“One could easily conclude, after reading through reams of federalism and administrative law articles and judicial decisions, that legal thinkers all think the federal government is a geographically concentrated monolith.”); see also Yishai Blank & Issachar Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1905 (2018). Blank & Rosen-Zvi observe:

notion—“intuitive, yet impoverished”³—is changing. In recent years, legal scholars have observed federal agencies apply law in a non-uniform manner along “regional” (that is, sub-national, but supra-state) lines.⁴ A study of the Army Corps of Engineers (“Corps”), for example, found regional variations in the agency’s permitting decisions and concluded that Corps staff in different field offices weigh local norms and conditions when interpreting national licensing rules. Examples like the Corps highlight how the “inherent imprecision of statutes and regulations”⁵ affords federal agencies, and their staff across the country, significant latitude to set policy goals or develop enforcement priorities and strategies. Administrative law, in particular, has “never pretended to be a complete body of law.”⁶ In short, in the same way that differences in common law decisions have been empirically identified in different regions of the United States,⁷ so too can federal regulation be adapted for different geographic areas of the United States.

For some legal scholars, “regional” administration offers a way to improve governance—a middle ground that transcends the binary of federalism and its “polarity of ‘[s]tate and [n]ational government.”⁸ Under this conception, the discretion exercised by regional staff of federal agencies is an essen-

Since the beginning of the twenty-first century, there has been a revival of interest in using federal regions as more than enforcers and implementers of central policies. The 9/11 attacks, the devastation of Hurricane Katrina, and the Great Recession brought the importance of regions as both coordinators and mediators to the forefront. Nonetheless, federal regions still tend to be seen simply as enforcers of central policies; the renewed attention has not been accompanied by any ideological shift or overarching legal reform.

Id.

3. Blank & Rosen-Zvi, *supra* note 2, at 1900.

4. *See* Owen, *supra* note 1.

5. *Id.* at 89.

6. Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983).

7. Yun-chien Chang & Geoffrey Miller, *Regional Common Law*, 45 J. LEGAL PROF. 151, 153–54 (2021).

8. Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 380–81 (2018) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)); *see also* David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727, 735 (2018) (“Rather than disproving that federal decentralization deserves a place alongside federalism and the separation of powers, these complications

tial feature by which administrators translate national rules to reflect local norms. Regional offices of federal agencies, thus, are “Janus-faced: [t]hey simultaneously decentralize and centralize power.”⁹ In this way, regional offices can foster, at the federal level, virtues the conventional wisdom imputes to state or local governance: responsiveness, accountability, innovation, inter-governmental competition, and governmental legitimacy.¹⁰

Theories regarding the potential of federal regions are not new. As Jessica Bulman-Pozen recently demonstrated, the administrative state was designed during the apex of American Regionalist ideology and amidst widespread fears of government centralization as fascism loomed in Europe. Regional offices, thus, were *intentionally* conceived not only as instruments for policy administration, but also substantive shields against federal centralization.¹¹

The U.S. Securities and Exchange Commission—one of the most respected, if not tenured, independent agencies—shares this history. Since its inception in 1934, the SEC has carried out its investigative and enforcement functions in the United States through its various regional offices. Today, the SEC has eleven regional offices, which report to the SEC’s headquarters in Washington D.C. Each regional office has examination and enforcement jurisdiction over a particular geographic region.¹² For example, the Atlanta Regional Office has jurisdiction in Georgia, North Carolina, South Carolina, Tennessee, and Alabama; the New York Regional Office has jurisdiction in New York and New Jersey; and so forth.¹³ Like many

prove that federal decentralization raises similar questions to those facing the two traditional pillars of structural constitutional law.”).

9. Blank & Rosen-Zvi, *supra* note 2, at 1907.

10. Owen, *supra* note 1, at 60.

11. See Bulman-Pozen, *supra* note 8, at 395, 397. For Bulman-Pozen, the regional structure “sprang from [its] perceived utility in resisting centralization,” and for proponents of regional organization, “regional governance could empower the states and forestall centralization by addressing problems that exceeded individual states’ capacity without resort to federal intervention.” *Id.*

12. See generally *What We Do*, SEC, <https://www.sec.gov/Article/whatwedo.html> (last visited Apr. 5, 2022).

13. See U.S. SEC. & EXCH. COMM’N, AGENCY FINANCIAL REPORT: FISCAL YEAR 2019, <https://www.sec.gov/files/sec-2019-agency-financial-report.pdf#mission>.

other administrative agencies, the SEC originally designed its regional offices to perform two general functions. First, SEC regional offices facilitated *administration* of the securities laws across a massive country by performing a monitoring and enforcement function: uncovering information about the local securities practices, institutions, markets, and frauds¹⁴—they were the “eyes and ears and enforcement arms of the Commission.”¹⁵ Second, regional offices facilitated *accommodation* by affording the SEC flexibility and localized discretion in applying the securities laws to different parts of the country and enabling the SEC’s enforcement program to respond to regional norms, markets, and trading practices.

The dual-functions of the SEC regional offices—regional *administration* and *accommodation*¹⁶—have existed in tension and evolved throughout the SEC’s history. During the first few decades of the SEC’s existence, the Commission’s regional offices operated independently. Each office—responsible for monitoring, investigating and enforcing securities violations in its specific geographic area—developed unique operating procedures, instigative methods, and even theories of prosecuting the federal securities laws.¹⁷ Starting in the 1960s, however, the SEC progressively centralized its enforcement functions and weakened the discretion of the regional offices, in part, in response to perceived failures at certain regional offices.¹⁸

The history of the SEC regional offices illustrates the significant challenges in calibrating and balancing benefits and drawbacks of regional discretion. Throughout its history, the SEC has faced sharp criticism that certain regional offices failed to detect, prevent, or prosecute securities violations. Most recently, if not famously, the SEC’s failure to detect the Ponzi scheme perpetrated by Bernie Madoff, which defrauded investors of billions of dollars, was blamed in part on the failures of regional staff in the SEC’s Boston and New York offices.¹⁹ This and other high-profile scandals prompted serious questions about the enforcement activities of the regional of-

14. See *infra* Part I.

15. Andrew Downey Orrick, *Organization Procedures and Practices of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 50, 82 (1959).

16. See Bulman-Pozen, *supra* note 8, at 401–09.

17. See *infra* Section I.A.

18. See *infra* Section I.A.

19. See *infra* Section I.B.

fices;²⁰ disparate enforcement of federal law is rarely viewed positively.²¹ Indeed, “[p]art of the rationale and purpose of federal (as opposed to state) regulation is the desire for greater uniformity in standards and their application across the states,” without which an agency will face “questions of fairness and accountability.”²² Magnifying these challenges is the fact that, unlike other agencies that focus on natural (and thus ostensibly regional) issue areas, like wildlife, the nature of the SEC’s work is decidedly national: the securities markets are not only largely borderless and national (if not international), but they are also increasingly detached from physical space.

The SEC has grappled with these challenges throughout its long history and undertaken extensive reforms to address structural problems concerning regional offices, and yet we still know very little about the SEC regional offices today. Even though 40% of the SEC’s 4,500+ staff are located in regional offices,²³ the workings of these regional offices remain unexamined in the literature, perhaps unsurprisingly given that SEC investigative and enforcement activities are frequently referred to as a black box, and the SEC publishes only limited information about the activities of its regional offices.²⁴ Ac-

20. See *infra* Section I.B; see also David Stout, *Report Details How Madoff’s Web Ensnared S.E.C.*, N.Y. TIMES (Sept. 2, 2009), <https://www.nytimes.com/2009/09/03/business/03madoff.html> (“The inspector general revisited the failure of the S.E.C.’s Boston office to take seriously the warnings of Harry Markopolos, a private fraud investigator who had been trying since 1999 to get the agency to investigate Mr. Madoff.”); Edward Wyatt, *S.E.C. Head Admits Misstep in a Madoff Ethics Issue*, N.Y. TIMES (Mar. 10, 2011), <https://www.nytimes.com/2011/03/11/business/11sec.html> (“[T]he S.E.C. should reconsider its regional model, which leaves some but not all enforcement and oversight functions in regional offices rather than at S.E.C. headquarters.”).

21. See Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1148 (2016).

22. David M. Hedge & Saba Jallow, *The Federal Context of Regulation: The Spatial Allocation of Federal Enforcement*, 71 SOC. SCI. Q. 786, 787 (1990).

23. See U.S. SEC. & EXCH. COMM’N, AGENCY FINANCIAL REPORT: FISCAL YEAR 2018 13, <https://www.sec.gov/files/sec-2018-agency-financial-report.pdf>.

24. See Verity Winship, *Enforcement Networks*, 37 YALE J. ON REG. 274, 277 (2020) (noting that “enforcement and investigation can be a black box”); Lorien Stice-Lawrence, *Monitoring Decisions and Frictions at the SEC 1* (Apr. 2021) (unpublished manuscript), <https://ssrn.com/abstract=3485468> (“[W]e know very little about the SEC’s internal decision-making process.”).

cordingly, the SEC regional offices remain largely unremarked, and the legal literature, as well as a related strain of finance scholarship, generally assumes that these offices are simply instrumental outposts that enforce the securities laws in a particular region.²⁵

This Article opens this black box up by offering an institutional account of the SEC regional offices, and in doing so, contributes to our understanding of federal regional administration. First, in Part I, this Article provides a brief history of the role of regional offices in the SEC enforcement program. The history of the regional offices not only illustrates the perils and potential of discretionary regional administration, but also shows how for years the SEC has used structural change as a tool to respond to crisis. Having established this historical context, this Article turns in Part II to the contemporary SEC, and examines a proprietary dataset that traces more than 10 years of regional office enforcement following significant structural reorganizations undertaken by the agency in the wake of the financial crisis of 2008. Our data suggest a more nuanced role for the regional offices than is typically found in the literature: geography does not necessarily determine which SEC office investigates or enforces a particular matter today. In fact, only a slim majority of regional offices' investigations and enforcement actions in our sample were determined by geographic region in recent years, and instead, the surveillance and enforcement functions of the regional offices appear increasingly detached from geographic place.

A range of explanations can be offered for this phenomenon of geographic decoupling. One plausible hypothesis, for example, rests on advances in communications technology, which have accelerated in lockstep as securities markets become increasingly detached from physical space. This Article, however, identifies an alternative, complementary explanation: the SEC's post-crisis reorganizations, which imposed a matrix-reporting structure and created specialized subject mat-

25. See, e.g., Bonsall et al., *Wearing Out the Watchdog: SEC Case Backlog and Investigation Likelihood* 14 (June 29, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3912645> ("Consistent with the local office usually, but not always, handling investigation of firms headquartered in their geographic nexus, we find that 73 percent of the investigations opened after a restatement are opened by the SEC regional office that has geographic purview over a firm's headquarters location.").

ter units. As told by SEC officials, these structural changes empowered SEC regional offices to develop differentiated *subject matter expertise*.²⁶ Our data, while limited in this respect, suggest that SEC regional offices today offer specialized expertise in specific market areas, which the SEC then disseminates to its other regional offices. To explain this theory, this Article provides parallel case study analysis of one regional office in particular, the SEC's Philadelphia office. The SEC's Philadelphia Regional Office has a long and specific history investigating frauds in the municipal securities market dating back to at least the early 1990s. In 2010, the Philadelphia Regional Office became the home of the SEC's Municipal Securities and Public Pension Unit. The Municipal Securities and Public Pension Unit, under its SEC leadership in the Philadelphia Regional Office, initiated various novel prosecutions in the municipal securities space, even the SEC's first case against a state.²⁷ As the Philadelphia Regional Office case illustrates, these offices exhibited characteristics typically associated with state or local governance: experimentation, inter-office competition, and nimbleness.

Taken together, these observations suggest that SEC regional offices today may act not merely as local monitors, but also as dispersed laboratories for developing and testing novel theories of securities enforcement. In a recent article, Dave Owen and Hannah J. Wiseman proposed a theory of administrative agencies as "federal laboratories of democracy," contending that experimentation "can, often does, and should occur at multiple levels, including the federal level."²⁸ In this vein, this Article suggests in Part III that SEC regional offices have the potential to develop, experiment, and ultimately test novel theories of enforcement. In this way, regional offices

26. See *infra* Section II.C.

27. Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010) [hereinafter SEC Names New Specialized Unit Chiefs], <https://www.sec.gov/news/press/2010/2010-5.htm>; Steven M. Witzel & Daniel C. Fishbein, *Increasing Enforcement In Municipal Bond Market*, N.Y. L.J. (May 3, 2018), <https://www.law.com/newyorklawjournal/2018/05/02/increasing-civil-and-criminal-enforcement-in-the-municipal-bond-market/> ("Since the creation of the Public Finance Abuse Unit, the Division has engaged in a number of 'first-of-their kind' actions.").

28. Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119, 1119 (2018).

may be ideal nodes for optimizing enforcement and for keeping regulators up to date with complex and ever-evolving financial markets.

I.

SEC REGIONAL OFFICES: ORIGINS, PURPOSE, AND LEGAL LANDSCAPE

The history of the SEC regional offices is one of contested forces of centralization and devolution. As law professor and former SEC official David L. Ratner put it, regional offices bolstered the SEC's "political acceptability because of their responsiveness to local conditions and attitudes."²⁹ However, the discretion exercised by SEC regional offices, which at times produced uneven enforcement of the federal securities laws, came at the expense of "the development and implementation of new or uniform enforcement programs."³⁰ These opposing values—the self-determination of decentralized governance, on the one hand, and the efficiency, rationalization, and standardization of centralized control, on the other—shaped the structure of the SEC today. Throughout its history, the SEC experimented with structural reforms to maximize the benefits of both centralized oversight and localized discretion. The structure of the contemporary SEC is the evolutionary product of these design choices.

A. *The Origins of the Regional Offices*

Broadly speaking, since Congress created the SEC in 1934 to administer the federal securities laws, the basic structure of the Commission has not changed. As it has since its inception, the SEC staff in Washington D.C.—including the agency's leadership of five Commissioners appointed by the U.S. President, as well as the Directors of each Division—perform policymaking and oversight functions. The SEC's headquarters are supported by various regional offices throughout the country.³¹ While the number, location, and reporting lines of the SEC regional offices have changed over time, their basic func-

29. David L. Ratner, *The SEC: Portrait of the Agency as a Thirty-Seven Year Old*, 45 ST. JOHN'S L. REV. 583, 591 (1971).

