

A Former SEC Trial Attorney on Fighting Enforcement 'Overreach'

Also, OCC nominee has lengthy list of bank clients; CFPB union applauds court ruling reinstating probationary employees; Pulte sworn in at FHFA

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Friday Q and A: The Republican-led SEC is doubling down on its mission to promote capital formation and provide more access to the markets for companies and investors. On the enforcement side, that has meant shifting resources, dropping prominent cases targeting crypto firms and a lot of talk about ending “regulation by enforcement.”

This week we sat down with a former trial lawyer at the commission who argues that much more needs to be done to make the effort stick. **Nick Morgan**'s Investor Choice Advocates Network is looking to set a “legal bulwark against overreach.” The non-profit works with law firms to provide pro bono legal representation for people facing SEC charges for offenses that don't involve fraud – but could cost millions of dollars to fight.

ICAN also files amicus briefs in cases that could impact the enforcement program. One of its best known filings was in the Supreme Court case that curbed the SEC's use of administrative courts. It was joined by **Elon Musk** and **Mark Cuban**, both of whom have had high-profile clashes with the agency.

Morgan says that regulation by enforcement will never go away entirely, and stresses that the real way to make lasting change is to establish legal precedents that keep the SEC's authority in bounds. Read on to hear about his litigation strategies and why he

wishes that some of those cases against digital asset companies had gone forward. What follows is our (lightly edited and condensed) conversation.



Nick Morgan

Capitol Account: Tell us about your career?

Nick Morgan: I was a senior trial counsel in the [SEC's] Los Angeles regional office...I was there for seven years, and enjoyed it very much...The assistant director I came up under was very fond of going after Ponzi schemes. We did one after another...After the SEC, I was in private practice for 18 years at big law firms, primarily DLA Piper and Paul Hastings.

CA: What led you to start ICAN?

NM: At first it was a sort of a side project at Paul Hastings, [with] my partner, **Tom Zaccaro**. We met at the SEC and have been friends and practiced together since...We created the non-profit for a number of reasons, but one of them was so that we would have a way to inform courts about a perspective we didn't think was being shared. We wanted to file amicus briefs.

CA: On what kind of topics?

NM: Often it was this sort of investor choice issue, where you've got a defendant arguing, 'I didn't do it.' And you've got the SEC saying, 'There's a legal violation here.' But no one is saying: Even if the defendant did it, if the SEC gets its way, the impact – particularly over a long period of time – will end up restricting investor choices. No one was in a position to make that argument.

CA: How did ICAN move to representing actual defendants?

NM: We frequently would get approached by people: 'I just got an SEC subpoena and I need to respond. Can I engage you?' We'd say yes – and then we'd tell them our price tag.

CA: Big law firms aren't cheap.

NM: It wasn't just being at a law firm that charged high hourly rates. It's also a function of the length of SEC matters, even at more modest rates. It's very expensive [to have] a lawyer start during the exam process, go through the investigation process and then through trial. You're talking millions of dollars.

CA: So the people you represent aren't necessarily well-heeled executives?

NM: They tend to be individuals who...don't have insurance coverage or they're not being indemnified by their current or former employer. They're paying out of their own pocket...We looked around and thought, who is representing these people? And the answer is, nobody. These SEC matters are civil, there is no right to a public defender, for example, that you might be entitled to in a criminal matter.

CA: How did this play out with your day job?

NM: Paul Hastings did not want ICAN...to represent people. It presented too many potential conflict issues and other complications that, very understandably, the firm didn't want. So at that point I decided to...devote myself a hundred percent of the time to ICAN.

CA: How do you choose cases to get involved with?

NM: Obviously there are a large number of folks who could use free representation. We try to pick cases where there is a potentially precedential issue...So far we have limited our clients to those who are not accused of fraud, not accused of misusing investor money. These tend to be cases where the SEC has alleged violations of registration provisions of one kind or another, either registrations of securities offerings or registrations as a broker dealer. But the primary criteria right now is that the case itself has to have an impact beyond just that one defendant so that we're leveraging our efforts and resources.

CA: What's an example?

NM: We represent three individuals who were sued [by the SEC] in 2015. They were low-level employees at a company that was selling life settlements.

CA: These are life insurance policies that are sold to third parties. The policy holder gets a cash payout and investors are entitled to the full death benefit. Does the SEC regulate those?

NM: The company had sought legal counsel about whether life settlements are securities under Howey.

CA: That's the Supreme Court case that lays out a test for what constitutes a security within the SEC's oversight.

NM: Our clients received advice of counsel that these instruments were not securities under Howey, based on a ruling out of the D.C. Circuit – decades before. [That] is the SEC's home court...But the SEC has the ability to ignore that ruling and sue in other circuits, which is what it did in our clients' case.

