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THE SCOPE OF THE JURY TRIAL RIGHT IN SEC ENFORCEMENT ACTIONS

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INTRODUCTION

The Seventh Amendment to the United States Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[1] In *Tull v. United States*,[2] the Supreme Court held that this jury trial right extends to the finding of "liability" requisite to the imposition of a monetary penalty in a civil government en-

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1. U.S. CONST. amend. VII.
2. 481 U.S. 412, 414 (1987).

forcement action brought in federal district court.[3] This jury trial right has been recognized as applying in enforcement actions brought by the U.S. Securities and Exchange Commission (SEC or Commission) seeking civil money penalties.[4]

To date, few defendants have raised and few courts have considered the scope of the "liability" finding to which a defendant is entitled from a jury (as compared to a judge) before a monetary penalty may be imposed in an SEC enforcement action.[5] In particular, no court has decided whether it is sufficient for Seventh Amendment purposes for a jury to find the charged securities law violation alone, or whether the jury must also make the particular factual findings set forth in the penalty provisions of the federal securities laws that expose a defendant to a particular penalty tier. This question is of significant practical importance: just because a jury finds that the SEC has proved each element of the alleged securities law violation, it does not follow that the jury has made all factual findings that are required to impose a particular statutory penalty. What must be shown under the federal securities laws' penalty provisions to trigger a given penalty may be more than what must be shown to establish a violation in the first instance. This is especially so with regard to strict liability and negligence-based securities law violations.

3. *Id.* at 427.

4. *See* SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002) (Posner, J.) (holding that defendant was entitled under *Tull* to a jury trial as to liability when the SEC sought a civil money penalty); SEC v. Spencer Pharm., Inc., 58 F. Supp. 3d 165, 166 (D. Mass. 2014) ("[T]here is a right to a jury trial to determine liability for civil penalties, but not to determine the amount of civil penalties." (internal quotation marks omitted) (citing *Tull*, 481 U.S. at 425–27)); SEC v. Mattera, No. 11 Civ. 8323, 2013 U.S. Dist. LEXIS 174163, at *44 (S.D.N.Y. Dec. 9, 2013); SEC v. Badian, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011) (stating that "determination of whether the facts are such that the defendants can be subjected to a civil penalty" is a question for the jury under *Tull*); SEC v. Solow, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008) (holding that defendant had a "constitutional right to have a jury determine his liability"), *aff'd* 308 F. App'x 364 (11th Cir. Jan. 21, 2009); SEC v. Kopsky, 537 F. Supp. 2d 1023, 1026 (E.D.Mo. 2008). Indeed, the SEC has acknowledged the application of *Tull* to enforcement actions seeking penalties in federal district court. *See* SEC v. Gowrish, 510 F. App'x 588, 590 (9th Cir. 2013) ("*Tull* . . . remains law and controls in this case."); Hill v. SEC, No. 1:15-CV-1801, 2015 U.S. Dist. LEXIS 74822, at *36–37 (N.D. Ga. June 8, 2015) ("The SEC does not dispute Plaintiff's argument that an enforcement action for civil penalties is clearly analogous to the 18th-century action in debt, and this remedy is legal in nature." (internal citations and quotation marks omitted)).

5. *Solow*, 554 F. Supp. 2d at 1367 (noting the "uncertainty" regarding the findings that a jury must make before a judge may impose a particular penalty).

The issue considered here is the scope of a defendant's Seventh Amendment right to a jury finding of "liability" before a particular monetary penalty may be imposed in an SEC enforcement action. This analysis is done in light of the Supreme Court's more recent jurisprudence holding that a criminal defendant's Sixth Amendment right to a jury trial extends to all facts that increase the statutory maximum sentence that a judge may impose. This Article concludes that, following the Supreme Court's decision in *Tull*, the Seventh Amendment similarly entitles a defendant in an SEC enforcement action brought in federal district court[6] to a jury finding as to all facts that set the statutory maximum civil money penalty that a district judge may impose. It should make no difference whether the facts on which the maximum penalty turns are located in the statutory provision defining the violation itself or are instead located elsewhere in the statutory scheme and characterized as penalty enhancers.

In other words, the question of liability on which *Tull* holds a defendant is entitled to a jury trial extends beyond the elements of the violation proper to include all factual findings that can lead to a more severe maximum sanction. It is not enough for the jury simply to find that there was a securities law violation if an enhanced civil money penalty is to be imposed. One's liability for purposes of the Seventh Amendment jury trial right cannot be assessed apart from the maximum sanction to which one is ultimately exposed. Indeed, the very definition of liability is "the state of being legally responsible for something . . . (such as the payment of money)."[7] This Article ends with some practical ramifications of its understanding of

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6. In *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442 (1977), the Supreme Court held that, notwithstanding the Seventh Amendment jury trial right, Congress can, at least in some circumstances, assign to an administrative tribunal the resolution of a claim created by Congress and on which a defendant would be entitled to a jury trial were the matter litigated in federal court. *Id.* at 450. One court has applied the teaching of *Atlas Roofing* to SEC enforcement proceedings brought in an administrative tribunal. *Hill*, 2015 U.S. Dist. LEXIS 74822, at *40–42 (holding that an SEC enforcement action for civil penalties does not guarantee a right to a jury trial under the Seventh Amendment because "Congress may assign the adjudication of cases involving so-called public rights to an administrative agency . . . ."); *see also* Wise, No. 3-11247, at *5 (ALJ Feb. 18, 2005) (holding that, as a result of the decision in *Atlas Roofing*, the respondent had no Seventh Amendment jury trial right in an enforcement proceeding brought in an administrative forum).

7. *Liability*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/liability (last visited Apr. 6, 2016); *see also liability*, BLACK'S LAW DICTIONARY 914 (6th ed. 1990) (defining "liability" as the "condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden").

the Seventh Amendment jury trial right as applied to the SEC's civil money penalty regime.[8]

I.
RIGHT TO A JURY TRIAL IN SEC ENFORCEMENT ACTIONS

Tull is the seminal Supreme Court case concerning the right to a jury trial in a civil government enforcement action. The defendant in *Tull* was a real estate developer sued by the federal government for illegal dumping under the Clean Water Act (CWA).[9] The government sought civil penalties of $22.8 million against the developer, as the CWA provided for a maximum penalty for an illegal dumping violation of $10,000 per day.[10] The district court judge denied the developer's request for a jury trial, and found after a fifteen-day bench trial that the developer had "illegally filled in wetland areas" in violation of the CWA.[11] The judge then imposed a civil penalty against the developer of $325,000.[12] The Fourth Circuit affirmed the trial court's judgment on appeal, rejecting the developer's argument that he was entitled to a jury trial under the Seventh Amendment.[13] The Supreme Court granted certiorari and reversed.[14]

The question presented in *Tull* was "whether the Seventh Amendment guaranteed . . . a right to a jury trial on both liability and the amount of penalty in an action instituted by the Federal Government seeking civil penalties and injunctive relief . . . ."[15] As noted above, the Seventh Amendment "preserved" the right to a jury trial "[i]n Suits at common law."[16] The Supreme Court has long interpreted the Seventh Amendment to afford a right to a jury trial "in those actions that are analogous to 'Suits at common law.'"[17] The *Tull* Court observed that "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of

8. Although we are focused in this Article on SEC enforcement actions, our reasoning may also apply to civil enforcement actions brought by other federal agencies.