30. *Id.*

31. Compare Chester T. Lane & Robert M. Blair-Smith, *The SEC and the "Expedition Settlement of Disputes,"* 34 ILL. L. REV. 699, 702 (1939), with U.S.

tions persist: undertaking the day-to-day fieldwork of investigating and prosecuting violations of securities laws.³² As Joseph P. Kennedy, the SEC's first Chairman, put it, the regional offices were established "at strategic points throughout the country to provide for adequate surveillance."³³ These regional offices carried out the SEC's responsibility to "investigate and police violations of the statutes it administers."³⁴

One element of the SEC's structure that has changed over time, however, is the degree of autonomy the SEC grants its staff in regional offices to set enforcement priorities, strategies, and procedures. The federal securities laws grant the SEC broad discretion to investigate and prosecute potential violations of securities laws.³⁵ In practice, this discretion entails the authority to, among other things, decide whether to commence an investigation, institute an enforcement action, or negotiate a settlement. Each of these determinations implicates a wide range of subsidiary judgments, such as, whether to respond to a tip or complaint in the first instance, how many resources to devote to any investigation, what violations to charge a defendant, what venue to bring the charges in, whether to settle the charges, and so on and so forth. SEC staff

SEC. & EXCH. COMM'N, AGENCY FINANCIAL REPORT: FISCAL YEAR 2021, at 8, <https://www.sec.gov/files/sec-2021-agency-financial-report.pdf>.

32. Lane & Blair-Smith, *supra* note 31, at 702–04.

33. Letter from Joseph P. Kennedy, Chairman, U.S. Sec. & Exch. Comm'n, to Nat'l Emergency Council (Nov. 23, 1934), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1934_11_23_JPK_to_National_t.pdf (last visited Feb. 3, 2022). Kennedy was writing about the OTC markets, but his sentiments are consistent with the administrative vision for the agency more broadly at the time.

34. Thomas L. Hazen, *Administrative Enforcement: An Evaluation of the Securities and Exchange Commission's Use of Injunctions and Other Enforcement Methods*, 31 HASTINGS L.J. 427, 434 (1979).

35. Ralph C. Ferrara, *SEC Division of Trading and Markets: Detection, Investigation and Enforcement of Selected Practices That Impair Investor Confidence in the Capital Markets*, 16 HOWARD L.J. 950, 953 (1971) ("Section 20(a) of the 1933 Securities Act, Section 21(a) of the 1934 Securities Exchange Act, Section 18(a) of the 1935 Public Utility Holding Company Act, Section 321(a) of the 1939 Trust Indenture Act, Section 42(a) of the 1940 Investment Company Act, and Section 209(a) of the 1940 Investment Advisors Act all authorize the Commission to conduct investigations to determine whether the Federal securities laws have been violated."); Susan Peggy Shapiro, *Detecting Illegality: A Perspective on the Control of Securities Violations* 166 (May 1980) (Ph.D. dissertation, Yale University) (ProQuest).

in regional offices, as the primary sites through which the SEC polices securities markets, have significant influence over each step of the securities enforcement process.³⁶ Over the course of its history, the SEC developed extensive internal guidelines that constrain and standardize, to some degree, how its staff undertake investigations and enforcement actions.³⁷ These protocols, however, did not exist during the first few decades

36. U.S. Sec. & Exch. Comm'n, Hist. Soc'y Oral Histories Comm., Roundtable on Enforcement: A Brief History of the SEC's Enforcement Program 1934–1981 (Daniel M. Hawke ed. 2002), at 2, [hereinafter Hawke] http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45?r81.cf1.rackcdn.com/collection/papers/2000/2002_0925_enforcementHistory.pdf (The SEC “vested the Regional Offices with primary responsibility for conducting investigations and bringing enforcement actions.”); Walter G. Holden, Assistant Dir., U.S. Sec. & Exch. Comm'n, & W. Victor Rodin, Assoc. Dir., Office of Opinion Writing, U.S. Sec. & Exch. Comm'n, Training Program Lectures: Commission's Enforcement Program, and Functions of the Office of Opinion Writing 4 (May 29, 1957) [hereinafter Holden & Rodin], https://www.sechistorical.org/collection/papers/1950/1957_0529_CommissionHoldenT.pdf. Holden & Rodin state:

The actual investigations, for the most part, are carried on by the Regional Offices. They have accountants, attorneys, investigators, who are experienced and work under the direction of the Regional Administrator to develop the necessary evidence to determine whether or not a violation has occurred. Based upon that, they recommend what action, if any, should be taken.

Our relations with the Regional Offices in that respect are that we have general administrative supervision over enforcement activities. We have the power of making suggestions as to certain avenues of investigation, and of terminating investigations that don't appear to be fruitful. These the Regional Administrator usually accept, although we do not have the power of direction. We cannot tell them what to do, we can only suggest. They keep us apprised of the developments of an investigation by means of a quarterly progress report.

Id.

37. The creation of the Division of Enforcement in 1972 was a major shift towards standardizing investigation and enforcement procedure. In June 1972, the SEC created a training manual which details best practices and emphasizes a “systematic” approach to investigations. *See, e.g.*, U.S. SEC. & EXCH. COMM'N, 1972 ENFORCEMENT TRAINING PROGRAM 1 (1972), <https://www.sechistorical.org/museum/search/?q-first=enforcementmanual>. Some of these changes are evidenced by the evolution of the SEC's enforcement manual. As the original Enforcement Manual from 1938 concedes: “[c]hanges in the original form of the Manual will be made from time to time as experience dictates and additions are contemplated.” U.S. SEC. &

of the SEC's existence, during which the regional offices operated nearly autonomously.

In this early period, SEC personnel in Washington D.C. only had the power of "general administrative supervision" over the regional offices.³⁸ In practice, the SEC's home office was originally little more than a "clearinghouse,"³⁹ and its supervisory authority was limited to "making suggestions as to certain avenues of investigation, and . . . terminating investigations that don't appear to be fruitful."⁴⁰ While regional offices would typically accept recommendations from the home office, the regional offices retained ultimate control. As put by a representative of the home office: "[w]e cannot tell them what to do, we can only suggest."⁴¹ Indeed, Stanley Sporkin described the SEC's home office as "really not much of an oversight office" and "much more of a receiving office, where it received the files."⁴² Illustrating how the regional offices were "really independent operators" and how "in practice there was no control from the home office," one SEC official recounted the following anecdote: when SEC staff from Washington D.C.

EXCH. COMM'N, ENFORCEMENT MANUAL (1938), https://www.sechistorical.org/collection/papers/1930/1938_0415_SECEenforcement?.pdf.

38. Holden & Rodin, *supra* note 36, at 4. Originally, the SEC divided the United States into nine regions, each overseen by a regional office established "in the principal financial center of each." Robert E. Kline, Jr., Assistant Gen. Couns., U.S. Sec. & Exch. Comm'n, Accounting and the Commission's Enforcement Program, Address Before the Chi Chapter of Delta Sigma Pi, Johns Hopkins University 2 (Oct. 12, 1939), https://www.sechistorical.org/collection/papers/1930?/1939?_1012?_KlineEnforcementT.pdf; *see also* Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), <https://www.sec.gov/news/speech/peirce-why-behind-no-051118>.

39. SUSAN P. SHAPIRO, WAYWARD CAPITALISTS: TARGET OF THE SECURITIES AND EXCHANGE COMMISSION 138 (Yale Univ. Press 1984) ("The home office, as this unit of enforcement coordinators was called, served primarily as a clearinghouse. Its staff tracked regional office cases, kept the commission apprised of regional enforcement activities and secured commission authorization of enforcement action, assigned personnel to assist in substantial regional office investigations, and spent a considerable amount of time answering letters from the public.").

40. Holden & Rodin, *supra* note 36, at 4.

41. *Id.*

42. U.S. Sec. & Exch. Comm'n Hist. Soc'y, The Roundtable on Regional Administrators 7 (May 29, 2003), <https://www.sechistorical.org/collection/programs/regAdmin0529Transcript.pdf>.

visited a broker–dealer in Atlanta, the broker–dealer called the head of the SEC’s Atlanta Regional Office who advised the broker–dealer to throw out the SEC’s D.C. examiners and call the police.⁴³ In short, “in the area of enforcement, the regions were pretty much omnipotent.”⁴⁴

The near-complete discretion of the regional offices to pursue investigations and prosecutions in their respective zones manifested in various ways. Certain regional offices developed their own procedures for handling enforcement matters, such as reviewing corporate filings and handling cases.⁴⁵ A former Associate Enforcement Director at the SEC noted:

Some of the regional offices had their own chief litigation counsel and worked like the home office model where the cases would be handed off. Some of the offices had, and still have a different model where basically the people that did the investigation are also the people who take the lead in the litigation.⁴⁶

Above all else, each regional office calibrated its enforcement efforts to regional market conditions, which varied sig-

43. Interview by David Silver with Irving Pollack (Jan. 16, 2002), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45?.r81?.cf1?.rackcdn?.com?/collection?/oral-histories?/20020116_Pollack_Irving_T.pdf.

44. *Id.* at 6.

45. For example, Glavin notes:

From the time of the first Regulation A the notifications were filed in the regional offices as they are today. In the early years the processing was not too uniformly performed, and it wasn’t ‘till about the late 1940’s that, seemingly, anyone gave much thought to determining whether any of those offerings required investigation, much less action. Offerings under the regulation were just not considered of sufficient importance to require much attention – except in very isolated instances.

James T. Glavin, Chief, Branch of Small Issues, Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n, Training Program Lectures: Filings under Regulation A, at 2 (May 15, 1957), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1?.rackcdn.com?/collection?/papers/1950/1957_0515_FilingsGlavinT.pdf.

46. Interview by Harwell Wells with Thomas Newkirk, Partner, Jenner & Block, in Washington, D.C. (Apr. 5, 2019), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45?.r81?.cf1?.rackcdn?.com?/collection?/oral-histories/2019_0405_Newkirk_Oral_History_T.pdf.

nificantly.⁴⁷ As David Ratner observed, “aggressive sales practices which are standard in Los Angeles would evoke cries of horror in Boston,” or conversely, “[t]rading practices in penny mining stocks that are considered a normal aspect of speculation in the Northwest would probably be looked upon as outright manipulation in other parts of the country.”⁴⁸

This variability often enhanced enforcement. Susan Shapiro, a sociologist who spent time embedded in the SEC regional offices during the 1970s, produced one of the few academic studies of the regional offices. According to Shapiro, SEC regional offices informally developed differentiated approaches to investigations. Certain regional offices undertook “special intelligence efforts”, that while “nowhere officially documented,” responded to, and relied on, to local constituencies.⁴⁹ For example, the Seattle Regional Office⁵⁰ developed a working partnership with the local Better Business Bureau, which resulted in a number of cases in connection with the Bureau’s consumer protection mandate; similarly, the San Francisco Regional Office reported a relatively high number of case referrals from California’s state securities enforcer.⁵¹ Moreover, the regional offices generated various novel legal theories of enforcement. As Irving Pollack notes:

Whether it was registration or whether it was broker dealers, they were establishing the principles for shingle theory, for the mark-ups, for self-regulation. All of that was pretty much being generated by the staff.

47. Irving Pollack, former Dir. of Enf’t Div., U.S. Sec. & Exch. Comm’n, Remarks at the SEC Historical Society Fireside Chat on the SEC Division of Enforcement 2 (Sept. 23, 2008), https://www.sechistorical.org/collection/programs/?Transcript?_2008?_0923?_FC?.pdf; Mary Keefe & Michael Wolensky, U.S. Sec. & Exch. Comm’n Historical Society Fireside Chat: SEC Regional Offices 9 (May 20, 2008), https://www.sechistorical.org/?collection?/?/programs/Transcript_2008_0520_FC.pdf (stating that “[e]ach office really has its own character that it has developed.”)

48. SHAPIRO, *supra* note 39, at 141 (quoting Ratner, *supra* note 29, at 590).

49. *Id.* at 69.

50. The SEC’s Seattle Regional Office was consolidated into the Commission’s Los Angeles and San Francisco Regional Offices in 1994. Seattle Times News Servs., *SEC Says It Will Close Seattle Office in July*, SEATTLE TIMES (Jan. 14, 1994), <https://archive.seattletimes.com/archive/?date?=19940114?&slug?=1889682>.

51. SHAPIRO, *supra* note 39, at 69.

And, as I said before, the regions were very effective in going after all these local crime things and also establishing criminal principles in the area of fraud.⁵²

The grassroots enforcement strategies incubated in the regional offices illuminated the benefits of decentralized administration, and the promise of “regionalism.” Regionalism, as a normative ideal, underwrote much of the organization of the administrative state and reflected a belief in decentralized governance. Regionalism in the 1920s and 1930s, as an artistic and intellectual movement, was ignited by many of the same forces reviving regional consciousness today: economic transformations, urbanization, and technological change. Regional philosophies emerged, in search of local identity that resisted homogenization on a national scale.⁵³ As Blank and Rosen-Zvi note:

[R]egional thinking was in vogue in the practice and theory of public administration The idea that administrative regions should enforce and implement federal policies in a way that mediates between central mandates and regional and local needs and conditions was especially dominant in these decades and was a conception held by many academics as well as senior officials in the administration of Franklin Delano Roosevelt.⁵⁴

The SEC regional offices embodied these principles of decentralized governance by engaging with the business community in the regions they oversaw—a policy described as “an attempt to decentralize its activities and bring its services more directly to the public.”⁵⁵

52. Interview by David Silver with Irving Pollack, *supra* note 43.

53. For a discussion of regionalism, see Bulman-Pozen, *supra* note 8.

54. Blank & Rosen-Zvi, *supra* note 2, at 1922, 1926.

55. Letter from Richard B. McEntire, Acting Chairman, U.S. Sec. & Exch. Comm’n, to Burnet R. Maybank, Chairman, Comm. on Bank & Currency, U.S. Senate 7 (May 1, 1950), https://www.sechistorical.org/?collection/papers/1950/1950_0501_McEntireMaybankT.pdf; *see also* A.K. Scheidenhelm, Exec. Dir., U.S. Sec. & Exch. Comm’n & Thomas G. Meeker, General Couns., U.S. Sec. & Exch. Comm’n, Report on Cooperation by Commission Employees with State Governments in Connection with State Securities Litigation (June 12, 1959), https://www.sechistorical.org/?collection/papers/1950/1959_0612_SECStateCooperationT.pdf.