CA: Your case is in California, in the 9th Circuit. What's happened over the past decade?

NM: The SEC sued the company, sued the principals and management. Those cases have all gone away, they've settled or got judgments. What's left is the case against our three clients who are not accused of fraud, not accused of harming investors. They're accused of participating in an unregistered offering of securities and of not registering as securities brokers...The other issue is whether the SEC is entitled to disgorgement of the money that these people received as employees. The SEC wants them to give up every dime they earned at the company, and pay penalties – despite the fact that there was no fraud and there are no harmed investors.

CA: The trial court ruled for the SEC, and your **appeal was argued** late last year.

NM: The decision is due out any time. I don't know which way the three-judge panel will go. But if we lose on either of those issues, it actually presents a pretty good potential split among the circuits.

CA: Meaning it could end up in the Supreme Court?

NM: We are committed to seeing this case through to wherever it goes.

CA: Part of ICAN's mission is to fight against 'SEC overreach.' That's a term that was used often to describe many of Gary Gensler's regulations. Is it different in the enforcement context?

NM: You can have SEC overreach like in the last administration, [where] there are rules being promulgated that would extend the SEC's authority beyond what's authorized by statute or the Constitution. That is largely addressed by industry groups. The [enforcement] overreach happens...incrementally on a case-by-case basis, as a byproduct of the fact that people can't afford counsel.

CA: How so?

NM: Because the SEC settles with everyone. It accumulates...a body of what it views to be precedent, at least internally. It's not technically precedent from an appellate court decision perspective. But that means over time you get a very pro-SEC landscape... You've got no one pushing back.

CA: What about financial firms? They have plenty of money, but they don't often fight the SEC in court either.

NM: These are regulated industries, like broker dealers and investment advisers. Do you want to be in the business of litigating with the SEC, your primary regulator? Is that a good idea when the next day their exam staff is going to be [at the firm] looking at new issues? It doesn't take a retaliatory mindset at the regulator, which I don't think exists, to be concerned about that issue.

CA: What's the broader point?

NM: At a minimum, we should all want to see a judge weigh in on some of these issues to test the SEC's theory – particularly where you've got an individual...whose career and livelihood will be ruined.

CA: ICAN also has a focus on 'breaking down barriers to capital markets.' How does that fit with enforcement overreach?

NM: If the SEC presents the capital markets as rife with regulatory ambiguity...that makes [them] seem to ordinary people like a very scary place...These excessive fines and penalties and regulation by enforcement causes uncertainty. We view that as making capital formation a less attractive alternative to other ways of getting money – borrowing, looking for donations, that sort of thing.

CA: Regulation by enforcement is almost a buzzword phrase now. What are your thoughts about it?

NM: This is where the SEC changes policy or enacts a new policy on a case-by-case basis, as opposed to doing it by rule...There's some discussion about maybe we should just prohibit the SEC from engaging in regulation by enforcement. That would be tough in my view. Because potentially every new enforcement case involves different facts than what is already on the books.

CA: How should it be addressed?

NM: I think there are guardrails you can put in place to cabin in regulation by enforcement...One important guardrail is to make sure that some defendants have the resources to fight back and get a decision from a judge. That is where the system falls down – if no one's fighting back.

CA: What do you think of the SEC, now under Republican leadership, dismissing some of Gensler's big crypto cases?

NM: While absolutely fantastic for the defendants in those cases, for the rest of us who would like some legal certainty, or are not happy with the current state of judicially created law, it means there's a missed opportunity for some clarity...From an intellectual perspective, it's unfortunate that we won't get some answers to those questions because the crypto industry had the resources to defend themselves and get to a judicial decision in a way that most people can't.

CA: There's a view out there that along with the obvious regulatory shift at the SEC, there will be a lot less enforcement. Do you agree?

NM: We heard the same kinds of things in the prior Trump administration, and that clearly wasn't the case. If you look at the annual enforcement report and the number of cases that are brought, one of the lowest numbers...was during the Gensler term. I just don't buy it.

CA: Will there be a shift in priorities? Republicans in the past have tended to focus on Ponzi schemes and other types of activity that targets retail investors.

NM: The SEC does have limited resources – they have plenty of resources, but they're limited...I do think that staff and resources [will be] reoriented toward fraud claims. We'll see more boiler room fraud [investigations], cases that impact retirees and people with not a lot of means.

CA: ICAN recently released a paper that detailed a number of policy fixes that the SEC should undertake. Any that you would especially highlight?

NM: One thing that should be changed institutionally is the incentive structure for the enforcement staff to bring cases. In general, the staff is rewarded internally for bringing a new enforcement action...And there is not much of a nuance there – does an Enron case get more credit than some small infraction by an investment adviser somewhere? No. They tend to be measured uniformly. Likewise, there's no

disincentive for bringing bad cases. If you can get the commission to approve it, it can be a ticky-tack, minor case. It can be a case that loses in court.