9. Tull v. United States, 481 U.S. 412, 414 (1987).

10. *Id* at 414–15.

11. *Id.* at 415.

12. *Id.* at 420.

13. *Id.* at 416.

14. *Id.* at 417.

15. *Tull*, 481 U.S. at 414.

16. U.S. Const. amend. VII.

17. *Tull*, 417.

law."[18] Accordingly, the Court held that the defendant had "a constitutional right to a jury trial to determine his *liability* on the legal claims."[19] Notably, the Supreme Court was unanimous on this point.[20]

The *Tull* Court then turned to the question of whether the defendant "additionally has a Seventh Amendment right to a jury assessment of the civil penalties."[21] The Court noted that, while the CWA "did not explicitly state whether juries or trial judges were to fix the civil penalties," the legislative history showed "that Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties after liability is found."[22] The Court observed that "[t]he Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability."[23] Accordingly, the Court concluded that "Congress' assignment of the determination of the amount of civil penalties to trial judges . . . does not infringe on the constitutional right to a jury trial."[24] In other words, the Court held, "a determination of a civil penalty is not an essential function of a jury trial, and . . . the Seventh Amendment does not require a jury trial for that purpose in a civil action."[25]

A decade later, the Supreme Court explained that *Tull* recognized a "right to a jury trial on all issues relating to liability for civil penalties . . . ."[26] While the *Tull* opinion stated that this jury trial right does not extend to a determination of the amount of the penalty to be imposed, the Supreme Court has since observed that this statement in *Tull* may have been dicta.[27] In any event, the Court has

18. *Id.* at 422.

19. *Id.* at 425 (emphasis added).

20. *Id.* at 425; *id.* at 427 (Scalia, J., concurring in part and dissenting in part) (joining majority opinion on defendant's right to jury trial on the issue of liability).

21. *Id.* at 425.

22. *Id.* at 425.

23. *Tull*, 425–26.

24. *Id.* at 426–27.

25. *Id.* at 427. On this point, Justices Scalia and Stevens dissented. They would have gone further than the majority and recognized a right to a jury trial not only on the question of the defendant's "liability," but also on the amount of the civil money penalty to be imposed. *Id.* at 427–28 (Scalia, J., concurring in part and dissenting in part).

26. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 354 (1998).

27. *Id.* at 354 n.8. We assume for purposes of this Article that the distinction drawn in *Tull* between liability and penalty amount is the law. If that is not the case, it may be that the defendant is entitled to a jury finding not only as to the facts that set the statutory maximum penalty to which the defendant is exposed, but also the precise penalty amount to be imposed within that range. *See* Grant R.

explained that *Tull*'s disparate treatment of the liability determination and the penalty amount was founded, at least in part, on the ground that "the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding."[28] Furthermore, there is a difference between determining the penalty to be imposed within the range fixed by a jury's factual findings, on the one hand, and the finding of facts that expose a defendant to a higher maximum penalty, on the other. Even as the former may be for the judge, the jury trial right attaches to the latter, as we discuss below.

Since the decision in *Tull*, lower courts have consistently recognized the application of its holding to SEC enforcement actions seeking civil money penalties.[29] The *Tull* Court did not, however, specify what findings are encompassed within a jury's "liability" finding that is requisite to a court's imposition of a civil money penalty, and the Supreme Court has not had a subsequent opportunity to consider that question. Nor have the lower courts offered much guidance concerning what is encompassed by the concept of "liability" that must be found by the jury before the trial judge may impose a penalty.

In SEC enforcement actions, courts and lawyers have mostly assumed, without discussion, that a jury need only return a general verdict finding a securities law violation, at which point the judge can (1) determine the appropriate penalty up to the statutory maximum authorized based on the facts found by the jury; and (2) make factual findings beyond those found by the jury regarding the presence of any additional facts set out in the statutory penalty regime that increase the maximum penalty that may be imposed on a defendant for a given violation.[30] To the extent this practice is based

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Mainland, Note, *A Civil Jury in Criminal Sentencing:* Blakely, *Financial Penalties, and the Public Right Exception to the Seventh Amendment*, 106 COLUM. L. REV. 1330, 1350 (2006) (arguing that "even though *Tull* is factually distinguishable from *Blakely*—the latter deals only with the Sixth Amendment, not the Seventh—it would make little sense to continue to apply an outdated, and possibly unconstitutional, liability/penalty dichotomy to the Seventh Amendment").

28. *Feltner*, 523 U.S. at 355.

29. *See supra* note 4.

30. *See* SEC v. Tourre, 4 F. Supp. 3d 579, 593–94 (S.D.N.Y. 2014) (imposing Second- and Third-Tier civil penalties after jury returned general verdict); SEC v. Solow, 554 F. Supp. 2d 1356, 1366–67 (S.D. Fla. 2008) (imposing Third-Tier civil penalties after jury returned general verdict); SEC v. Ingoldsby, No. 88-1001-MA, 1990 WL 120731, at *6 (D. Mass. May 15, 1990) (granting disgorgement and declining to impose additional civil penalty after jury returned general verdict). *But see* SEC v. Novus Techs., LLC, No. 2:07-CV-235-TC, 2010 U.S. Dist. LEXIS 111851, at *41 (D. Utah Oct. 20, 2010) (holding that the state of mind required for imposi-

on the belief that the Seventh Amendment entitles a defendant to no more than a general determination that a securities law violation has occurred, it cannot be reconciled with *Tull* and is inconsistent with how the Supreme Court has addressed what it has described as an "analogous"[31] issue in the criminal sentencing context.

II.
RIGHT TO A JURY TRIAL AS TO PENALTY ENHANCEMENTS IN CRIMINAL CASES

The Sixth Amendment provides that those accused of a crime have the right to a trial on those accusations by an impartial jury.[32] This jury trial right "requires that each element of a crime be proved to the jury beyond a reasonable doubt."[33] Beginning more than a decade ago with the Supreme Court's decision in *Apprendi v. New Jersey*,[34] the Supreme Court has held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[35] The Court held that this principle applies regardless of whether the fact is identified in the statutory regime as an "element" of the offense or a "sentencing factor."[36] The Court "dismissed the possibility that a State could circumvent the protections of [the Constitution] merely by 'redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'"[37]

The defendant in *Apprendi* was charged with and pled guilty to possession of a firearm for an unlawful purpose, but his maximum term of imprisonment for that crime was increased from ten years

tion of Third-Tier penalties is a question for the jury). For a discussion of the penalty tiers in an SEC enforcement action, *see infra* Part III.

31. *Feltner*, 523 U.S. at 355.

32. U.S. Const. amend. VI.

33. Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013).

34. 530 U.S. 466 (2000).

35. *Id.* at 490.

36. *Id.* at 478, 492–94 (stating that the label of "element" or "sentencing factor" is irrelevant, and the "relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"); *see also* United States v. Leahy, 438 F.3d 328, 336 (3d Cir. 2006) ("[F]or purposes of sentencing under *Apprendi* and *Blakely*, whether a fact is labeled a sentencing fact or an element of the offense is of no consequence.").