Large-sample SEC enforcement data from 1948–1972 underscores the localized and dispersed character of the SEC enforcement program during this period, finding “considerable variability” among the regional offices, in terms of amount of cases initiated, docketing procedures, types of violations prosecuted, and other factors, including recordkeeping procedures (“some regional offices kept better records than others”).⁵⁶ Enforcement patterns reflected the particular nature of the local securities markets. New York, for example, brought 30% of all investigations from 1932–1962, no doubt reflective of the large amount of stock trading and related activity relative to the rest of the country.⁵⁷ In addition, enforcement data also indicated variability by violation type, finding “more problems with the conduct of broker–dealers and of securities listed on the exchanges in New York, oil and gas cases in Ft. Worth, gold and silver mining cases in Seattle and Denver, [and] problems with land and real estate in Atlanta (especially Florida) and California.”⁵⁸ As Susan Shapiro concluded:

SEC regional offices are so distinctive that after several months of coding SEC investigations, I was usually able to guess the regional office conducting an investigation from characteristics of the alleged offenders under investigation, their *modi operandi* and styles of violation, their strategies for recruitment of victims and the kinds of victims they touched, and especially by the kinds of investigative strategies and practices adopted and enforcement priorities articulated by regional office personnel.⁵⁹

56. Shapiro, *supra* note 35, at 85, 117.

57. *Id.* at 165.

58. *Id.* at 165–66.

59. SHAPIRO, *supra* note 39, at 140. Shapiro writes:

Sometimes the trademarks were more esoteric, for example, the involvement of other law enforcement or self-regulatory agencies in investigative activity, the way in which an offense was detected, the kind of evidence gathered, the amount of time it took to complete the investigation, or the quality of care taken in documenting investigative activities. Even though these investigations span twenty-five years and reflect the efforts of hundreds and perhaps thousands of individuals, regional offices and their constituencies leave such a distinctive mark on investigative caseload that they can often be blindly identified.

Id.

When applied properly, the enforcement discretion of the regional offices reflected the virtues of public administration. As put by William O. Douglas, “discretion, tempered by fairness and reasonableness and protected by constitutional safeguards, permits elasticity and flexibility. Case by case, group by group, problems can be solved with particular reference to the merits of each.”⁶⁰

But discretion is not always without challenges. In the case of the SEC, it threatened uneven enforcement of the federal securities laws—at times at the expense of defrauded investors. A congressional study of the SEC, published in 1952, illustrates some of these challenges. The study included four case studies of investigations where “the Commission’s performance . . . [was] far from satisfactory,” in certain respects, due to the operations of regional offices.⁶¹

One case included in the 1952 study concerned the botched investigation of a securities broker, Richard C. Badger, by SEC staff in the Denver Regional Office. Badger, a prominent member of the community, had defrauded his clients for years, and this fraudulent activity ultimately culminated with his suicide.⁶² One month prior to his death, SEC staff had examined Badger’s books.⁶³ Despite various warning signs in preceding years—repeated failures to make required annual filings and improper book-keeping—the SEC regional staff instituted no enforcement proceedings.⁶⁴ Even after Badger’s death prompted a renewed SEC inquiry, the Denver regional administrator concluded that Badger was “in

60. William O. Douglas, *Virtues of the Administrative Process*, Talk Before Eighth Annual Forum of Current Problems (Oct. 1938), https://www.sechistorical.org/collection/papers/1930/1938_1000_Douglas_Virtues.pdf.

61. SEC. & EXCH. COMM’N SUBCOMM. AND COMM. ON INTERSTATE & FOREIGN COM., 82D CONG., *STUDY OF THE SECURITIES AND EXCHANGE COMMISSION I* (SUBCOMM. PRINT 1952).

62. *Id.* at 12 (describing Badger as “a respected member of the community and active in church, social, and civic activities in Salt Lake City and Ogden”).

63. *Id.* at 10, 11.

64. *Id.* at 13 (“[M]ore pertinent to a discussion of preventing frauds. . . is the necessity for a more adequate and more thorough inspection program . . . You will recall that our inspections of the Badger firm did not include a financial examination; that such examination was not made.”).

pretty good shape financially.”⁶⁵ The congressional subcommittee investigation revealed that the SEC staff in Denver did not properly investigate the broker–dealer’s financials, which showed serious issues:

Facts developed in this case, however, and other matters which have come to our attention emphasize the absolute necessity for a thorough review of the work of the Commission’s regional offices, which we have been unable to undertake. It is in these field offices that much of the important work of the Commission, particularly the inspection of brokers and dealers, and the investigation of manipulative and fraudulent practices in the securities markets, is conducted.⁶⁶

The Badger case underscored issues with the SEC’s structure. The SEC report detailed “evidences of internal lack of coordination, between Divisions and between regional and home offices, of duplication of effort, such as preparation of legal actions in the field and in Washington,” and concluded that a “reexamination of past practices and tightening up of procedures well may assist in meeting the Commission’s personnel problem.”⁶⁷ The Badger example illustrates one risk inherent to limited centralized oversight of regional offices: uneven enforcement, the burdens of which were borne by unsuspecting investors.⁶⁸ It also signaled changes to come. The localized regional discretion that characterized the early SEC regional offices began to erode in the mid-20th century. The SEC’s original structure endured through the late 1950s, up to which point nearly all of the SEC’s investigations were instituted by the regional offices.⁶⁹ High-profile enforcement issues in the 1950s and 1960s, culminating with the failure to prosecute abuses at the American Stock Exchange, “would redirect the focus of the enforcement program back to the home office, and would trigger a series of events at the Commission that, eventually, led to the creation of the Division of Enforcement more than a decade later,” noted Stanley Sporkin and Irving M. Pollack, who would go on to become

65. *Id.* at 11.

66. *Id.* at 2.

67. *Id.* at 124.

68. *Id.*

69. Hawke, *supra* note 36, at 14.

the first of the two Directors of the Division of Enforcement.⁷⁰ Thus, as political pressure began to mount on the SEC, the home office began to assert more and more control over the regional offices. This reflected a broader appetite for centralization, across U.S. administrative agencies, that would intensify through the 1980s.⁷¹

The creation of the Division of Enforcement was the first major step to centralizing and standardizing the SEC's enforcement efforts.⁷² Created in 1972, the Division of Enforcement served to "concentrate resources by focusing all enforcement and investigative activity in one division."⁷³ Today, the enforcement and investigative activities of each regional office are overseen by the SEC's Division of Enforcement, based in Washington D.C. The Division of Enforcement is responsible for conducting investigations into potential securities laws violations and prosecuting the SEC's enforcement actions. The Division of Enforcement employs over 1,100 personnel and is the SEC's largest division.⁷⁴ Today, the SEC conducts its investigations through its Division of Enforcement, whose staff are located both in the SEC home office in Washington, D.C., as

70. *Id.* at 2–3.

71. See Randall P. Bezanson, *The Myths of Formalism*, 69 IOWA L. REV. 957 (1984).

72. Irving Pollack, Remarks at the Past Enforcement Directors Roundtable (June 14, 2006), https://www.sechistorical.org/collection/papers/2000/2006_0614_SECEnforcement.pdf. Pollack states:

Prior to that time all of the enforcement activities were fairly well done in the regional offices and the home office served nearly as a service entity for the regional offices. It's hard to believe but in those days the regional offices had to ask another regional office to do any work that was outside of their region. There were no resources to pay the regions to travel outside of their own region.

Indeed, when I first joined the Division of Enforcement that part of the Division of Trading Exchanges they had a rule that that nobody could make a long distance call without the permission of an Assistant Director. In those days too we didn't have electronic records. If you were going to do an investigation you would have to get long distance post slips from the telephone company.

Id.

73. U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT XXVII (1972), https://www.sec.gov/about/annual_report/1972.pdf.

74. DIV. OF ENF'T, U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT (2017), <https://www.sec.gov/files/enforcement-annual-report-2017.pdf>.

well as in the SEC's eleven regional offices. These enforcement division staff are responsible for instituting investigations in response to complaints and tips, the majority of which today are received in electronic form, and then forwarded to the appropriate regional office or home office.⁷⁵ The SEC also receives many tips or complaints from members of Congress or their constituents, which, in similar fashion, are then directed to the relevant regional office.⁷⁶

The 1960s saw the SEC home office develop from a “small, reactive, caretaker office to a large, specialized, proactive, self-initiating office, constantly expanding the boundaries of enforcement policy and serving as a leader and model for the enforcement activities of the regions.”⁷⁷ Indeed, since then, the SEC home office “dramatically and consistently” increased its caseload relative to the regional offices.⁷⁸ Enforcement data bears this out: in the 1950s, the SEC home office instituted less than 1% of all investigations; after 1972, the D.C. office accounted for over 15% of the Commission's investigations.⁷⁹

The cycle of crisis followed by remedial reorganization is a persistent theme in the evolution of the SEC regional office structure.

75. See U.S. SEC. & EXCH. COMM'N, SEC ENFORCEMENT MANUAL 8 (Nov. 28, 2017) [hereinafter 2017 SEC ENFORCEMENT MANUAL], <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (“The vast majority of complaints and tips received by the Division are in electronic form and the Division encourages the public to communicate with it through the online web form. Every complaint is carefully reviewed by Division staff for apparent reliability, detail and potential violations of the federal securities laws. After review, the complaint or tip generally is processed according to the guidelines below. . . . Complaints that appear to be serious and substantial are usually forwarded to staff in the Home Office or the appropriate regional office for more detailed review and may result in the opening of a MUI.”).

76. See *id.* at 11 (“The SEC frequently receives complaints and other information from members of Congress on behalf of the constituents whom they represent. Most of these letters are directed to the Office of Legislative Affairs or the Office of the Chairman and then assigned to the appropriate SEC division or regional office.”).

77. SHAPIRO, *supra* note 39, at 140.

78. *Id.* at 138.

79. *Id.*

B. *Crisis and Reorganization*

The Division of Enforcement was instrumental in ushering the SEC enforcement program out of its so-called “Dark Ages” into a more modern, technologically competent, and national regime.⁸⁰ But, issues persisted.

Notwithstanding the SEC’s progressive centralization of its enforcement program since the 1960s described above, the SEC regional offices still retained some autonomy. Enforcement Division staff at each regional office, for example, had the discretion to open a so-called “Matter Under Inquiry” or “MUI.”⁸¹ These staff members retained, as they still do today, the responsibility for conducting the initial analyses as to whether there might be a potential violation of the securities laws that warrants an investigation, and then, for seeking approval from the Regional Office’s Director or Associate Director to open the investigation.⁸² The determination regarding whether to open an investigation is a multi-faceted one: Enforcement Division staff at each regional office must determine whether such office opening the investigation “will be the best use of resources for the Division of a whole.”⁸³

Unsurprisingly, challenges relating to the discretion of each regional office persisted. While the Division of Enforce-

80. Hawke, *supra* note 36, at 22.

81. Roundtable on Regional Administrators, *supra* note 42, at 6 (describing the relationship between the home office and regional offices in opening MUI).

82. The SEC Enforcement Manual details the specific procedures for opening a matter under investigation, or “MUI”:

Opening a MUI requires that the staff assigned to a MUI (at the Assistant Director level and below) first conduct preliminary analyses to determine: (1) whether the facts underlying the MUI show that there is potential to address conduct that violates the federal securities laws; and (2) whether the assignment of a MUI to a particular office will be the best use of resources for the Division as a whole. If the preliminary analyses indicate that a MUI should be opened, then the staff should follow the procedures below for opening a MUI within the internal system and seeking approval of the assigned Associate Director or Regional Director . . . Prior to opening a MUI, the assigned staff (Assistant Director and below) should determine whether the known facts show that an Enforcement investigation would have the potential to address conduct that violates the federal securities laws.

2017 SEC ENFORCEMENT MANUAL, *supra* note 75, at 12.

83. *Id.*

ment created some degree of oversight, the structure of the regional offices led to other problem areas: inadequate enforcement expertise at certain regional offices, at times, and coordination issues among offices. For example, reports surfaced in the late 1980s about ineffective enforcement efforts at the New York Regional Office. In 1987, a senator on the Committee on Banking, Housing and Urban Affairs sent a letter to SEC Chairman Ruder regarding “bothersome” reports about the New York Regional Office and demanded that the SEC prioritize “cleaning up the reported mess in the New York regional office.”⁸⁴ In 2003, the Boston Regional Office underwent restructuring and personnel changes following the high-profile Putnam case involving “market-timing”—a fraudulent trading practice utilized by investment funds that provoked public outcry in the wake of investigations by New York Attorney General Eliot Spitzer.⁸⁵ As reported by *The Wall Street Journal* at the time, “the SEC is looking into why a tip from a Putnam employee wasn’t taken more seriously by the SEC’s Boston regional office” and is “trying to determine why its most recent inspection of Putnam didn’t turn up problems.”⁸⁶

Concerns about each regional office’s ability to police and prosecute increasingly complex financial markets continued to escalate and would come to a head in the 2000s. In 2004, David Silver, a senior SEC official, issued an urgent warning that the “internal organization of the SEC is in dire need of substantial reorganization and improvement to meet current and future challenges.”⁸⁷ Silver cited two key issues: first, the

84. Letter from William Proxmire, U.S. Senator, to David Ruder, Chairman, Sec. & Exch. Comm’n (Aug. 13, 1987), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1987_0813_RuderComplaint.pdf.

85. Tom Lauricella et al., *Mutual Funds Face Overhaul as Spitzer, SEC Fight for Turf*, WALL ST. J. (Oct. 31, 2003), <https://www.wsj.com/articles/SB106755098985825600>.