CA: ICAN's priorities seem to align with the new SEC's agenda. Are you worried that you're not going to have much to do soon?

NM: We are not. There are plenty of cases out there that are already in the works. We have calls on a regular basis [about] existing issues that still need to be addressed. And, you know, the future is long...We don't view this as partisan at all. We view this as a fairness issue and [one] that should have appeal across the board: How do we make the SEC's enforcement activities consistent with making capital markets as broadly available to as many people as possible?

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Disclosure: Comptroller nominee Jonathan Gould's financial and ethics disclosures were released this week, and they highlight his professional ties to many of the large banks he would be charged with overseeing.

An attorney whose career has included stints at BlackRock and as OCC general counsel in the first Trump administration, Gould is currently a partner in Jones Day's financial regulatory practice. He reported \$1.5 million in income from the role, and estimated that he would receive another \$1 to \$5 million when the firm cashes him

out. Gould's total assets came in north of \$2.9 million (though that is a low estimate – more on that below).

Gould's extensive client list included numerous big firms that operate OCC-regulated national banks: JPMorgan Chase, Wells Fargo, PNC, Capital One, KeyCorp, M&T, Citizens and Flagstar. The disclosure also shows he represented the Bank Policy Institute, American Bankers Association, U.S. Chamber of Commerce, Goldman Sachs, crypto payments company Circle Internet Financial and the American Investment Council, the private equity trade group.

Gould's ethics [agreement](#), dated March 10, didn't make clear what his plans were for recusing himself from meeting with former clients. He didn't immediately respond to a request for comment.

Gould did commit to selling off scores of blue-chip stocks, including big banks. The investments were generally valued at \$15,000 or less.

It's hard to put a precise number on any nominee's wealth because disclosure forms allow officials to report assets within a broad range. Gould, for example, reported about 500 separate holdings with a value of between \$1,000 and \$15,000 (most of them were stocks). Those assets could be worth between \$500,000 and \$7.5 million.

Reinstated: Recent court rulings reversing the Trump administration's mass dismissal of probationary employees drew praise from the CFPB's union, which has been arguing for weeks that about 200 firings during Acting Director **Russell Vought's** first week on the job were illegal.

Cat Farman, the union president, praised an [order](#) yesterday from a district judge in Maryland (which followed a similar decision from a California federal court hours earlier) directing the bureau to reinstate the employees and follow established

procedures for reductions in force if it wants to jettison them. Notably, the case also involves the FDIC and the Treasury Department.

The NTEU chapter also issued a statement from a CFPB data scientist named **Jasmine McAllister**, who countered the administration's claims that the firings at the bureau were related to job performance.

“I received a termination letter at 9 p.m. that didn't even have my name on it, but claimed I was being terminated for performance reasons. Everyone else got the same email that night, with no notice to our managers, meaning the performance justification couldn't possibly be true. It's common sense for the court to recognize this.”

On the Job: Bill Pulte was sworn in today as FHFA director. “I am honored by President Trump's trust as we usher in a Golden Age of housing and mortgage accessibility,” Pulte said in a statement. “Safe and sound housing markets are the foundation of American homeownership, so I will be laser-focused on the safety and soundness of our regulated entities as we ensure that the dream of homeownership becomes a reality for as many Americans as possible.”

On his newly active X [account](#), Pulte also said he had spoken with the CEOs of Fannie Mae and Freddie Mac and that he and the two management teams would be conducting an “immediate review” of their 2025 budgets. “You didn't really think I'd stop tweeting did you,” he posted yesterday.

One (humorous) head fake: The initial press release emailed out to announce Pulte's swearing in had the wrong headline, trumpeting “FHFA and U.S. Treasury Announce Amendments to the Preferred Stock Purchase Agreements (PSPAs).” It seems that was old news. FHFA did make such an announcement – back on Dec. 31.

Next Week:

- On Monday at 12:00 p.m., Acting SEC Chairman **Mark Uyeda** speaks at an Investment Company Institute conference. He will be followed by **Natasha Vij Greiner**, the director of the investment management division, at 4:30 p.m.
- On Tuesday at 11:10 a.m., SEC Commissioner **Caroline Crenshaw** speaks at the ICI event.
- On Tuesday at 1:25 p.m., Acting Comptroller **Rodney Hood** speaks at a Consumer Bankers Association conference in Orlando.
- On Wednesday at 2:00 p.m., the PCAOB holds an open meeting where staff members will brief the board on audit firms' implementation of quality control standards.
- On Wednesday at 2:30 p.m., Fed Chairman **Jerome Powell** holds a press conference.
- On Friday at 1:00 p.m., the SEC's crypto task force holds a roundtable discussion on the "security status" of tokens.



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