37. *Apprendi*, 530 U.S. at 485 (quoting Mulvaney v. Wilbur, 421 U.S. 684, 698 (1975)).

to twenty years based on the trial judge's determination that the crime was committed with racial bias.[38] The State argued that the racial bias enhancement was a "sentencing factor" rather than an "element" of the offense, and thus was not subject to the Sixth Amendment's jury trial right.[39] The Supreme Court rejected this argument, concluding "that there was no 'principled basis for treating' a fact increasing the maximum term of imprisonment different than the facts constituting the base offense."[40] The relevant question, the Court explained, is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict[.]"[41] If so, then the finding is one that must be made by the jury based on proof beyond a reasonable doubt.[42]

By contrast, a true "sentencing factor" that need not be found by a jury is a fact "that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense."[43] Indeed, the *Apprendi* Court was careful to note that it was in no way "suggest[ing] that it was impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute."[44] To the contrary, the Court observed that "judges in this country have long exercised discretion of this nature in imposing sentences *within statutory limits* in the individual case."[45]

The Court's analysis in *Apprendi* began with Oliver Wendell Holmes, Jr.'s observation that "'[t]he law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them.'"[46] As the Court observed, New Jersey threatened the defendant "with certain pains if he unlawfully possessed a weapon and with additional pains if he selected victims with a purpose to intimidate them because of their race."[47] Thus, the *Apprendi* Court concluded, "[a]s a matter of simple justice, it

38. *Id.* at 469–71.

39. *See id.* at 471–72.

40. Alleyne v. United States, 133 S. Ct. 2151, 2157 (2013) (quoting *Apprendi*, 530 U.S. at 476).

41. *Apprendi*, 530 U.S. at 494.

42. *Id.* at 492.

43. *Id.* at 494 n.19.

44. *Id.* at 481.

45. *Id.*

46. *Id.* at 476 (quoting OLIVER W. HOLMES, JR., THE COMMON LAW 40 (M. Howe ed. 1963)).

47. *Apprendi*, 530 U.S. at 476.

seems obvious that the procedural safeguards designed to protect [the defendant] from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment."[48] The State could not avoid this conclusion with careful labeling: "Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently."[49]

The Court based this conclusion in part on the Fourteenth Amendment's "proscription of any deprivation of liberty without 'due process of law.'"[50] The Court went on to observe that the "historical foundation" for this principle extended back to the common law respect for the role of the trial by jury "'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties.'"[51] Of particular relevance to our discussion here, the Court invoked the historic value placed on jury trials in *both* the civil and criminal context in support of its conclusion that a criminal defendant has a right to a trial by jury on any fact that increases the maximum sentence to which the defendant is exposed.[52]

One challenge facing courts in the wake of *Apprendi* has been how to define a "crime" as opposed to a "sentencing factor."[53] For example, the Federal Sentencing Guidelines purported to guide the district courts in their determination of the appropriate sentence up to the maximum set by statute. But in practice, the Guidelines mandated an increased sentence based on the presence of facts found by the judge under a preponderance of the evidence standard.[54] Accordingly, in *United States v. Booker*,[55] the Supreme Court held that this mandatory sentencing guidelines regime based on judge-found facts ran afoul of the jury trial right as articulated in *Apprendi*.[56] To remedy this constitutional flaw in the Sentencing Guidelines, the Supreme Court interpreted the Guidelines as advisory, serving only as a factor to guide a district judge in his or her exercise of sentencing discretion within the range permitted by the

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48. *Id.*
49. *Id.*
50. *Id.* at 476 (quoting U.S. CONST. amend. XIV).
51. *Id.* at 477 (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).
52. *Id.* at 479–80 n.6 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES (dealing with civil jury trials) and 4 WILLIAM BLACKSTONE, COMMENTARIES (dealing with criminal jury trial)).
53. Alleyne v. United States, 133 S. Ct. 2151, 2156 (2013).
54. United States v. Booker, 543 U.S. 220, 233–35 (2005).
55. *Id.*
56. *Id.* at 243–45.

offense of conviction, but not mandating any particular sentence within that range.[57]

Similarly, numerous federal (and state) criminal statutes define a base offense subject to a given sentence, but then set out various factors that, if also present, increase the statutory maximum sentence to which the defendant is exposed for that base offense. For example, mail and wire fraud carry a statutory maximum sentence of twenty years in prison and a $250,000 fine, unless that offense "affects a financial institution," in which case the statutory maximum sentence increases to thirty years in prison and a $1 million fine.[58] Similarly, health care fraud generally carries a statutory maximum sentence of ten years in prison and a $250,000 fine.[59] But the statutory maximum term of imprisonment increases to twenty years if "the violation results in serious bodily injury" and up to life in prison "if the violation results in death."[60] And, for all federal offenses, the statutory maximum fine that may be imposed is the greater of either the fine set forth in the statute that the defendant was convicted of violating, or "twice the gross gain or twice the gross loss" resulting from the violation.[61] Since *Apprendi*,[62] courts have recognized that these additional facts must be proven to and found by a jury beyond a reasonable doubt to trigger the application of the enhanced statutory maximum sentence.[63]

57. *Id.* at 245.

58. 18 U.S.C. §§ 1341, 1343, 3571(b)(3) (2012).

59. *Id.* §§ 1347, 3571(b)(3).

60. *Id.*

61. *Id.* § 3571(d).

62. Technically, these holdings are more a product of the Supreme Court's decision in *Jones v. United States*, 526 U.S. 227 (1999), than of *Apprendi*. *Jones* held that federal statutes should be interpreted to require a jury finding on these penalty-enhancing factors, so as to avoid the constitutional question addressed a year later in *Apprendi*. *Id.* at 242–44.

63. *See* United States v. Trudeau, 562 F. App'x 30, 34–35 (2d Cir. 2014) (holding that the statutory maximum sentence for wire fraud conviction was twenty years in the absence of a jury determination that the offense "affected a financial institution"); United States v. Webb, 655 F.3d 1238, 1255–58 (11th Cir. 2011) (holding that the jury must determine whether the health care fraud offense "resulted in death"); United States v. Pfaff, 619 F.3d 172, 174–75 (2d Cir. 2010) (holding that twice the gain or loss fine statute required that the jury determine the gain/loss resulting from the violation); United States v. Ubakanma, 215 F.3d 421, 426 (4th Cir. 2000) (holding that the mail or wire fraud that "affects a financial institution" is an additional element of the offense); United States v. Benzer, No. 2:13-CR-18 JCM (GWF), 2015 WL 2250043, *7 (D. Nev. May 13, 2015) ("In order for defendants to be convicted of the enhanced wire fraud category, the jury would have to find beyond a reasonable doubt that their conduct affected a financial institution."); United States v. Sanford Ltd., 878 F. Supp. 2d 137, 147 (D.D.C.

In *Southern Union Co. v. United States*,[64] the Supreme Court considered the application of the *Apprendi* principle to the imposition of criminal fines. In that case, the defendant was charged with violating the Resource Conservation and Recovery Act (RCRA) from September 19, 2002 through October 19, 2004.[65] RCRA provided for a statutory maximum fine of $50,000 for each day the defendant was in violation of the Act.[66] The jury found the defendant corporation guilty at trial, but did not specify in its verdict how many days RCRA had been violated.[67] Nevertheless, the district court imposed the statutory maximum fine of $50,000 for each of the 762 days from September 19, 2002 through October 19, 2004, resulting in a total fine of $38.1 million.[68] The appellate court affirmed the sentence, holding that *Apprendi* does not apply to criminal fines.[69]

The Supreme Court granted certiorari and reversed, holding that the principle of *Apprendi* does apply to criminal fines.[70] The government argued that *Apprendi* applies only to the elements of the offense, not to sentencing factors such as how long the violation lasted or how much money the defendant gained (or the victim lost) from the violation.[71] The Court rejected this argument, noting that those facts can, in a given statutory scheme, set the maximum penalty that the district court can impose.[72] For example, the Court noted that the maximum fine that may be imposed under many statutory schemes turns on such things as "the duration of a statutory violation" or "the defendant's gain or the victim's loss."[73] Such facts, the Court held, are precisely of the sort that the Sixth Amendment, as interpreted by *Apprendi* and its progeny, requires a jury to find to the extent they increase the statutory maximum fine to which a defendant is exposed.[74] In the *Southern Union* case, the district court's determination that the violation had continued for 762 days was "a determination that for each given day, the Government

2012) (holding that the jury must determine the "gross gain" derived from the offense under the statute increasing criminal fines to twice the gross gain or loss from the offense).