86. *Id.*

87. David Silver, *What Went Wrong at the SEC?*, Remarks in Milan, Italy 3 (Apr. 23, 2004) http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/2000/2004_0423_Silver.pdf (last updated Nov. 2004) (“As the securities industry developed, the SEC’s three traditional operating Divisions, Investment Management, Market Regulation and the Division of Corporation Finance, organized along the lines of the three major federal securities statutes remain conceptually and functionally isolated from each other, each as it were, in its own silo.”)

lack of a single body within the Commission with systemic oversight of the market as a whole, and second, the “centralization of enforcement and inspections by the creation of the Division of Enforcement and OCIE, [that] has had the unintended consequence of taking away the eyes and ears of the operating Divisions thus adding another degree of insularity.”⁸⁸ As another SEC official put it: “To understand how the SEC operates, think of Germany prior to Bismarck: a series of semi-autonomous feudal states that operate autonomously in most ways and occasionally compete amongst themselves, except when a common enemy appears at the border.”⁸⁹

Two high-profile frauds would force the SEC into action. In December 2008, the SEC charged Bernie Madoff for pepe-

They report upwards to a five member Commission which has no real coordinating and integrating facilities of its own, although in recent Senate testimony Chairman Donaldson stated that an Office of Risk Assessment not bound by divisional lines is being created as well as inter-divisional task forces to work on special problems. I should also note that the Director of the Division of Enforcement also promised better communication in the future with the operating divisions. While these are laudable steps, even if fully implemented, more fundamental changes may be needed.”).

88. *Id.* at 4. Silver notes:

Let me give very two examples of what I am talking about. On January 14, a New York Times article indicated that the Division of Enforcement was taking a hard look and might be planning enforcement actions against mutual fund organizations that are not adequately disclosing non-sales charge compensation paid to fund retailers through payments for shelf space, etc. Yet, four years ago the SEC’s General Counsel’s Office filed an amicus brief in a lawsuit then pending in New York, indicating that certain very general prospectus disclosures provided an adequate legal blessing to these payments.

The second instance involves market timing. I believe that between 1993 and 2003 there was at least six reported lawsuits in which market timers, complaining about efforts by mutual funds to curtail their activities, sued insurance and mutual fund organizations. The SEC did not file an amicus brief in any of these cases. I believe that any careful study of these two examples and others would substantiate that the view that the regulatory voids which followed action in the one case and inaction in the other helped create a false image of regulatory tolerance in two extremely important and problematic areas. I strongly believe that the internal fragmentation I have described played a significant role.

Id.

89. Jonathan G. Katz, *Reviewing The SEC, Reinvigorating The SEC*, 71 U. PITT. L. REV. 489, 503 (2010).

trating a more than \$50 billion Ponzi scheme—the largest in history.⁹⁰ Stunningly, internal investigations would later reveal that between 1992 and 2008 the SEC “received more than ample information in the form of detailed and substantive complaints” that Madoff was operating a Ponzi scheme.⁹¹ Moreover, as early as 2001, popular publications like *Barron’s* were openly questioning the performance of Madoff’s investments.⁹² In response to perceived failures of the New York and Boston Regional Offices to identify the fraud, the SEC Office of Inspector General (“OIG”) launched an internal probe regarding the handling of the Madoff case.⁹³

A few months later, the Commission was dealt another blow. In spring 2009, the SEC filed charges against Allen Stanford for operating a \$7 billion Ponzi scheme—among the largest in history.⁹⁴ Reportedly, a Fort Worth examination official warned her branch chief to “keep your eye on these people because this looks like a Ponzi scheme to me and someday it’s going to blow up,” but the Fort Worth Regional Office was unable to prevent the fraud.⁹⁵ Writing in *Business Insider*, Henry Blodget excoriated the SEC: “After years of ignoring ex-employees who said that Stanford Financial was a massive Ponzi

90. Diana B. Henriques, *Bernie Madoff, Architect of Largest Ponzi Scheme in History, Is Dead at 82*, N.Y. TIMES (Apr. 15, 2021), <https://www.nytimes.com/2021/04/14/business/bernie-madoff-dead.html>.

91. OFFICE OF INSPECTOR GEN., U.S. SEC. REPORT NO. OIG-509, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF’S PONZI SCHEME – PUBLIC VERSION 20–21 (2009) [hereinafter SEC REPORT NO. OIG-509].

92. *Id.* at 27. The SEC’s OIG report quotes one article, noting the “MARHedge article, written by Michael Ocrant and entitled ‘Madoff tops charts; skeptics ask how,’ stated how many were ‘baffled by the way [Madoff’s] firm has obtained such consistent, nonvolatile returns month after month and year after year.’” *Id.* at 27–28 (internal citations omitted).

93. *Id.* at 133; see Interview by William Thomas with David Bergers, in Boston, Mass. (Aug. 4, 2015), https://www.sechistorical.org/collection/oral-histories/20150804_Bergers_David_T.pdf (describing the relationship between the Boston and New York Regional Offices in connection with the Madoff investigation and contesting the OIG’s findings).

94. Daniel Gilbert & Tom Fowler, *Stanford Guilty in Ponzi Scheme*, WALL ST. J. (Mar. 6, 2017), <https://www.wsj.com/articles/SB10001424052970203458604577265490160937460>.

95. OFFICE OF INSPECTOR GEN., U.S. SEC., CASE NO. OIG-526, REPORT OF INVESTIGATION OF THE SEC’S RESPONSE TO CONCERNS REGARDING ROBERT ALLEN STANFORD’S ALLEGED PONZI SCHEME 33 (2010) [hereinafter SEC REPORT NO. OIG-526], <https://www.sec.gov/files/oig-526.pdf>.

scheme, the SEC now concludes that Stanford was . . . a massive Ponzi scheme.”⁹⁶ The OIG launched a second investigation, focused on the Fort Worth Regional Office’s investigation of Stanford.⁹⁷ As Senator Dodd summarized in Congressional hearings:

[A] central problem was the failure of the SEC Fort Worth District Office Enforcement staff to heed the warning of the Examination staff. The IG report shows that the examiners at the Fort Worth District Office raised red flags about Mr. Stanford’s operation in four exams conducted over 8 years, beginning in 1997, concluding in each examination that Stanford’s CDs were likely a Ponzi scheme or a similar fraudulent scheme. However, the Enforcement staff disregarded the examiners’ repeated warnings, continually turning a blind eye for nearly a decade.⁹⁸

The Madoff and Stanford cases highlighted underlying issues in the regional office structure, key among them a severe lack of inter-office communication. Structural issues pervaded the findings of the OIG reports, which cited “insufficient expertise, training, experience and supervision by management; inadequate internal communication and coordination among and within various SEC divisions; deficiencies in investigative planning and prioritization; lack of follow-through on leads; and insufficient resources.”⁹⁹ The OIG concluded that internal organizational and communication issues contributed to the SEC’s failure to detect the fraud.¹⁰⁰ As former Chairman David Ruder noted: “Each division operated on its own. The

96. Henry Blodget, *SEC: We Are Shocked To Discover Stanford Was A Ponzi Scheme*, BUS. INSIDER (Feb. 28, 2009), <https://www.businessinsider.com/sec-okay-okay-stanford-was-a-ponzi-scheme-2009-2>.

97. SEC REPORT NO. OIG-526, *supra* note 95.

98. *Oversight of The SEC Inspector General’s Report on the “Investigation of the SEC’s Response to Concerns Regarding Robert Allen Stanford’s Alleged Ponzi Scheme” and Improving SEC Performance: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 111th Cong. 3 (2010) (statement of Sen. Christopher Dodd, Chairman, S. Comm. on Banking, Hous., and Urb. Affs.).

99. *Oversight of the Securities and Exchange Commission’s Failure to Identify the Bernard L. Madoff Ponzi Scheme and How to Improve SEC Performance: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 111th Cong. (2009) (statement of Robert Khuzami, Dir., Div. of EnFt & John Walsh, Acting Dir., Office of Compliance Inspections and Examinations).

100. See SEC REPORT NO. OIG-509, *supra* note 91, at 29.

divisions didn't talk to each other very much."¹⁰¹ Harry Markopolos—the tipper who provided the SEC with detailed accounting evidence of Madoff's fraud—blamed the failure to identify the Madoff case on “regional turf rivalries” between the Boston and New York Regional Offices.¹⁰²

More alarmingly, the OIG reports made clear that the SEC prosecutors did not appear to have the requisite market knowledge to identify and prosecute the frauds, a critical blind spot as financial markets became more and more complex. As the Madoff OIG report notes, SEC regional office staff conducted various investigations of Madoff's investment operations prior to 2008 without diagnosing the Ponzi scheme.¹⁰³ The SEC investigation in 2006, following a tip from a “concerned citizen,” was terminated without finding any violations of the securities laws, and the SEC's examiner in question received high marks for their “ability to understand and analyze the complex issues of the Madoff investigation.”¹⁰⁴

The Madoff and Stanford cases—and the ensuing OIG investigations—catalyzed sweeping organizational change. In response, the SEC underwent a comprehensive restructuring of its regulatory and enforcement functions, including the further reorganization of its regional office structure.¹⁰⁵

Certain SEC reforms were centralizing and echoed steps taken by the agency in response to the crises of the 1950s and 1960s, namely consolidating and centralizing oversight of enforcement¹⁰⁶ to “tear down the silos.”¹⁰⁷ The SEC flattened re-

101. Interview by William Thomas with David Ruder, in Chicago, Ill. (May 27, 2015), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/20150527_Ruder_David_T.pdf.

102. *Madoff Whistleblower: SEC Failed to Do the Math*, NPR (Mar. 2, 2010, 12:00), <https://www.npr.org/templates/story/story.php?storyId=124208012>.

103. SEC REPORT NO. OIG-509, *supra* note 91 (describing OCIE examinations in 2004 and 2005). Of particular note is the investigation in 2005 by the “Northeast Regional Office,” which today is the New York Regional Office. *Id.*

104. *Id.* at 40–41.

105. *The Securities and Exchange Commission Post-Madoff Reforms*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/spotlight/secpostmadoffreforms.htm> (last modified July 15, 2019).

106. *See* Regional Office Reorganization, Exchange Act Release No. 57877, 17 C.F.R. § 200.11 (2021).

107. Dean V. Shahinian, Senior Couns., U.S. Sen. Banking, Hous., and Urb. Affs. Comm., Remarks at the SEC Historical Society Fireside Chat: View

porting structures, standardized training across regional offices, and consolidated a range of enforcement functions.¹⁰⁸ As put by Robert Khuzami, “[t]he examination program in other regional offices has been consolidated under the leadership of a single senior manager to ensure consistent supervision on their coordination, collaboration and communication.”¹⁰⁹ One SEC staffer noted:

[R]egional chief counsels reported to one of three Washington chief counsels who also had their day job to run the enforcement centers here in [D.C.] . . . so, part of the reorganization was to create this one person who was responsible for the regional enforcement program in Washington and everybody would report up to that person.¹¹⁰

Additionally, in 2008, the SEC published its enforcement manual for the first time ever, in a move designed to, among other goals, standardize investigation and enforcement procedures across all offices.¹¹¹

And yet, while certain of the reorganizations were clearly centralizing, the SEC also instituted structural changes that *decentralized* authority and autonomy to the regional offices. One of the main reforms was the creation of national specialized units in 2010, a move that the SEC’s Division of Enforcement called the “most significant reorganization since its establishment in 1972.”¹¹² These national specialized units would focus on specific issue areas of the securities markets in order to—as Robert Khuzami, the program’s architect noted—“foster a

From Congress (Mar. 27, 2007), https://www.sechistorical.org/collection/programs/Transcript_2007_0327_FC.pdf.

108. See *Oversight of the Securities and Exchange Commission’s Failure To Identify the Bernard L. Madoff Ponzi Scheme and How to Improve SEC Performance: Hearing Before the S. Comm. On Banking, Hous., and Urb. Affs.*, 111th Cong. 95 (2009) (statement of Robert Khuzami, Dir., Div. of Enf’t & John Walsh, Acting Dir., Office of Compliance Inspections and Examinations).

109. *Id.* at 99.

110. Interview by William Thomas with Emily Gordy, former Deputy Chief Couns., Div. of Enf’t, U.S. Sec. & Exch. Comm’n (Sept. 23, 2013), https://www.sechistorical.org/collection/oral-histories/20130923_Gordy_Emily_T.pdf.

111. Harold K. Gordon & Tracy V. Schaffer, *Release of ‘Red Book’ a Move Toward SEC Transparency*, LAW (Dec. 11, 2008, 12:00 AM), <https://www.law.com/almID/1202426646812/>.

112. SEC Names New Specialized Unit Chiefs, *supra* note 27.

more comprehensive and coherent national program that encourages communication and collaboration.”¹¹³

Notably, each subject matter unit was staffed by personnel across the various regional offices, and many of the units were actually headed by SEC directors in regional offices.¹¹⁴ Describing this new “matrix reporting” structure, Khuzami noted:

[T]he SEC had historically only been organized regionally, the New York region, the San Francisco region, the Dallas/Fort Worth region, and each regional director was in charge of everything that happened in that region whatever the nature of the case. We laid over that structure with this regional structure, these specialized units which were across the country. They may have had a chief in New York and a deputy chief in Atlanta and staff in the unit in five of those regions. You had regional directors who no longer have full autonomy over their cases. In fact, people in their region will now be reporting still to the regional director for some cases, but to the head of the unit in New York.¹¹⁵

113. See *Oversight of the Securities and Exchange Commission’s Failure to Identify the Bernard L. Madoff Ponzi Scheme and How to Improve SEC Performance. Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 111th Cong. 99–100 (2009) (statement of Robert Khuzami, Dir., Div. of Enf’t) (observing, “[f]or example, the New York Regional Office already has adopted a protocol under which a single team of examiners, drawn from the broker–dealer and investment management units, will jointly examine selected firms to ensure that the examination team includes those most expert in the subject of the examination”).

114. For example, the Asset Management Unit was originally co-headed by Bruce Karpati in the New York Regional Office; the Market Abuse Unit was originally led by Daniel M. Hawke, who was the director of the Philadelphia Regional Office; and the Municipal Securities and Public Pensions Unit was originally headed by Elaine C. Greenberg, Associate Regional Director of the Philadelphia Regional Office. See SEC Names New Specialized Unit Chiefs, *supra* note 27.

115. Interview by Dr. Harwell Wells with Robert Khuzami, former Dir. of the Div. of Enf’t, U.S. Sec. & Exch. Comm’n, in New York, N.Y. (Feb. 15, 2019), https://www.sechistorical.org/collection/oral-histories/2019_0215_Khuzami_Oral_History_T.pdf.

From time to time, leadership of these units has transferred from one region to another.¹¹⁶ Additionally, in response to the emergence of novel financial products and trading strategies, the SEC has created new or expanded existing specialized units. As Khuzami notes: “They were never designed to be static. They can shrink if that subject matter is no longer a significant priority for the division.”¹¹⁷

SEC leadership has highlighted the significant reforms that the Commission has undergone in recent years and praised the Commission for taking comprehensive action. In 2012, Chair Schapiro looked back on the agency’s reforms, calling the recent reorganizations “one of the most productive periods in the agency’s history,” citing “improvements in culture, management approach, and attitude.”¹¹⁸ Former Chair Breeden noted more recently, “[i]t’s really exciting to see the agency move past the terrible era of the Madoff collapse and past 2008 and the attempts to dismember the agency. The SEC flag is flying as proudly as I’ve seen it in decades and that’s a wonderful thing.”¹¹⁹ The Division of Enforcement, thus, has sought “to avoid such turf battles by pressing supervisors to work with their counterparts in other offices to make sure that investigations are being conducted by the appropriate regional offices.”¹²⁰

116. For example, in 2016, C. Dabney O’Riordan was announced as co-chief of the Asset Management Unit, realigning the group’s leadership from New York to Los Angeles, where O’Riordan was based. *See* Press Release, U.S. Sec. & Exch. Comm’n, C. Dabney O’Riordan Named as Co-Chief of the Asset Management Unit (June 28, 2016), <https://www.sec.gov/news/press-release/2016-134.html>.

117. Interview by Dr. Harwell Wells with Robert Khuzami, *supra* note 115.

118. Mary Schapiro, former Chairman, U.S. Sec. & Exch. Comm’n, Remarks at the SEC Historical Society 13th Annual Meeting Program, A Creative Irritant: The Relationship between the SEC and Accounting Standard Setters (June 7, 2012), https://www.sechistorical.org/collection/programs/sechistorical_060712_transcript.pdf.

119. Richard Breeden, former Chairman, U.S. Sec. & Exch. Comm’n, Remarks at the SEC Historical Society 17th Annual Meeting Program, At the Crossroads of the White House and the SEC (June 2, 2016), <https://www.sechistorical.org/collection/programs/sechistorical-060216-transcript.pdf>.

120. Luke Cadigan, *The Role Of Regional Offices In the SEC FCPA Unit*, LAW360 (Sept. 30, 2011), <https://www.law360.com/articles/274598/the-role-of-regional-offices-in-the-sec-fcpa-unit?copied=1>.

II.

THE CONTEMPORARY SEC: A MATRIX ORGANIZATION

The evolution of the SEC regional office structure illustrates how institutional structures—specifically, arrangements that centralize or devolve discretion—impact administrative enforcement. As described in Part I, the SEC has historically responded to public outcry following high-profile scandals with structural reorganizations. In the aftermath of 2008, however, unlike previous crises responses, the SEC opted for a middle ground approach: a reorganization that was both centralizing *and* decentralizing, known as a “matrix” structure.¹²¹ In this way, the SEC sought to overcome the problems endemic to decentralized enforcement: capture, information siloes, and disparate enforcement. At the same time, however, the SEC also preserved devolutionary structures that sought to recall the benefits that characterized the early regional offices: experimentalism, competition, and responsiveness, each in their own regard tools to keep up with transforming market practices.¹²²

Despite these changes—described as “pretty radical” by SEC officials—very little data has been compiled on the enforcement patterns of regional offices.¹²³ Given this lack of information, one might question if the predominant assumption found in the securities law and related finance literatures today, that SEC regional offices primarily serve to investigate and enforce violations in a particular geographic area, still holds,¹²⁴ and, more broadly, how these regional offices con-

121. Interview by Dr. Harwell Wells with Robert Khuzami, *supra* note 115.

122. *See id.* at 10–12 (describing the intent and benefits of the matrix reporting structure).

123. *See* CTR. FOR STRATEGIC & INT’L STUDS, THE FUTURE OF THE SECURITIES AND EXCHANGE COMMISSION IN A CHANGING WORLD 13 (2015), <http://ssrn.com/abstract=2715143> (“The Enforcement Division, now with 1,300 staff members, has undergone ‘pretty radical’ changes in the past five to ten years, with ‘tremendous impact’ on how it functions. The Division now has industry experts that allow it to cover a broader swath of the securities markets and to do so fairly.”).

124. Bonsall et al., *supra* note 25, at 14 (“Consistent with the local office usually, but not always, handling investigation of firms headquartered in their geographic nexus, we find that 73 percent of the investigations opened after a restatement are opened by the SEC regional office that has geographic purview over a firm’s headquarters location.”).

tribute to, and fit within, the interlocking layers of the securities enforcement ecosystem.

Part II is a first step in addressing this lack of data, and in turn, understanding how the discretion of each SEC regional office impacts securities enforcement today. While our data is only suggestive, it offers an entryway to theorize about not only the contemporary purposes of the SEC regional offices, but also the potential for current design choices to remedy long-standing questions about securities enforcement.

A. *Descriptive Statistics*

Data about regional office enforcement is scarce: the SEC does not publish enforcement data by regional office in its annual report. Therefore, we provide a snapshot of SEC regional office participation in the investigation and/or enforcement of actions in the past decade.

To determine which SEC regional office participated in the investigation and/or enforcement of a case, we rely on documents published by the SEC where the SEC indicates which regional office participated—typically press releases, but also litigation releases, administrative summaries or court documents (such as a complaint). Our sample tracks enforcement actions initiated from October 1, 2009, through September 30, 2020, (consistent with the SEC’s fiscal calendar) by the SEC against public companies and subsidiaries.¹²⁵ Our sample consists of 348 enforcement actions from the Securities Enforcement Empirical Database (SEED).¹²⁶

125. The sample consists of enforcement actions against defendants that are public companies and their subsidiaries. Public companies are defined as those that traded on a major U.S. exchange as identified by the Center for Research in Security Prices (CRSP) at the time the enforcement action was initiated, or otherwise within the five-year period preceding the initiation. Thus, public companies that traded over-the-counter or only on major non-U.S. exchanges are excluded, as are companies that did not become public until after the enforcement action was initiated. Subsidiaries are those entities that had a publicly traded parent company at the time the enforcement action was initiated, or otherwise within the five-year period preceding the initiation. Enforcement actions solely against natural person defendants, entities other than public companies and subsidiaries, and relief defendants were excluded from the sample.

126. *Securities Enforcement Empirical Database*, N.Y.U. POLLACK CTR. FOR L. & BUS. & CORNERSTONE RSCH., <https://research.seed.law.nyu.edu/> (last visited Mar. 9, 2022) [hereinafter SEED].

SEED identifies 698 SEC actions from FY 2010 through FY 2020.¹²⁷ Of these actions, 157 are civil actions, 539 are administrative proceedings, 2 are reports of investigation. We capture 157 out of 157 civil actions in SEED, from FY 2010 through FY 2020, because the SEC specifies the enforcing offices in its complaints.¹²⁸ We capture 191 out of 539 administrative proceedings in SEED, from FY 2010 through FY 2020, because the SEC does not always provide information about its investigating offices or enforcing offices in administrative proceeding documents.¹²⁹ We capture 0 out of 2 report of investigation. In the aggregate, we capture 348 SEC enforcement actions (157 civil actions and 191 administrative proceedings). Therefore, the SEC indicated which regional office participated in the matter for about half of the total enforcement actions brought in the same period. We consider the “Participating SEC Office” to be the regional office that conducted the investigation that led to the prosecution and/or prosecuted the enforcement action.

A close look at the enforcement activities of regional offices in the last decade suggests, in the aggregate, the persistence of historic geographic patterns of enforcement. As noted below, for example, the New York Regional Office participated in the greatest number of actions outside of the home office, consistent with its activity dating back to 75 years ago. Consistent with historical data, the New York Regional Office also participated in the most actions against securities broker-dealers and investment advisers, as well as the most actions targeting market manipulation, unsurprisingly reflecting

127. N.Y.U. POLLACK CTR. FOR L. & BUS. & CORNERSTONE RSCH., SEC ENFORCEMENT ACTIVITY: PUBLIC COMPANIES AND SUBSIDIARIES: FISCAL YEAR 2020 UPDATE 11 (2020), <https://www.cornerstone.com/wp-content/uploads/2021/12/SEC-Enforcement-Activity-FY2021-Update.pdf>. This report mentions 697 (and not 698) enforcement actions because one action was added to SEED after the release of the report due to the fact that the SEC posted a press release announcing the initiation of this additional enforcement action only after the release of the report.

128. For some civil cases, the SEC also expressly provides information about the investigating offices in its press releases and litigation releases.

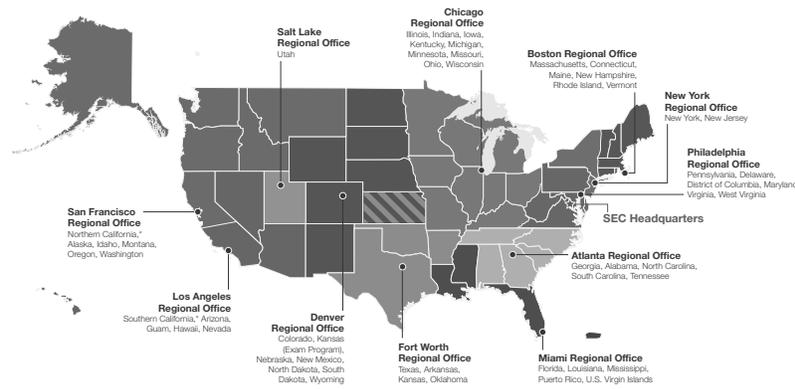
129. When the SEC *does* provide information about the investigating offices and/or enforcement offices for a given administrative proceeding, this information is provided in SEC press releases, litigation releases, and administrative releases. Consequently, this Article captured the 191 administrative proceedings based on the review of these three types of documents.

the high concentration of financial services in the state (see Figure 1 below). Conversely, the Salt Lake Regional Office brought only a small percentage of the enforcement actions in our sample—consistent with the office’s historical output and the types of actions it brings (i.e., typically localized affinity fraud that would not be captured in a data set focused on public companies and subsidiaries). Outside of these outliers, however, most of the other regional offices participated in roughly comparable numbers of enforcement actions.

FIGURE 1: NUMBER OF ACTIONS BY SEC OFFICE AND ALLEGATION TYPE¹³⁰

SEC Offices	Issuer Reporting and Disclosure	Foreign Corrupt Practices Act	Investment Advisors/Investment Companies	Broker Dealer	Public Finance Abuse	Securities Offering	Market Manipulation	Insider Trading	Other	Total
Atlanta	4	0	3	0	0	1	0	0	0	8
Boston	11	8	4	3	16	1	1	0	1	45
Chicago	13	1	5	5	4	1	0	0	1	30
Denver	7	1	5	1	0	2	0	0	3	19
Fort Worth	11	8	1	0	0	2	0	0	2	24
Los Angeles	10	4	4	3	0	0	0	0	1	22
Miami	4	7	4	5	0	1	0	0	0	21
New York	27	4	12	21	1	3	4	0	5	77
Philadelphia	7	0	6	5	5	0	0	0	1	24
Salt Lake City	0	3	0	0	0	0	0	0	0	3
San Francisco	12	6	2	0	2	0	0	0	0	22
Washington D.C.	39	31	0	1	2	7	0	0	4	84

130. SEED, *supra* note 126.

FIGURE 2: SEC REGIONAL OFFICES' JURISDICTIONS¹³¹

In some ways, the persistence of historical geographic enforcement patterns across regional offices reflects the SEC's normative design choices. The SEC continues to acknowledge that the regional offices do reflect, and benefit from, the character of their regional constituencies. The SEC touts that regional offices “tailor their efforts to the needs of the regions they serve.”¹³² The SEC has even acknowledged that these regional differences might benefit enforcement. Recently, SEC Commissioner Hester Peirce maintained that “staff on the ground throughout the country is essential to our ability to fulfill our responsibilities” because the “regional staff gets to know the areas they serve, the local securities bar, their fellow regulators in the region, and local law enforcement. They also get to know the types of problems that are unique to, or concentrated in, the area they serve.”¹³³

And yet, while certain regional office enforcement patterns mirror those of fifty years ago, the presumption that regional offices focus primarily on their geographic region is qualified by our data. Our data suggest that the link between regional office and in-region enforcement may not be all that clear cut. Indeed, despite the limitations of our sample—which only covers actions against public companies and their subsidiaries—it appears that, in the last decade, geography was

131. U.S. SEC. & EXCH. COMM'N, AGENCY FINANCIAL REPORT: FISCAL YEAR 2018, *supra* note 23, at 9.

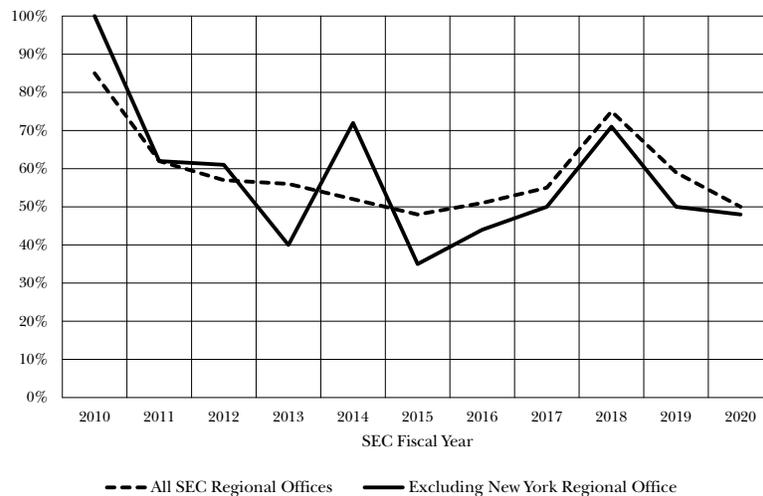
132. *Id.* at 13.

133. Peirce, *supra* note 38.

not the overriding determinant of SEC regional office participation in the investigation and/or enforcement of cases for violations of the federal securities laws.

We analyzed whether or not SEC regional offices primarily investigate and/or enforce actions against companies in their geographic region. To this end, we report on the number of enforcement actions each regional office participated in *within* and *outside* its respective geographic location. To determine whether a Participating SEC Office brought an enforcement action *within* or *outside* its jurisdiction, we look at the SEC regional office jurisdiction as prescribed by Section 200.11 of the Code of Federal Regulations (see Figure 2 above)¹³⁴ and at the headquarter of the defendant/respondent as specified in the SEC's complaint or in the SEC's order instituting administrative proceedings. In those cases where the SEC's complaint or the SEC's order does not mention the headquarters, we collect this information from Capital IQ. For California, which is divided into two SEC regions, we roughly estimated location based on the SEC's map above (see Figure 2 above).