64. 132 S. Ct. 2344 (2012).

65. *Id.* at 2349.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *S. Union Co.*, 132 S. Ct. at 2357 ("We hold that the rule of *Apprendi* applies to the imposition of criminal fines.").

71. *Id.* at 2356.

72. *Id.*

73. *Id.* at 2350–51.

74. *Id.* at 2351.

ha[d] prove[n] that Southern Union committed all of the acts constituting the offense."[75] That determination, the Court concluded, was one that the Sixth Amendment commits to the jury.[76]

The *Southern Union* Court explained that "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.'"[77] The Court continued, "[t]hat concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses . . . . [T]he amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts."[78] The *Southern Union* Court emphasized its reasoning, stating, "[t]his is exactly what *Apprendi* guards against: judicial fact-finding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow."[79]

In response to the government's argument that the application of the *Apprendi* principle should be limited to the punishments of imprisonment and death, the Court responded that many criminal fines are substantial. For example, the Court noted that "[t]he federal twice-the-gain-or-loss statute, in particular, has been used to obtain substantial judgments against organizational defendants."[80] In the case of individual defendants, the Court observed that "a large fine may engender a significant infringement of personal liberty."[81]

In dissent, Justice Breyer, joined by Justices Kennedy and Alito, acknowledged that "[t]he number of days (beyond one) on which the defendant violated [the] criminal statute" was a fact within the

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75. *Id.* at 2356.

76. *See S. Union Co.*, 132 S. Ct. at 2357; *see also* Blakely v. Washington, 542 U.S. 296, 303–04 (2004) ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to punishment.'").

77. *S. Union Co.*, 132 S. Ct. at 2350 (quoting Oregon v. Ice, 555 U.S. 160, 170 (2009)).

78. *Id.*

79. *Id.* at 2352.

80. *Id.* (internal citations omitted).

81. *Id.* (internal quotation marks omitted). As the Court observed in *Southern Union*, the federal sentencing statute governing the imposition of fines requires a district court to consider the "burden" that a criminal fine would place on the defendant. *See id.* (citing 18 U.S.C. § 3572(a)(2)). Furthermore, the Eighth Amendment's Excessive Fines Clause recognizes the infringement of liberty that even purely monetary sanctions imposed by the government can cause.

scope of the rule laid down in *Apprendi*.[82] Nevertheless, the dissent did not believe that *Apprendi* and its progeny controlled the outcome in *Southern Union* because, in their view, criminal fines were historically an issue to be decided by the judge alone.[83] The majority disagreed with this reading of the historical precedents.[84]

One scholar has argued that the *Apprendi* principle should apply in the civil context because the beyond-a-reasonable-doubt standard of proof on which *Apprendi*'s reasoning is based originated in a civil case.[85] This scholar argues that *Apprendi* should apply to any statute, whether labeled civil or criminal, if the statute has an effect similar to a criminal proceeding in that it stigmatizes a defendant or deprives him or her of liberty.[86] Similarly, another commentator has argued that *Apprendi* could be extended to government enforcement actions because "Congress's 'civil' label is not determinative and certain 'civil' statutes that are punitive in nature should be considered criminal for the purpose of constitutional protections provided to the defendant."[87] In effect, this argument is that substance should trump form.

What these commentators have not considered is whether, as to civil money penalties in government enforcement actions, *Tull* provides a jury trial right under the Seventh Amendment that is analogous to the Sixth Amendment jury trial right articulated in *Apprendi* and *Southern Union* with respect to criminal cases.[88] In other words, the question addressed here is not whether *Apprendi*'s interpretation of the Sixth Amendment jury trial right applies to civil proceedings as such. By its terms, it does not. The question this Article addresses is whether *Apprendi* and *Southern Union* help us

82. *S. Union Co.*, 132 S. Ct. at 2360 (Breyer, J., dissenting).

83. *Id.*

84. *Id.* at 2353.

85. *See* W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re *Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 121–22, 136–42 (2011).

86. *Id.*

87. Owen Moroney, Comment, *Complicating the Complicated:* Southern Union *and How Environmental Crime Cases Just Became More Complex*, 50 IDAHO L. REV. 115, 137 (2013). This argument is based on the Supreme Court's decisions in *United States v. Ward*, 448 U.S. 242, 248–49 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963), in which the Court noted that a statutory penalty designated by Congress as "civil" may be so punitive as to be criminal in nature.

88. *Cf.* Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After* Booker*: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895 (2005) (examining whether the Seventh Amendment's guarantee of a right to a jury determination of facts in the civil context should inform the interpretation of the Sixth Amendment right to a jury trial in the criminal context).

better understand the scope of the jury determination of "liability" that *Tull* holds a defendant in a civil penalty proceeding is entitled to under the Seventh Amendment. These authors think that they do, but it is useful first to discuss the civil money penalty regime under the federal securities laws enforced by the SEC.

III.
CIVIL MONEY PENALTY REGIME UNDER THE FEDERAL SECURITIES LAWS

As originally enacted, the federal securities laws authorized the SEC to bring enforcement actions only to seek injunctive relief.[89] This changed with the passage of the Insider Trading Sanctions Act of 1984, which authorized the imposition of civil money penalties in SEC enforcement actions brought for insider trading violations.[90] In particular, Congress authorized imposition of a penalty, the amount of which "shall be determined by the court in light of the fact[s] and circumstances, but shall not exceed three times the profit gained or loss avoided" as a result of the violation.[91]

The SEC's authority to seek the imposition of civil money penalties for insider trading was further expanded by the Insider Trading and Securities Fraud Enforcement Act of 1988.[92] That Act authorized the imposition of civil money penalties on those who "directly or indirectly controlled the person who committed" an insider trading violation.[93] The amount of those penalties was also to "be determined by the court in light of the facts and circumstances,

89. Securities Act of 1933 § 20(b), 48 Stat. 86; Securities Exchange Act of 1934 § 21(d)(1), 48 Stat. 900; Investment Company Act of 1940 § 42(d), 54 Stat. 843; Investment Advisers Act of 1940 § 209(d), 54 Stat. 847. Beginning in the early 1970s, courts grafted on to this statutory authority to grant injunctive relief further authority to grant monetary equitable relief in the form of disgorgement. *See* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 Duke L.J. 641–45 (1977) (discussing history of this supposed authority); SEC v. DiBella, 409 F. Supp. 2d 122, 130–32 (D. Conn. 2006) (same). The Supreme Court has yet to rule on the legitimacy of this claimed authority. *See id.* at 131. As part of the Sarbanes-Oxley Act of 2002, Congress expressly authorized the Commission to seek and courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." Securities Exchange Act of 1934 § 21(d)(5), 15 U.S.C. § 78u(d)(5) (2012).

90. Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (codified as amended in scattered sections of 15 U.S.C.).

91. *Id.* § 2 (codified as amended at 15 U.S.C. § 78u-1(a)(2) (2012)).

92. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified as amended in scattered sections of 15 U.S.C.).

93. *Id.* § 3 (codified as amended at 15 U.S.C. § 78u-1(a)(1)(b) (2012)).

but shall not exceed the greater of $1,000,000, or three times the amount of profit gained or loss avoided as a result of" the insider trading violation.[94] The "profit gained" or "loss avoided," for purposes of these penalty provisions, was statutorily defined as "the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information."[95]

In the case of insider trading, then, the federal securities laws set a maximum statutory penalty to which a defendant is liable only upon proof of the profit gained or loss avoided as a result of the violation. That profit gained or loss avoided amount is trebled to determine the statutory maximum penalty to which a defendant is liable for an insider trading violation. The court (which is understood to mean a judge)[96] is then authorized to determine the appropriate penalty to be imposed up to that statutory maximum amount based on the facts and circumstances of the particular case.

The Securities Enforcement Remedies and Penny Stock Reform Act of 1990 authorized the SEC to seek, and courts to impose, civil money penalties for all violations of the federal securities laws.[97] Specifically, the Securities Act, Securities Exchange Act, Investment Company Act, and Investment Advisers Act were all amended to authorize a district court to impose civil money penalties in SEC enforcement actions for "each violation."[98] While these statutes provide that the "amount of the penalty shall be determined by the court in light of the facts and circumstances," the statutes set the maximum penalties that may be imposed depending on the presence or absence of additional facts.[99]

Specifically, the statutes set three penalty tiers that permit the imposition of progressively higher maximum money penalties for violations of the federal securities laws depending on the presence or absence of certain additional facts. The first penalty tier allows

94. *Id.* § 3 (codified as amended at 15 U.S.C. § 78u-1(a)(3) (2012)).

95. *Id.* § 3 (codified as amended at 15 U.S.C. § 78u-1(e) (2012)).

96. *See, e.g.*, SEC v. Svoboda, 409 F. Supp. 2d 331, 346–49 (S.D.N.Y. 2006) (assuming that statutory authorization for "court" to impose penalty means that judge, rather than jury, determines penalty amount).

97. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (codified as amended in scattered sections of 15 U.S.C.).

98. *Id.* at 932, 936, 945, 950.

99. SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005) ("The tier determines the maximum penalty, with the actual amount of the penalty left up to the discretion of the district court.").

the judge to impose a maximum penalty of the greater of either $5,000 for a natural person ($50,000 for a corporation or other entity)[100] or the "gross amount of pecuniary gain to [the] defendant as a result of the violation."[101] The second penalty tier allows the judge to impose a maximum penalty of the greater of either $50,000 for a natural person ($250,000 for a corporation or other entity) or the "gross amount of pecuniary gain to [the] defendant as a result of the violation" *if* the violation committed by the defendant "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement."[102] The third penalty tier allows the judge to impose a maximum penalty of the greater of either $100,000 for a natural person ($500,000 for a corporation or other entity) or the "gross amount of pecuniary gain to [the] defendant as a result of the violation" *if* the violation committed by the defendant "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" *and* "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons."[103]

In other words, for violations other than insider trading, the penalty provisions of the federal securities laws set a base maximum penalty amount of $5,000 per violation for a natural person ($50,000 for a corporation or other entity). The maximum permissible penalty amount for any violation increases to the gross amount of pecuniary gain to that particular defendant from the offense if that gain is the "result of" the violation. In the absence of gross pecuniary gain to the defendant from the violation,[104] the

100. The amounts set forth in the above paragraph have been adjusted periodically for inflation. *See* 28 U.S.C. § 2461 note (2012) (Federal Civil Penalties Inflation Adjustment); SEC Adjustment of Civil Monetary Penalties Rule, 17 C.F.R. § 201.1005 (2013).

101. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d)(2)(A) (2012); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(i) (2012); Investment Company Act of 1940 § 42(e)(2)(A), 15 U.S.C. § 80a-41(e)(2)(A) (2012); Investment Advisers Act of 1940 § 209(e)(2)(A), 15 U.S.C. § 80b-9(e)(2)(A) (2012).

102. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d)(2)(B); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(ii); Investment Company Act of 1940 § 42(e)(2)(B), 15 U.S.C. § 80a-41(e)(2)(B); Investment Advisers Act of 1940 § 209(e)(2)(B), 15 U.S.C. § 80b-9(e)(2)(B).

103. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d)(2)(C); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(iii); Investment Company Act of 1940 § 42(e)(2)(C), 15 U.S.C. § 80a-41(e)(2)(C); Investment Advisers Act of 1940 § 209(e)(2)(C), 15 U.S.C. § 80b-9(e)(2)(C).

104. SEC v. Pentagon Capital Mgmt. PLC, 725 F.3d 279, 288 (2d Cir. 2013) ("The statutory language allowing a court to impose a civil penalty plainly requires

maximum penalty that can be imposed is a specified statutory amount that increases from the base amount of $5,000 for a natural person in the event that additional factual showings can be made (i.e., up to $50,000 if the violation involved fraud and up to $100,000 if it also involved substantial losses to others). For a corporation or other entity, the maximum penalty increases from $50,000 to $250,000 or $500,000 under similar circumstances.

Stated another way, a natural person defendant is liable for a maximum penalty of only $5,000 per violation in the absence of proof that the violation "result[ed]" in gross pecuniary gain to the defendant, "involved fraud," or "resulted in substantial losses" to others.[105] The situation is analogous for a corporation or other entity defendant: the maximum penalty of $50,000 can increase if the violation "result[ed] in" gross pecuniary gain to the defendant, "involved fraud," or "resulted in substantial losses" to others. In other words, certain "civil penalties do not automatically follow from findings of securities fraud."[106]

Or viewed from yet another perspective, the penalty regime under the federal securities laws gives rise to new violations with additional elements. For example, a defendant who engages in a scheme or artifice to defraud in connection with the purchase or sale of securities commits one violation of the securities laws.[107] We could call that violation "securities fraud simpliciter." But a defendant who engages in a scheme or artifice to defraud in connection with the purchase or sale of securities that results in substantial losses commits a different violation of the securities laws.[108] This violation could be referred to as "injurious securities fraud." The civil money penalty to which a defendant is exposed for each of

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that such awards be based on the 'gross amount of pecuniary gain *to such defendant*.'" (quoting 15 U.S.C. § 77t(d)(2)) (emphasis added)).

105. *See supra* notes 100–04 and accompanying text. It is worth noting that respondents in enforcement proceedings brought by the SEC in an administrative forum are not subject to civil monetary penalties determined by the amount of gross pecuniary gain. *See* Securities Act of 1933 § 8A(g)(2), 15 U.S.C. § 77h-1(g)(2); Securities Exchange Act of 1934 § 21B(b), 15 U.S.C. § 78u-2(b); Investment Company Act of 1940 § 9(d)(2)), 15 U.S.C. § 80a-9(d)(2); Investment Advisers Act of 1940 § 203(i)(2), 15 U.S.C. § 80b-3(i)(2).