FIGURE 3: PERCENTAGE OF IN-REGION ACTIONS¹³⁵



134. 17 C.F.R. § 200.11 (2015).

As shown in Figure 3 above, outside of FY 2018, in-region participation by SEC regional offices in our sample has hovered near 50% in recent years. Even excluding the New York Regional Office (the solid black line in Figure 3 above), which is often viewed as a regional office with a national scope due to its nexus to markets, geographic detachment is evident.

The above data are only suggestive in a few ways. Because our data set focus only on actions against public companies and subsidiaries—which primarily consist of only the largest companies—it is possible that the data simply reflect that in the most significant enforcement matters (measured by impact to investors) geography matters less. In addition, we lack enforcement data prior to the SEC’s restructurings in 2008, and accordingly, we make no claims regarding any shift flowing from the post-Madoff reorganizations.

B. *Contextualizing the Data: Technology*

One possible explanation for the geographic detachment in our sample is simply a change in communications technology. Technological advancements have created conditions that enable regional offices to monitor greater geographic areas today than they ever could. It is unlikely that geography will cease to matter, at least in the near future, because SEC officials still benefit from spatial proximity to witnesses and companies in the course of investigations and enforcement actions. However, the COVID-19 pandemic has forced the Commission to rethink its deposition process, which is now conducted by videoconference, as well as other aspects of investigations and enforcement, which are increasingly being undertaken remotely.¹³⁶ Indeed, some commentators have suggested that the SEC’s remote-work response to the COVID-19 pandemic will usher an era of data-driven investigations, as well as “mission-driven initiatives such as broad investigations into pricing, compensation, and disclosure that are detectable

135. SEED, *supra* note 126.

136. Boris Feldman, *Reinventing Depositions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 14, 2020), <https://corpgov.law.harvard.edu/2020/05/14/reinventing-depositions/>; *see also* Margaret Meyers, Daniel Zinman & Lee Richards, *Defending Remote Testimony in White Collar, Securities Cases*, LAW360 (May 27, 2020), <https://www.law360.com/articles/1273949/defending-remote-testimony-in-white-collar-securities-cases>.

through data analytics, similar to last year's share class selection disclosure cases."¹³⁷

Even much of the SEC's historic monitoring function has been offloaded to technology. Across all of the administrative agencies, data-driven technologies have transformed in administrative governance, as has predictive modeling technology,¹³⁸ and the SEC has invested heavily in these technologies over the last decade.¹³⁹ Indeed, among the various federal agencies, the SEC ranks near the top in deploying new technologies.¹⁴⁰ For example, the SEC is in the process of rolling out algorithmic enforcement tools which target trading abnormalities, like the Advanced Relational Trading Enforcement Metrics Investigation System (ARTEMIS) and the Abnormal Trading and Link Analysis System (ATLAS).¹⁴¹ In 2016, the SEC and FINRA adopted a consolidated audit trail (CAT) to bolster

137. G. Jeffrey Boujoukos, Ariel Gursky & Ben A. Indek, *SEC Examinations and Enforcement in the COVID-19 Era*, MORGAN LEWIS (Apr. 21, 2020), <https://www.morganlewis.com/pubs/sec-examinations-and-enforcement-in-the-covid-19-era-cv19-lf>.

138. See Irina Pencheva, Marc Esteve & Slava J. Mikhaylov, *Big Data and AI – A Transformational Shift for Government: So, What Next for Research?*, 35 PUB. POL'Y & ADMIN. 24, 25 (2020).

139. Mariusz Maciejewski, *To Do More, Better, Faster and More Cheaply: Using Big Data in Public Administration*, 83 INT'L REV. ADMIN. SCIS. 123–24, 126 (2017) (describing the use of predictive modeling technology in public administration and the SEC's use of big data in detecting irregularities in financial markets); Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147, 1164–66 (2017) (noting the SEC's use of cloud computing technology and recognition of machine-learning approaches to fraud detection).

140. See DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE M. SHARKEY & MARIANO-FLORENTINO CUÉLLAR, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES, REPORT SUBMITTED TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 16 tbl.2, 22–23 (2020).

141. Mary Jo White, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at the International Institute for Securities Market Growth and Development (Apr. 8, 2016), <https://www.sec.gov/news/statement/statement-mjw-040816.html> (discussing the Division of Enforcement's use of ARTEMIS); Jay Clayton, Chairman, Sec. & Exch. Comm'n, Keynote Remarks at the Mid-Atlantic Regional Conference (June 4, 2019), <https://www.sec.gov/news/speech/clayton-keynote-mid-atlantic-regional-conference-2019> (discussing the Division of Enforcement's use of the data analytics tool ATLAS).

the agency's information collection function.¹⁴² The SEC cites the *Ieremenko* case as one where technology enabled the Commission to levy an enforcement action that it previously would not have been able to.¹⁴³ As put by the Co-Director of the SEC's Division of Enforcement, “[*Ieremenko*] is a type of case that, quite frankly, might not have been possible a few years ago due to the geographical dispersal and technological sophistication of the perpetrators.”¹⁴⁴

These technological advancements have enabled more offices to conduct investigations from a distance. Today, the SEC makes resource-based determinations about which regional offices participate in enforcement. In making these decisions, the SEC weighs five factors in determining whether one or another regional office will participate in an investigation. Four of the factors are explicitly geographic, which include: the location of the alleged violation, the location of the alleged wrongdoer, the location of the relevant business, and the location of the relevant witnesses or victims.¹⁴⁵ However, today, the SEC also considers “the resources and expertise of the office.”¹⁴⁶

In addition, some evidence suggests that new technology is making the regional offices more homogenous. First, the SEC is taking steps to ensure that its technological initiatives are uniformly applied across its offices, and the SEC's Office of Information Technology oversees the regional offices to standardize technology implementation.¹⁴⁷ Second, in a report authored for the Administrative Conference of the United States, professors Engstrom, Ho, Sharkey and Cuellar predict the “displacement of [SEC] enforcement discretion,” as “[c]ontinued

142. Press Release, U.S. Sec. & Exch. Comm'n, SEC Approves Plan to Create Consolidated Audit Trail (Nov. 15, 2016), <https://www.sec.gov/news/pressrelease/2016-240.html>.

143. DIV. OF ENF'T, U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT 13 (2019), <https://www.sec.gov/files/enforcement-annual-report-2019.pdf>.

144. Steven Peikin, Co-Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, Keynote Speech at Southeastern Securities Conference (Sept. 6, 2019), <https://www.sec.gov/news/speech/peikin-keynote-speech-southeastern-securities-conference-2019>.

145. See 2017 SEC ENFORCEMENT MANUAL, *supra* note 75, at 13.

146. *Id.*

147. U.S. SEC. & EXCH. COMM'N, AGENCY FINANCIAL REPORT: FISCAL YEAR 2014, at 12, 43, <https://www.sec.gov/reportspubs/annual-reports/about-secafr2014shtml.html>.

technological advances may eventually cause much of enforcement decision-making, from monitoring to initiation of enforcement actions to agency adjudication, to be an entirely machine-driven process.”¹⁴⁸ Indeed, technology appears to be supplanting the discretion of agency staffers at all levels, both “in some cases displacing the decisions of more senior agency decision-makers” but also “increasingly displacing the smaller scale and more numerous decisions of the ‘street-level bureaucrats’ that perform much of the visible, citizen-facing work of government.”¹⁴⁹

C. *Contextualizing the Data: Enforcement Laboratories*

While the sheer number of cases in which SEC regional offices participate outside of their region may indeed be a product of technological change, data points from our sample indicate that SEC regional offices participate in clusters of actions in a particular subject area, at times outside of their region. These patterns might be supported by a complementary, but separate, theory, one that fits with the stated goals of the SEC’s post-Madoff reorganizations: certain regional offices developing subject matter expertise sanctioned by top-down initiatives.

As noted in Part I, the relatively unchecked autonomy of the SEC regional offices enabled a sort of bottom-up laboratories to form.¹⁵⁰ As Shapiro notes, different regional offices developed informal ties with local institutions.¹⁵¹ These grassroots efforts facilitated investigations and resulted in prosecutions, but made coordination and standardization between offices difficult.

The development of differentiated practice areas of expertise at regional offices is suggested by the nature and structure of the SEC’s national specialized units. As mentioned above, the Division of Enforcement consists of five national specialized units: “the Asset Management Unit, the Municipal Securities and Public Pension Unit, the Complex Financial In-

148. See ENGSTROM, HO, SHARKEY & CUÉLLAR, *supra* note 140, at 27–28. The authors do qualify this vision, noting that “line-level” SEC enforcers tend to be skeptical of this technology. *Id.* at 28.

149. *Id.* at 11.

150. See *supra* notes 35–44 and accompanying text.

151. See SHAPIRO, *supra* note 39, at 69 (observing the Seattle Regional Office’s “ties” with the city’s Better Business Bureau).

struments Unit, the Foreign Corrupt Practices Unit and the Market Abuse Unit.”¹⁵² Each specialized unit consists of personnel from different regional offices. For example, the Foreign Corrupt Practice Act Unit consists of the following regional offices: Boston, Los Angeles, Miami, Salt Lake City, San Francisco, and Fort Worth.¹⁵³ One effect of the national specialized units has been the mitigation of inter-office coordination issues. As Luke Cadigan, former Assistant Director in both the Boston Regional Office and the Foreign Corrupt Practices Act Unit of the SEC Enforcement Division, noted:

The Enforcement Division has sought, with some success, to avoid such turf battles by pressing supervisors to work with their counterparts in other offices to make sure that investigations are being conducted by the appropriate regional offices.

Given the budgetary restrictions under which the Enforcement Division staff has had to operate, and the need to avoid travel costs where at all possible, the division has reinforced the importance of a geographic nexus to the region. Thus, if an FCPA matter concerns a company within a geographic area traditionally covered by a regional office that has unit membership, there will be a preference within the unit that the matter be handled by that office.¹⁵⁴

In this way, regional office staff working in national specialized units mitigated some territorial detachment. This mitigating effect on territorial dispersion is corroborated by our data when, for example, we consider the Fort Worth Regional Office, which is part of the Foreign Corrupt Practice Act Unit and has territorial jurisdiction in Texas, Oklahoma, Arkansas, and Kansas.¹⁵⁵ Indeed, when—from our dataset of 348 enforcement actions from FY 2010 through FY 2020—we consider enforcement actions for violations of the Foreign Corrupt Practice Act against public companies and subsidiaries located in the territorial jurisdiction of the Fort Worth Regional

152. See 2017 SEC ENFORCEMENT MANUAL, *supra* note 75, at 5.

153. See Cadigan, *supra* note 120.

154. *Id.*

155. Fort Worth Regional Office, U.S. Sec. & Exch. Comm’n, sec.gov/regional-office/fort-worth.

Office, we see (in Figure 4 below) that the Fort Worth Regional Office kept (i.e., was a “Participating SEC Office” in) eight out of eleven of those actions, while for the other three actions the SEC Participating Office was Washington, D.C.

FIGURE 4: FOREIGN CORRUPT PRACTICES ACT ACTIONS WITHIN FORT WORTH REGIONAL OFFICE JURISDICTION¹⁵⁶

SEC Regional Office	Defendant Headquarters	In-Region
Fort Worth	Houston, Texas	Yes
Fort Worth	Houston, Texas; Geneva	Yes
Fort Worth	Houston, Texas	Yes
Fort Worth	Houston, Texas	Yes
Fort Worth	Sugar Land, Texas	Yes
Fort Worth	Houston, Texas	Yes
Fort Worth	Houston, Texas	Yes
Fort Worth; Los Angeles	Lewisville, Texas	Yes
Washington, D.C.	Springdale, Arkansas	No
Washington, D.C.	Texas	No
Washington, D.C.	Houston, Texas; Cayman Islands	No

On the other hand, the participation of SEC regional offices in the enforcement activities of the national specialized units may contribute to territorial detachment. As mentioned above, in the past, out-of-region office participation occurred when a regional office lacking a territorial nexus would start the investigation before any other regional office—a mere accident. Today, regional office participation in investigations and enforcement appears more intentional. The work of the SEC’s national specialized units within regional offices points to “expertise”—as described in the SEC’s enforcement manual¹⁵⁷—as the most likely explanation for the territorial detachment shown by our data. One of the most striking exam-

156. SEED, *supra* note 126.

157. 2017 SEC ENFORCEMENT MANUAL, *supra* note 75, at 13–14. The manual also states that “[c]omplaints that appear to be serious and substantial are usually forwarded to staff in the Home Office or the appropriate regional office for more detailed review and may result in the opening of a MUI.” *Id.* at 8.

ples of this involves 15 enforcement actions in our data set in which the Boston Regional Office was the Participating Office. In 2014, the SEC announced the “Municipal Continuing Disclosure Cooperation Initiative.”¹⁵⁸ The initiative was coordinated by the home office and sought to encourage municipal securities issuers to self-report violations by offering “favorable settlement terms to municipal bond underwriters and issuers that self-reported violations.”¹⁵⁹ The Boston Regional Office participated in a significant percentage of these enforcement actions—actions, in our data set, where the issuers were not located in the territorial jurisdiction of the Boston Regional Office. More specifically: of the 32 actions in the Municipalities Continuing Disclosure Cooperation Initiative captured on SEED, the Boston Regional Office participated in 15; none of the respondents in those 15 enforcement actions, however, were in the Boston territorial jurisdiction.¹⁶⁰ At the time of the sweep, the head of the SEC’s Municipal Securities and Public Pensions Unit was situated in Boston (previously, it was housed in Philadelphia).¹⁶¹ The SEC’s more-recent Share Class Selec-

158. Andrew Ackerman, *SEC Charges Municipal Underwriters with Making False Statements*, WALL ST. J. (Sept. 30, 2015), <https://www.wsj.com/articles/sec-charges-municipal-underwriters-with-making-false-statements-1443625175>.

159. Press Release, U.S. Sec. & Exch. Comm’n, SEC Completes Muni-Underwriter Enforcement Sweep (Feb. 2, 2016), <https://www.sec.gov/news/pressrelease/2016-18.html>.

160. The SEC’s Municipalities Continuing Disclosure Cooperation (MCDC) Initiative is detailed in the following SEC press releases, in which the SEC announced settled actions. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges California School District with Misleading Investors (July 8, 2014), <https://www.sec.gov/news/press-release/2014-133>; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges 36 Firms for Fraudulent Municipal Bond Offerings (June 18, 2015), <https://www.sec.gov/news/press-release/2015-125.html>; Press Release, U.S. Sec. & Exch. Comm’n, SEC Sanctions 22 Underwriting Firms for Fraudulent Municipal Bond Offerings (Sept. 30, 2015), <https://www.sec.gov/news/pressrelease/2015-220.html>; SEC Completes Muni-Underwriter Enforcement Sweep, *supra* note 159; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges 71 Municipal Issuers in Muni Bond Disclosure Initiative (Aug. 24, 2016), <https://www.sec.gov/news/pressrelease/2016-166.html>. Of all the actions described in the foregoing releases which constitute MCDC Initiative, 32 are captured on SEED (because they fall within the SEED criterion described in footnote 125 *supra*).

161. By 2016, the SEC renamed the Municipal Securities and Public Pensions Unit the “Public Finance Abuse Unit.” See Andrew J. Ceresney, former Dir., Div. of Enf’t, U.S. Sec. & Exch. Comm’n, *The Impact of SEC Enforce-*

tion Disclosure Initiative was conducted under the leadership of Chief of the Asset Management Unit out of the Los Angeles Regional Office, where the Co-Chief of the Asset Management Unit is situated.¹⁶²

Although our dataset is too small to have statistical power in this regard, supplemental evidence strongly suggests that the creation of specialized units within the regional offices—both which have their own reporting lines to D.C., but also which leverage non-unit staff in their respective regional offices—enabled subject matter expertise to develop within certain regional offices. SEC officials, for example, have touted the Commission’s “specialized” approach to monitoring and prosecuting complex areas of the market.¹⁶³ These dynamics are better illustrated with a case study of how the SEC’s national specialized units institutionalize knowledge to optimize investigations and enforcement at regional offices. We focus on the Philadelphia Regional Office, which has a unique, yet largely unexamined, history of prosecuting municipal securities cases—and participated in various out-of-region municipal securities actions in our dataset. The history of the Philadelphia Regional Office helps clarify how enforcement patterns emerge, and how organizational structures help harness and institutionalize market knowledge developed over time to optimize enforcement.

The Philadelphia Regional Office is viewed internally by SEC staff as a “foothold” of municipal securities cases.¹⁶⁴ Since

ment on Public Finance: Keynote Address at Securities Enforcement Forum 2016 (Oct. 13, 2016), <https://www.sec.gov/news/speech/speech-ceresney-10132016.html/>

162. Press Release, U.S. Sec. & Exch. Comm’n, SEC Share Class Initiative Returning More Than \$125 Million to Investors (Mar. 11, 2019), <https://www.sec.gov/news/press-release/2019-28>. This press release does not mention any SEC regional office involved in the initiative; therefore, we were unable to capture any enforcement actions related to the same initiative. Several enforcement actions mentioned in the press release as part of the same initiative, however, are included in SEED. See N.Y.U. POLLACK CTR. FOR LAW & BUS. & CORNERSTONE RSCH., SEC ENFORCEMENT ACTIVITY: PUBLIC COMPANIES AND SUBSIDIARIES: FISCAL YEAR 2019 UPDATE (2019) <https://www.law.nyu.edu/sites/default/files/NYU-Cornerstone%20Report-FY%202019.pdf>.

163. See Ceresney, *supra* note 161.

164. Interview by William Thomas with Fiona Philip, former Enft Couns. to Chairman, U.S. Sec. & Exch. Comm’n, in Washington, D.C. (June 19, 2015).

at least the early 1990s, the Philadelphia Regional Office developed repeated experience—and thus, expertise—in prosecuting violations in municipal securities markets.¹⁶⁵ For example, one notable set of enforcement actions spearheaded by the Philadelphia Regional Office involved the prosecution of yield burning.¹⁶⁶

“Yield burning” was a phenomenon that emerged in complex municipal-bond refinancing during the early 1990s.¹⁶⁷ Municipal securities brokers engaged in this practice by replacing older, higher-yielding bonds with new bonds sold with lower interest rates.¹⁶⁸ Yield burning was—as put by popular accounts—“protected by a far-reaching network of secrecy and quid pro quo.”¹⁶⁹

Philadelphia Regional Office officials were able to penetrate these networks through specific, local market experience. As Paul Maco of the SEC recounts, people were beginning to “drop[] dimes” and tell the SEC about this practice through whisper networks.¹⁷⁰ While yield burning is likely an issue that was widespread nationally, SEC officials in other regional offices were not necessarily identifying the practice. As one SEC official recounted, “[w]hen you said yield burning . . . I didn’t

165. See Interview by William Thomas with Elaine Greenberg, former Chief, Mun. Sec. & Pub. Pensions Unit, Enf’t Div., U.S. Sec. & Exch. Comm’n, in Washington, D.C. (July 17, 2014), https://www.sechistorical.org/collection/oral-histories/20140717_Greenberg_Elaine_T.pdf (describing the formation of the specialized unit for municipal securities in the Philadelphia Regional Office); see also Interview by William Thomas with Paul Maco, former Dir., Office Mun. Sec., U.S. Sec. & Exch. Comm’n, in Washington, D.C. (May 12, 2014), https://www.sechistorical.org/collection/oral-histories/20140512_Maco_Paul_T.pdf (describing the formation and growth of the Philadelphia Regional Office).

166. See Interview with Elaine Greenberg, *supra* note 165.

167. See Michael McCarthy, Chairman, Bond Mkt. Found. & Christopher Taylor, Exec. Dir., Mun. Sec. Rulemaking Bd., Remarks at the SEC Historical Society Fireside Chat: Municipal Securities (Apr. 20, 2004) (“As we move into the 1990s, we have one more high-visibility scandal, Orange County, as well as yield burning and a variety of other things that made the news.”).

168. See Charles Gasparino & John Connor, *Agencies Near Rescue Plan for Yield-Burning Victims*, WALL ST. J. (Feb. 19, 1998) (“Yield burning occurs when underwriters slap excessive mark-ups on securities used to complete complex municipal-bond deals known as advanced refunding.”).

169. See HENRY SCAMMELL, *GIANT KILLERS: THE TEAM AND THE LAW THAT HELP WHISTLE-BLOWERS RECOVER AMERICA’S STOLEN BILLIONS* 157 (2005).

170. Interview with Paul Maco, *supra* note 165.

remember what it was about. The guys in New York weren't doing this, believe me."¹⁷¹

Crucially, staff in the Philadelphia Regional Office were instrumental not only in identifying the violations, but also in developing the necessary theories to prosecute the violations. Prosecuting yield burning presented problems of first impression, and accordingly, required novel theories to enforce. As Elaine Greenberg—a staffer in the Philadelphia Regional Office who would eventually serve as the head of the specialized unit—explained:

[T]he anti-fraud provisions are fairly broad, intentionally. . . . so there is latitude to be able to look at novel fact patterns, novel situations, instances where there was really no precedent, and be able to apply a lawyerly analysis to determine that there were in fact violations of the federal securities laws.¹⁷²

In the case of yield burning, staff in the Philadelphia Regional Office relied on an SEC enforcement action from 1939 to argue that the broker-dealers participating in yield burning owed a broad fiduciary duty.¹⁷³ As Paul Maco notes, “[t]he judge came back and found that there was a duty there that had been breached, and that again strengthened the ability of the Enforcement Division to be more aggressive and feel more confident in pushing other yield burning cases.”¹⁷⁴ In short, novel theories of enforcement, specifically relating to municipal securities, were being cultivated out of the Philadelphia Regional Office. In particular, these cases speak to how the office tapped into what was once the defining feature of the regional offices.

171. See Interview by William Thomas with David Clapp, former Chairman, Mun. Sec. Rulemaking Bd., in Fla. (Apr. 21, 2014), https://www.sec.gov/historical.org/collection/oral-histories/20140421_Clapp_David_T.pdf.

172. Interview with Elaine Greenberg, *supra* note 165.

173. Interview with Paul Maco, *supra* note 165 (“And we began looking at old fiduciary cases or instances where a respondent had been both a broker and an adviser, to see what came out of them and to see if there was any case law that would be helpful. And we came across this 1939 case, Arleen Hughes, who was a broker but she acted in an advisory capacity in certain instances, and therefore when she did so the circuit court, I believe it was, said that she had a fiduciary duty.”).

174. *Id.*

Yield burning represented just one of many issues of first impression in the municipal securities markets that the Philadelphia Regional Office prosecuted. As Elaine Greenberg notes:

[M]ost of the municipal securities cases that I was involved in, most of them were cases of first impression. There were novel issues. They were situations where the SEC had never brought an action in this area before, so we were developing a lot of the case law, which was an extraordinary opportunity as a lawyer to be part of that effort, to develop the case law and to bring cases of first impression. Of course, they had to be legally sound and have a basis for applying the law to the facts.¹⁷⁵

The institutional knowledge developed by Philadelphia over time was sanctioned, formalized, and institutionalized by the SEC's restructuring in the wake of 2008, which formally created a "Municipal Securities and Public Pensions Unit" led from the Philadelphia Regional Office.¹⁷⁶ Greenberg describes the creation of the unit as follows:

The units were created to address, in some respect, some of the criticism that the SEC had been getting in the post-Madoff, post-financial crisis world, and it was a way for the Division of Enforcement to really have a self-assessment and figure out: is there a way that we can address these concerns and better position ourselves to be smarter about how we go about our business? These units were created with that in mind . . .¹⁷⁷

The Municipal Securities and Public Pensions Unit enhanced the SEC's enforcement efforts in the municipal securities space. The number of municipal enforcement actions increased exponentially following the creation of the specialized unit.¹⁷⁸ Moreover, many of these actions were cases of first im-

175. Interview with Elaine Greenberg, *supra* note 165.

176. SEC Names New Specialized Unit Chiefs, *supra* note 27.

177. See Interview with Elaine Greenberg, *supra* note 165.

178. See Ceresney, *supra* note 161 ("The Commission is bringing actions against more municipal issuers and public officials. For example, since the beginning of 2013, the Commission has brought enforcement actions against 76 state or local government entities (including 4 U.S. states), 13

pression. One example was a settlement achieved by the SEC against State Street involving a “pay-to-play scheme in a corner of the market where such schemes had not been previously found—custodial services for public pension funds.”¹⁷⁹ Other notable “firsts” involved the SEC’s first prosecution of a state (New Jersey),¹⁸⁰ as well as the revival of new enforcement tools, like temporary restraining orders deployed in a matter involving the city of Harvey, Illinois.¹⁸¹ Perhaps the most significant effort led by the Municipal Securities and Public Pensions Unit was the SEC’s first “self-reporting” sweep since the creation of the Division of Enforcement.¹⁸²

The Municipal Securities and Public Pensions Unit in the Philadelphia Regional Office disseminated knowledge across other regional offices. The Municipal Securities and Public Pensions unit created a muni “boot camp” for SEC Enforcement personnel¹⁸³ “and graduates contributed new tiles to the mosaic defining the boundaries of acceptable municipal market conduct.”¹⁸⁴ This knowledge would facilitate prosecutions by other regional offices. The Miami Regional Office, for example, brought, and won, a municipal securities case against the city of Miami, “the first federal jury trial by the SEC against a municipality or one of its officers for violations of the federal securities laws.”¹⁸⁵ Prior to the enforcement action, how-

obligated persons and 16 public officials. In contrast, for the entire 10 year period from 2002 to 2012, there were enforcement actions brought against 6 government entities, 6 obligated persons and 12 public officials.”) (internal citations omitted).

179. *Id.*

180. Edith Honan & Karen Pierog, *SEC Charges New Jersey with Securities Fraud*, REUTERS (Aug. 10, 2010), <https://www.reuters.com/article/us-sec-newjersey/sec-charges-new-jersey-with-securities-fraud-idUSTRE67H58S20100818>.

181. *See* Ceresney, *supra* note 161.

182. *See id.* (“It is the first self-reporting initiative undertaken by the Enforcement Division since the 1970s.”).

183. *See* Interview with Elaine Greenberg, *supra* note 165 (“The first thing that we set about doing was to train everyone, and we had a muni boot camp that we held for everyone in Philadelphia.”).

184. *The Municipal Securities Rulemaking Board Gallery on Municipal Securities Regulation*, SEC HISTORICAL SOCIETY, https://www.sechistorical.org/museum/galleries/mun/mun_06b_less_than_level.php (last visited Jan. 5, 2022).

185. *See* Andrew Ceresney, former Dir., Div. of Enf’t, U.S. Sec. & Exch. Comm’n, Statement on Jury’s Verdict in Trial of the City of Miami and

ever, there was disagreement within the SEC at the time about bringing the action, and this disagreement was rooted in misunderstandings about the municipal market and the relevant legal authority.¹⁸⁶ Elaine Greenberg has spoken about the instrumental role the Municipal Securities and Public Pensions Unit played in educating other regional offices and preparing them to prosecute violations in this area.¹⁸⁷ More broadly, Greenberg has reiterated the role of the regional offices: “it’s in line with what I was saying about looking at people’s expertise and capabilities as opposed to just being locked into where they are in the country and that certain cases should be brought in certain particular offices because that’s where the conduct is.”¹⁸⁸

These sketches, while only descriptive, are consistent with our data and SEC staff statements. Robert Khuzami has emphasized how the new structure has “created great cartilage” across the SEC, emphasizing a renewed regional office autonomy, as well as knowledge dissemination.¹⁸⁹ As Khuzami put it, one could now have a “staff unit in San Francisco working with somebody in Boston, who was in the asset management.”¹⁹⁰ Per Khuzami, a core design principle of the units was that they would *explicitly* serve to not only develop novel theories of subject matter expertise, but also disseminate it:

When we did that, you had the unit there as a source of competence and excellence and expertise that

Michael Boudreaux (Sept. 14, 2016), <https://www.sec.gov/news/statement/ceresney-statement-2016-09-14.html>.

186. Interview by William Thomas with Martha Haines, former Chief, Off. of Mun. Sec., U.S. Sec. & Exch. Comm’n, in Bethesda, Md. 31 (Mar. 4, 2014) (“There was considerable misunderstanding among other parts of the Commission about municipal financial statements, and there was one attorney who insisted that this couldn’t be fraud because they were required by law to have balanced financial statements, a balanced budget. It’s like, yes, but not by fooling with the numbers and claiming that you’re going to get a billion dollars in federal grants this year which you know you won’t get until the following year, and other things. So that took a lot of time, working with others on the Commission to educate them about how the muni world, the governmental world operated, and then they could see that this was clearly wrong.”).