106. SEC v. Capital Sols. Monthly Income Fund, LP, 28 F. Supp. 3d 887, 901 (D. Minn. 2014).

107. *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b); SEC Manipulative and Deceptive Devices & Contrivances Rule, 17 C.F.R. § 240.10b-5(a) (2012).

108. *Compare* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. §§ 78j(b), *with* Securities Exchange Act of 1934 § 21(d)(3)(B)(iii), 78u(d)(3)(B)(iii), *and* 17 C.F.R. § 240.10b-5(a).

these distinct violations differs. Similarly, the penalty for securities fraud simpliciter is different from the penalty for engaging in a scheme or artifice to defraud in connection with the purchase or sale of securities resulting in gain to the defendant.[109] We could call this "profitable securities fraud." While the elements of the securities fraud simpliciter, injurious securities fraud, and profitable securities fraud violations are scattered among multiple sections of the United States Code, the statutory organization of these elements cannot be determinative on the question of whether a defendant is entitled to a jury trial on those elements.[110]

IV.
REQUIRED JURY FINDINGS IN SEC ENFORCEMENT ACTIONS

What does *Tull*'s holding that a defendant is entitled to a jury trial on the question of "liability" in a government enforcement proceeding mean when it comes to applying the statutory penalty regime of the federal securities laws in an SEC enforcement action? It is clear, after *Tull*, that the defendant is entitled to a jury finding on the elements of the substantive violation with which the defendant is charged. But is a defendant in an SEC enforcement action also entitled to[111] a jury finding as to all of the facts that set the statutory maximum penalty that the court may impose for an underlying violation? Specifically, must the jury (rather than the judge) find (a) the number of violations; (b) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless violation of a regulatory requirement; (c) the causal connection between the violation and any gains or losses; (d) the gross amount of any pecuniary gain to the defendant; (e) whether any resulting losses to investors were substantial; and (f) in the insider trading context, the profits gained or losses avoided?

These authors think the answer is yes across the board. These additional factual findings are required to establish a defendant's potential "liability" for a new maximum penalty because, absent a

109. *Compare* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. §§ 78j(b), *with* Securities Exchange Act of 1934 § 21(d)(3)(B), 78u(d)(3)(B), *and* 17 C.F.R. § 240.10b-5(a).

110. *Cf. supra* notes 36, 43–45 and accompanying text.

111. Of course, as in criminal cases, a defendant may waive this right. *See* SEC v. Loving Spirit Found., Inc., 392 F.3d 486, 495 (D.C. Cir. 2004). However, at least one court has held that the SEC can insist on a jury trial in the face of a defendant's waiver of such right. *See* SEC v. Kopsky, 537 F. Supp. 2d 1023, 1028 (E.D. Mo. 2008).

finding of these facts, the defendant would be exposed to a lesser maximum penalty. In other words, a defendant's civil jury trial right extends to these additional facts because they expose the defendant to a greater punishment than does the jury's finding of the underlying substantive violation standing alone. Facts beyond the elements of the underlying offense need to be found before the judge can impose the heightened sanction. Thus, under *Tull*, a defendant is entitled to a jury finding that these facts are present and, accordingly, that the defendant is subject to a heightened maximum penalty before a judge can determine the appropriate penalty up to that statutory maximum. On the other hand, once the jury has determined the facts that expose the defendant to a particular penalty tier, the judge is then free under *Tull*[112] to hear evidence on the factors that inform his or her exercise of discretion to set the penalty up to the maximum penalty permitted by that tier.[113] Stated simply, the jury must decide the penalty range while the judge is entitled to decide the actual penalty within that range.

An example illustrates this point. Take the case of an individual charged with the unregistered sale of securities in violation of Section 5 of the Securities Act of 1933 (Securities Act).[114] Imagine that the defendant is alleged to have committed this Section 5 violation as part of a broader pump-and-dump securities fraud scheme, but is only alleged to have himself violated Section 5. The Commis-

112. As noted above, the Supreme Court has, since *Tull*, asserted that the statements in that decision to the effect that the defendant was not entitled to a jury finding as to the precise amount of the penalty to be imposed are "arguably dicta." *See supra* note 27 and accompanying text.

113. A court, in exercising its discretion to select the appropriate penalty to impose up to the statutory maximum, relies on a number of factors. Specifically, the court in SEC v. Coates, 137 F. Supp. 2d 413, 428–29 (S.D.N.Y. 2001), outlined five factors that judges should consider when determining whether to assess civil penalties and thereafter determining the amount of the penalty. These factors include: (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition. *Id.* at 429. Courts routinely use the *Coates* factors to inform their exercise of discretion when assessing civil penalties for federal securities law violations. *See* SEC v. Gupta, 569 F. App'x 45, 47–48 (2d Cir. 2014) (applying *Coates* factors to determine civil penalty); SEC v. Sargent, 329 F.3d 34, 41–42 (1st Cir. 2003) (same); SEC v. Rockwell Energy of Tex., LLC, No. H-09-4080, 2012 WL 360191, at *4 (S.D. Tex. Feb. 1, 2012) (same); SEC v. Solow, 554 F. Supp. 2d 1356, 1365–66 (S.D. Fla. 2008) (same); SEC v. Opulentica, LLC, 479 F. Supp. 2d 319, 331–32 (S.D.N.Y. 2007) (same).

114. 15 U.S.C. § 77e(a) (2012).

sion has long argued—and, to date, the courts have accepted—that Section 5 is a strict liability provision.[115] In that instance, what penalty, if any, is the maximum to which the defendant is exposed? The answer to that question depends on the answer to a number of other questions. Absent proof of anything other than a Section 5 violation, the defendant is liable for no more than a single penalty of up to $5,000, since that is the base statutory maximum penalty authorized for a violation of the federal securities laws by an individual.[116]

Proof of additional facts beyond the elements of a Section 5 violation could expose the defendant to additional penalties. In the event it is proven that the defendant not only violated Section 5, but did so multiple times, the defendant could be liable for up to $5,000 for each such violation. If it is proven that the defendant reaped a gross pecuniary gain from one or more of the violations, then the statutory maximum penalty for each such violation would be the greater of $5,000 or the amount of the gross pecuniary gain to the defendant from each such violation. If the defendant did not receive a gross pecuniary gain greater than $5,000 from a violation, the defendant could be liable for a maximum penalty of up to $50,000 for that violation if it "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"[117] and up to $100,000 for that violation if it also resulted in "substantial losses or created a significant risk of substantial losses to other persons."[118] Because proof of a violation of Section 5 does not necessarily involve the proof of a mental state, a jury's finding of a Section 5 violation does not entail a finding of fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. Nor does a jury verdict on a Section 5 claim standing alone involve a finding concerning losses.

115. *E.g.*, SEC v. Sierra Brokerage Servs., Inc., 608 F. Supp. 2d 923, 939 (S.D. Ohio 2009) ("Scienter is not an element of a Section 5 violation because Section 5 imposes strict liability on sellers of securities." (citations omitted)).

116. *See supra* note 100 and accompanying text.

117. Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d)(2)(B) (2012); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(ii) (2012); Investment Company Act of 1940 § 42(e)(2)(B), 15 U.S.C. § 80a-41(e)(2)(B) (2012); Investment Advisers Act of 1940 § 209(e)(2)(B), 15 U.S.C. § 80b-9(e)(2)(B) (2012).

118. Securities Act § 20(d), 15 U.S.C. § 77t(d)(2)(C); Securities Exchange Act § 21(d), 15 U.S.C. § 78u(d)(3)(B)(iii); Investment Company Act § 42(e)(2)(C), 15 U.S.C. § 80a-41(e)(2)(C); Investment Advisers Act § 209(e)(2)(C), 15 U.S.C. § 80b-9(e)(2)(C).

Thus, in each of these scenarios, the defendant's liability for a penalty above $5,000 requires proof of facts beyond establishing the elements of the Section 5 violation. The question is whether the defendant is entitled to a jury trial on each of these additional facts, which subject the defendant to a higher potential penalty. As was stated previously, these authors believe that the import of *Tull* is that a defendant is entitled to a jury finding on each of these additional facts. In *Tull*, the Supreme Court held that a defendant is entitled to a jury trial on the issue of "liability," though not on the particular penalty amount.[119] Whether a defendant is exposed to a maximum penalty requires proof of facts beyond the formal elements of the alleged violation, and these authors read *Tull* to hold that a defendant is entitled to a jury finding on those additional facts.

This reading of *Tull* is bolstered by the Supreme Court's more recent jurisprudence interpreting the Sixth Amendment's jury trial right in *Apprendi* and its progeny, including *Southern Union*. As noted above, the Supreme Court's analysis in *Apprendi* was based in part on due process principles that transcend criminal trials, and the Court explicitly invoked historic regard for the jury trial in both the civil and criminal arenas in support of its holding.[120] Indeed, the Supreme Court subsequently noted that *Tull*'s holding was based in part on the notion that "the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding."[121] Furthermore, the due process principles of fairness that animated the Court's decision in *Apprendi* are likewise applicable in the civil context. Congress has threatened certain pains for violating the federal securities laws and other pains if that violation resulted in pecuniary gain to the defendant, or if the violation involved fraud or deceit, or if the violation resulted in substantial losses to victims.[122] The Supreme Court reasoned in *Apprendi* that, "[a]s a matter of simple justice, it seems obvious that the procedural safeguards designed to protect [a defendant] from unwarranted pains should apply equally to the [differing] acts that [Congress] has singled out for punishment."[123] This same reasoning applies when considering the punishment to which a defendant is exposed in an SEC enforcement action brought under the federal securities laws.

119. 481 U.S. 412, 426–27 (1987).
120. *See supra* notes 50–52 and accompanying text.
121. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).
122. *See supra* notes 98–103 and accompanying text.
123. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

Our conclusion is further bolstered by the similar concerns and goals underlying the constitutional guarantees of a jury trial in both the civil and criminal context. Given these similarities, it has been argued that the scope of "the jury's constitutional authority" should be "integrate[d]" in the civil and criminal contexts.[124] The reasons for this integration are threefold. First, in both the civil and criminal contexts, the jury trial right is designed to further the goal of just adjudication[125] by, among other things, protecting "individual rights against an abusive government."[126] This vision of the role of the jury trial "enjoys a pedigree established both in modern legal theory and in the political thought of the Founders."[127] Second, an examination of the history, text, and structure of the Sixth and Seventh Amendment jury trial guarantees suggests that the intended role of civil and criminal juries is quite similar.[128] The Founders had a vision of the jury's role that, for the most part, was not dependent on whether that jury was civil or criminal and that, at its core, called for the jury to resolve disputed factual questions.[129] Finally, the respective "institutional attributes" of juries and judges do not differ as between civil and criminal trials.[130] In both contexts, juries "have similar societal functions, including checking the abuse of governmental power, determining disputed facts, injecting community values into legal decisions, and aiding the public acceptance of legal determinations."[131] As a result, "in most respects the criminal jury right guaranteed by the Sixth Amendment and the civil jury right guaranteed by the Seventh Amendment have been implemented in coordinate fashion."[132]

In the criminal context, the Sixth Amendment entitles the defendant to a jury finding on all facts that increase the statutory maximum sentence to which the defendant is subject; the court then exercises its discretion to impose a sentence up to that maximum.[133] Similarly, these authors believe that *Tull*'s holding that a defendant is entitled, under the Seventh Amendment, to a jury trial on the issue of "liability" in a civil government enforcement action

124. Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 729 (1993).
125. *Id.* at 727, 729.
126. *Id.* at 728.
127. *Id.*
128. *Id.* at 729.
129. *Id.* at 745.
130. Murphy, *supra* note 124 at 729.
131. Kirgis, *supra* note 88, at 903.
132. *Id.* at 902.
133. *Apprendi*, 530 U.S. at 490.

seeking monetary penalties means that a defendant is entitled to a jury finding on all disputed facts that increase the statutory maximum money penalty to which a defendant is exposed. The judge retains the discretion to select an appropriate money penalty up to that maximum based on the facts and circumstances of the given case. Put slightly differently, as to any factual finding that increases the potential punishment of a defendant beyond what the defendant is subject to as a result of the base offense itself, the defendant is entitled to a jury trial under the Seventh Amendment.

The authors' reading of *Tull* is confirmed by the historic fact-finding role played by the jury. In *Tull*, the Supreme Court concluded that the defendant was entitled to a jury determination of liability, but not as to the amount of the penalty, since the latter was not "'regarded as fundamental, as inherent in and of the essence of the system of trial by jury . . . .'"[134] By contrast, the Court held, the jury must determine liability because that determination was the "substance of the common-law right of trial by jury."[135] As noted above, the core of the jury's role, in both the civil and criminal contexts, is to resolve disputed factual issues.[136] Finding facts that increase the statutory maximum penalty to which a defendant is exposed is different in kind from the discretionary determination as to the specific amount of the penalty that is appropriate within the range authorized by the jury's factual findings. The jury trial right should extend not only to the disputed facts that determine whether there is a violation of the federal securities laws in the first place, but also to any additional facts that increase the maximum punishment to which a defendant is exposed. The judge, then, is free to set the appropriate penalty up to the maximum set by the jury's factual findings.

In light of the due process concerns animating the Supreme Court in *Apprendi* and *Southern Union*, there is no reason for the jury trial right to hinge on whether disputed facts are labeled an element of the violation itself or are labeled a penalty enhancement, when in either case the fact-finding is what exposes the defendant to a particular maximum penalty. Thus, *Tull*'s reasoning together with the historic role of the jury as fact-finder confirm the authors' reading of that decision as requiring a jury determination of disputed facts necessary for enhanced maximum penalties to apply for federal securities law violations. The resolution of these disputed

134. 481 U.S. 412, 426 (1987) (quoting Colgrove v. Battin, 413 U.S. 149, 156 n.11 (1973)).

135. *Id.* (quoting *Colgrove*, 413 U.S. at 157).

136. *See* Murphy, *supra* note 124 and accompanying text.

facts must reside with the jury in order to preserve the "substance of the common-law right of trial by jury" since such fact-finding is "inherent in and of the essence of the system of trial by jury."[137]

To restate this argument in more conceptual terms, "liability" should encompass more than the mere existence of a substantive violation. It should encompass all of the findings that can lead to a more severe sanction—that is, all the facts that determine the stakes for the defendant. After all, a primary reason for finding a violation—indeed, for making certain conduct illegal—is to deter the conduct by, among other things, allowing the government to seek a penalty (or injunctive relief). The maximum penalty permitted based on the jury's fact-finding is part and parcel with the defendant's liability because it sets the maximum consequence for the defendant arising from the defendant's conduct. The right to a jury trial is meant to protect the accused from the full brunt of the government. That animating purpose applies not only to finding an underlying substantive violation but also to any factor that results in a greater maximum punishment, as the defendant deserves the protection of a jury trial when it comes to both the violation which triggers any sanction and the facts that fix the maximum sanction that may be imposed.