187. See Interview with Elaine Greenberg, *supra* note 165.

188. *Id.*

189. See Interview with Robert Khuzami, *supra* note 115.

190. *Id.*

others could consult with, but you didn't want to vacuum up every case across the division because you didn't want to create a two-tiered system where somehow the specialized units were viewed as where the real action was and where the best cases were.¹⁹¹

III.

IMPLICATIONS

This Article has shown that the SEC regional offices are not, and have never been, interchangeable sites of securities enforcement. Instead, each regional office—with its specific history, market knowledge, and human experience—represents a dynamic node for policing the various institutions, individuals, and transactions that constitute the ecosystem of the securities markets. Our account of the SEC regional offices, thus, has at least two implications for legal scholars.

First, and at the most basic level, the SEC regional offices complicate prevailing accounts of the securities enforcement ecosystem. In the way that evidence of regional variation in federal administration has pushed some scholars of administrative law and federalism to rethink the benefits—and drawbacks—of federal versus state and local governance, research of securities regulation may benefit from similar nuance.

The securities law enforcement ecosystem is, as various legal scholars have observed, complex. It is comprised of an array of regulatory actors navigating overlapping jurisdictional boundaries. Unlike rulemaking, where the federal government enjoys “near-exclusive” authority to create regulations and set policy, responsibility for upholding the rules is split between federal and state securities enforcers, which share “roughly equal, and concurrent, enforcement jurisdiction.”¹⁹²

191. *Id.*

192. Andrew K. Jennings, *State Securities Enforcement*, 47 *BYU L. REV.* 67, 69, 76 (2022); see also Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 *CONN. INS. L.J.* 107, 114–15 (2004) (describing how following a political movement towards preemption in the 1990s “focused on limiting state authority over securities registration and private litigation of fraud claims” but “left intact state power to publicly enforce their securities fraud statutes”). For a clarification on the difference between rulemaking and enforcement, see Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 *YALE J. ON REG.* 149, 167 (1990) (“[R]egulations prescribe, in advance of their application,

Within this “multi-enforcer” regime,¹⁹³ criminal securities enforcement responsibility is shared between the Department of Justice, on the one hand, and Attorneys General and state-level and local prosecutors, on the other; civil enforcement duties are shared primarily between the SEC, and state securities regulators, as well as the private securities bar.¹⁹⁴

Legal scholars have written extensively about this parallel track system, the site of “significant jurisdictional skirmishing for nearly a century.”¹⁹⁵ In recent years in particular—perhaps in response to the growing complexity and digitization of finance, which has made jurisdictional boundaries blurrier—legal scholars have focused on the institutional and regulatory structures designed to enforce securities laws, and in particular, the normative question of “who should enforce the rules?”¹⁹⁶ Many, for example, have approached the question through the theoretical lens of federalism—for example, offering competitive federalism as a tool to maximize enforcement¹⁹⁷ or grappling with the potential and risks of devolving

normative standards of conduct to which persons subject to agency jurisdiction must adhere in the future. Enforcement powers apply existing rules to past facts, to assure compliance with regulatory standards, both by the entity subject to the standard (but accused of noncompliance) and by other entities similarly situated.”) (footnotes omitted).

193. See Wendy Gerwick Couture, *Principles for State Prosecution of Securities Crime in a Dual-Regulatory, Multi-Enforcer Regime*, 22 U. PA. J. BUS. L. 30 (2019).

194. There are other federal enforcers. The Securities Enforcement Manual notes:

The handling of securities investigations and enforcement actions is complicated by the overlapping jurisdiction of the different agencies that are charged with enforcing federal and state securities laws. An investigation by one regulator frequently arouses the enforcement interest of other regulators. A company or individual may be under investigation by the SEC, by several state securities regulators, and by one or more SROs for alleged violations arising out of the same or related transactions.

THE SECURITIES ENFORCEMENT MANUAL: TACTICS AND STRATEGIES 6 (Michael J. Missal & Richard M. Phillips eds., 2nd ed., 2007).

195. Donald C. Langevoort, *Federalism in Corporate/Securities Law: Reflections on Delaware, California, and State Regulation of Insider Trading*, 40 U.S.F. L. REV. 879, 879 (2006).

196. Brian Knight, *Federalism and Federalization on the Fintech Frontier*, 20 VAND. J. ENT. & TECH. L. 129, 204–06 (2017).

197. See Jones, *supra* note 192.

enforcement duties.¹⁹⁸ Some have analyzed the impact of the present fintech moment on enforcement.¹⁹⁹ More recently, legal scholars have offered institutional accounts of state securities enforcers, the long-undertheorized “local cops on the securities beat” that complement the SEC’s monitoring and enforcement functions.²⁰⁰ This is a rich and sophisticated literature that is not easily summarized; by and large, it traces the familiar contours of broader debates over federalism: state-level securities enforcement offers experimentalism, risk-taking, competition, and responsiveness, but risks balkanization. Federal enforcement benefits from more resources, expertise and centralized oversight, but falters where states can be nimbler and more responsive.²⁰¹

The work of the SEC regional offices—largely unconsidered in this literature—offers a way to move beyond the binary conceptions of federalist securities enforcement. Specifically, the SEC’s institutional structure may offer a potential pathway for meeting this central challenge of securities enforcement, which is, as John Coates writes, “achiev[ing] the benefits of regulatory competition without incurring all of the costs, by retaining federal regulation of securities but establishing some form of competition among federal regulators, as currently exists in part in the sphere of banking regulation.”²⁰² More empirical and theoretical research on this point is needed, but it’s a start.

Beyond securities law, however, the SEC regional offices offer lessons for scholars of administrative and regulatory design. If, as our institutional account above suggests, the SEC regional offices today indeed do not simply administer law in their regions, but also act as laboratories of enforcement, this observation has implications for administrative and regulatory policy.

198. See, e.g., John C. Coates IV, *Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis*, 41 VA. J. INT’L L. 531 (2001) (discussing the costs of devolving securities enforcement to state-level or private enforcers).

199. See, e.g., Knight, *supra* note 196.

200. See Jennings, *supra* note 192, at 82; see also Couture, *supra* note 193, at 56–62.

201. See generally Jones, *supra* note 192, at 116, 126–27.

202. See Coates, *supra* note 198, at 536.

First, our institutional account affirms that “regional” administration need not be determined by, or restricted to, physical space. In a recent article, Jessica Bulman-Pozen theorized that in part due to advances in communications technologies, the future of “regionalism” was a “regionalism without regions.”²⁰³ Bulman-Pozen argues that contemporary regionalism is not defined by geographic space, but instead by “collaborations among state and federal actors [that] need not involve contiguous areas”—like blue states cooperating with other like-minded blue states, for example.²⁰⁴ Our findings fit neatly alongside this, and related, research about federal administration that displaces, or at least qualifies, the primacy of geography with network theory. In the area of securities enforcement, Verity Winship has demonstrated—using SEC enforcement data and leveraging network theory—a “networked response” by securities enforcers to securities violations.²⁰⁵ The SEC regional offices illustrate how decentralized, discretionary enforcement practices can, and have, developed in the Commission’s regional offices. At times, these practices have emerged in response to conditions in the regional office’s correspondent geographic area. In other cases, however, regional offices have exercised their enforcement discretion in response to certain market practices or segments that correspond to the regional office’s market experience or the specific expertise of staffers.

Second, it shows that “regionalism”—that is, administration involving some level of discretionary, decentralized control, be it geographically determined or otherwise—can work in the enforcement context. Law enforcement is one of, if not the, central part of the work of administrative agencies.²⁰⁶ An agency’s institutional design choices “can make it more or less

203. See Bulman-Pozen, *supra* note 8, at 432.

204. *Id.* at 432, 435. Bulman-Pozen also states: “[r]egionalism has been, first, a means of preserving state vitality in the face of perceived need for larger-scale governance. Today, as in the past, the state is most powerful when it stands with others, but there is no need for it to stand next to these others; proximity is not required for mutual identification or for coordination. Regionalism has also diversified exercises of federal power as it has been incorporated into federal programs. In recent years, party-inflected difference has become a more plausible basis than geography for instantiating pluralism in many national programs.” *Id.* at 437.

205. See Winship, *supra* note 24.

206. Barkow, *supra* note 21, at 1130.

prone to over- or underenforcement,”²⁰⁷ and implementing effective structures at the agency level is particularly important, because, as Rachel Barkow has noted, “[m]ost aspects of agency enforcement policy generally escape judicial review” and the “judiciary takes a similarly hands-off approach to an agency’s broader plans for how it will proceed with enforcement, [and] changes in its nonbinding enforcement policies.”²⁰⁸ In a recent article, Roberta Romano asked if agency structure affects agency decision-making.²⁰⁹ Analyzing data on the practices of the Consumer Financial Protection Bureau, Romano concluded that “agency structure influences regulatory strategy.”²¹⁰ While Romano was focused on the relationship between Congress and regulatory agencies—and the independence that Congress grants agencies—the basic point is reaffirmed by our observations of SEC regional offices. In designing enforcement programs, administrative agencies grapple with—in addition to basic issues of efficient case administration and adjudication²¹¹—three central problems: underenforcement (and the related issue of agency capture), overenforcement, and selective enforcement.²¹² The SEC regional offices illustrate how a structure typically associated with disparate enforcement can bolster enforcement outcomes through experimentalism and inter-agency competition between regional offices.

In particular, the SEC regional office matrix structure suggests an organizational model for administrative agencies deal-

207. *Id.* at 1142.

208. *Id.* at 1130, 1132.

209. See Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB’s Design for Administrative Governance*, 36 *YALE J. ON REG.* 273, 274 (2019); see also B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 *J. POLITICS* 176, 176 (2004) (noting that “ideally” administrative agencies should be “designed for efficient and effective policy implementation, as well as democratic accountability”).

210. Romano, *supra* note 209, at 330.

211. See, e.g., Lane & Blair-Smith, *supra* note 31.

212. See Barkow, *supra* note 21, at 1139–59. Barkow also notes that “[w]hile selective prosecution claims can be raised in court, the bar for succeeding on them is a high one, particularly when the agency can explain that it makes difficult selection decisions based on resource constraints, the overall strength of the case, and the government’s enforcement priorities.” *Id.* at 1150 n.91.

ing with complexity. “Complexity,” argues Steven Schwarcz, is “the greatest financial-market challenge of the future.”²¹³ To keep up with fast-moving and complex markets, “[r]egulators need information from industry to remain relevant,”²¹⁴ and moreover, the expertise to process and understand the information. Eric Pan has noted:

Regulators must manage complexity. The development of new financial products stresses the capacity of regulators to keep up and understand how to regulate these instruments. Thus, regulators need to develop the relevant expertise to understand how financial transactions are conducted, the terms of those transactions, the legal and financial obligations of the different parties, and, in the case of prudential regulation and systemic-risk regulation, the level of risk taken on by financial firms.²¹⁵

Robert Khuzami, the SEC Enforcement Director that spearheaded the post-Madoff reorganizations, cites his experience with complicated derivatives as the genesis for the post-Madoff reorganizations.²¹⁶ Moreover, even after identifying complex frauds, prosecuting them is difficult because as Donald Langevoort notes, “[g]iven the inherent ambiguity and complexity of risk in financial firms, the truth is always contestable.”²¹⁷ Accordingly, John Coffee notes, “[o]rganizational crime and misconduct cannot be effectively addressed without designing a system that can investigate complex matters thoroughly and in a manner that neither compromises the integrity of the study nor imposes unacceptably high costs on the government.”²¹⁸

213. Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 213 (2009).

214. *Id.* at 264.

215. Eric J. Pan, *Understanding Financial Regulation*, 2012 UTAH L. REV. 1897, 1934 (2012).

216. Interview with Robert Khuzami, *supra* note 115 (“It gave me a great appreciation for the expertise. I think it’s that idea that eventually spawned the decision to go forward and create specialized units in part of the Enforcement Division.”).

217. DONALD C. LANGEVOORT, SELLING HOPE, SELLING RISK: CORPORATIONS, WALL STREET, AND THE DILEMMAS OF INVESTOR PROTECTION 148 (2016).

218. JOHN C. COFFEE, CORPORATE CRIME AND PUNISHMENT 10 (2020).

The SEC's matrix structure offers a method of carrying out a federal centralized enforcement function, where Washington D.C. maintains its oversight and coordination roles, but the creation of theories of prosecution becomes dispersed through the regional laboratories. The SEC's structure provides another example supporting the emergent literature of federal regionalism—but one in the enforcement sphere.

CONCLUSION

The structural reorganizations throughout the SEC's history—which modulated the discretion of the regional offices, and most recently, created and institutionalized market-area specializations within regional offices—suggest that, at the very least, SEC officials believe that organizational design impacts enforcement outcomes. SEC regional offices were originally designed as semi-autonomous sites of securities law enforcement, but, over time, enforcement authority was progressively consolidated and centralized in Washington D.C. While generally understood as regional monitors today, descriptive data and evidence from post-Madoff reorganizations suggest that, while still local enforcers, regional offices have evolved into laboratories for the creation of new theories of enforcement that are then adopted nationwide. With the creation of subject matter specific units in the aftermath of the Madoff case, the SEC has reanimated the historical and specific institutional knowledge of regional offices with new reporting lines that both diffuse knowledge and disperse authority throughout the SEC's various offices. The work of the Philadelphia Regional Office, which ultimately led the SEC's municipal securities unit, illustrates how the new regional structure facilitates, channels, institutionalizes, and disseminates knowledge.

The design of the SEC regional offices has policy implications. Other regional agencies may consider implementing the SEC's matrix reporting structure. The SEC's new anatomy offers a method of carrying out a federal centralized enforcement function, where D.C. maintains its oversight and coordination roles, but the creation of theories of prosecution becomes dispersed through the regional laboratories. The SEC's structure provides another example supporting the emergent literature of federal regionalism—but one in the enforcement sphere. In short, the history and recent evolution of SEC re-

gional office enforcement offer a novel model for regional decentralized administration, as well as support for broader normative theories regarding federal governance. Moreover, a close look at the SEC's office structure raises a host of questions and paths for further research regarding the role of the regional administrative office.