To the extent that the SEC attempts to avoid this conclusion by arguing that facts that increase the maximum monetary sanction are penalty factors rather than offense elements, the *Apprendi* line of cases teaches that such a distinction is of no moment. The relevant question, the *Apprendi* line of cases explains, is whether a fact must be found, regardless of its label, in order to increase the statutory maximum penalty to which the defendant may be exposed. If so, that fact is one as to which the defendant is entitled to a jury finding. The same result should obtain in the civil context. If a fact increases the statutory maximum money penalty to which a defendant is subject, that fact constitutes part of the "liability" question on which the defendant is entitled to a jury trial. It makes no more difference to the jury trial right under *Tull* than under *Apprendi* where Congress has chosen to locate those factual requisites in the statutory scheme that determine the defendant's maximum potential jeopardy.

137. *Tull*, 481 U.S. at 426 (internal quotation marks omitted) (quoting *Colgrove*, 413 U.S. at 156–57).

V.
PRACTICAL APPLICATIONS

If this Article is correct that the Seventh Amendment entitles a defendant in an SEC enforcement action brought in federal court to a jury trial on those facts that increase the statutory maximum money penalty for which the defendant is liable, and not just on those facts that establish the underlying securities law violation, then the next challenge is identifying the requisite factual findings to be made by the jury under the statutory penalty scheme. While this Article does not purport to identify all such findings to be made by a jury, several of the more difficult issues presented are set out below.

A. *Number of Violations*

These authors believe that the Seventh Amendment jury trial right includes a right to a jury determination of the number of violations committed. Frankly, these authors see little room for disagreement on this point notwithstanding the contrary practice in many SEC enforcement actions. As explained above, the federal securities laws' penalty provisions authorize various penalties for "each violation."[138] In other words, penalty liability under the federal securities laws is on a per-violation basis; a defendant is liable for a second penalty only if he has committed a second violation.[139] It is inconceivable that, under *Tull*, a defendant could be entitled only to a jury verdict on the question of whether a single violation of the securities laws was committed, but that the judge could then determine that multiple violations were committed and impose additional penalties for these additional violations.[140] Such a practice would be directly contrary to the holding of *Tull*, which provides that a defendant is entitled to a jury trial on the issue of "liability," which must include a determination of the number of violations for

138. *See* Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d) (2012); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d) (2012); Investment Company Act of 1940 § 42(e), 15 U.S.C. § 80a-41(e) (2012); Investment Advisers Act of 1940 § 209(e), 15 U.S.C. § 80b-9(e) (2012).

139. *See* SEC v. Schooler, No. 3:12-cv-2164-GPC, 2015 WL 3491903, at *11 n. 6 (S.D.Cal. June 3, 2015) ("[I]n determining the appropriate civil penalties in SEC enforcement actions, each separate violation is relevant."); SEC v. Tourre, 4 F. Supp. 3d 579, 583 (S.D.N.Y. 2014) ("Courts assess civil penalties on a per-violation basis.").

140. *See Schooler*, 2015 WL 3491903, at *11 n. 6 (putting to the jury the question of how many violations the defendant committed to the extent the SEC sought penalties with regard to those alleged violations).

which the defendant is liable.[141] Indeed, in the Sixth Amendment context, the Supreme Court has easily concluded that the number of violations is at the core of the defendant's jury trial right.[142]

At first blush, it may seem that putting to the jury the question of how many securities laws violations the defendant committed would be a simple endeavor. In practice, it may not be so easy.[143] The challenge is in identifying the appropriate unit of violation for a given statutory provision.[144] Take, for example, Section 10(b) of

141. *Cf.* Rapoport v. SEC, 682 F.3d 98, 108 (D.C. Cir. 2012) (holding that, in order to impose a Second-Tier penalty, the Commission "must determine how many violations occurred and how many violations are attributable to each person, as the statute instructs").

142. S. Union Co. v. United States, 132 S. Ct. 2344, 2356 (2012).

143. The fact that defining the proper unit of violation for a given securities law violation may prove challenging is not an argument against submitting to the jury the question of how many violations were committed. The issue is already one that the jury must decide in criminal trials involving securities law violations and there is no reason to think the issue is more difficult for a civil jury to decide than for a criminal jury. *See supra* note 136 and accompanying text.

144. *See* SEC v. StratoComm Corp., 89 F. Supp. 3d 357, 372 (N.D.N.Y. 2015) ("While these statutes do not define a 'violation,' courts have determined the number of violations involved using different methods."); SEC v. GTF Enters., No. 10-CV-4258, 2015 WL 728159, at *4 (S.D.N.Y. Feb. 19, 2015) ("[C]ourts have determined the number of violations using several methods."); SEC v. Wheeler, 56 F. Supp. 3d 241, 246 (W.D.N.Y. 2014) ("Courts have used various methods for counting the number of violations pursuant to a third tier penalty, including counting each unlawful trade as a separate violation, each falsified or fraudulent document as a violation, and each investment a defendant received from defrauded investors as a violation." (citation omitted)); *Tourre*, 4 F. Supp. 3d at 592 ("The concept of a 'violation' is thus tied to some action (such as a misstatement) or an omission by the defendant. In the context of fraud, a violation is tied to the act or omission that constitutes the fraud, or the subsequent 'peddling' of that fraud."); *In re* Reserve Fund Secs. & Derivative Litig., Nos. 09 MD.2011(PGG), 09 Civ. 4346(PGG), 2013 WL 5432334, at *20 (S.D.N.Y. Sept. 30, 2013) (noting the statutory ambiguity regarding the scope of a particular "violation" for purposes of the penalty provisions); SEC v. Haligiannis, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007) ("Each of the quarterly statements sent to each of the investors is a materially false statement that technically constitutes an independent violation of the Securities Act."); SEC v. Invest Better 2001, No. 01 Civ. 11427(BSJ), 2005 WL 2385452, at *5 (S.D.N.Y. May 4, 2005) ("The exact number of violations committed by the Defendants is nearly impossible to determine."); Harding Advisory LLC, No. 3-15574, 2015 WL 137642, at *93 (ALJ Jan. 12, 2015) (noting the difficulty of identifying the "unit of violation" under the federal securities laws); Lorenzo, No. 3-15211, 2013 WL 6858820, at *9 (ALJ Dec. 31, 2013) (noting that the Exchange Act's penalty provision, "like most civil penalty statutes, leaves the precise unit of violation undefined"); *see also* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1441 (1979) (noting that "most [federal penalty] statutes leave the precise unit of violation undefined").

the Securities Exchange Act of 1934[145] (Exchange Act) and Rule 10b-5 thereunder,[146] prohibiting fraud and manipulation in connection with the purchase or sale of securities through the use of instrumentalities of interstate commerce. The question presented is whether the violation of these provisions consists of the entire scheme to defraud, each separate fraudulent misrepresentation, each purchase or sale of securities by an investor, or each use of an instrumentality of interstate commerce by the defendant. The federal appellate courts have reached different conclusions when considering what constitutes the analogous unit of prosecution in criminal securities cases.[147]

The practical significance is this: If the violation is defined by, say, each sale of securities, then the Commission will be required, in order to obtain Third-Tier penalties, to prove that each particular sale (*i.e.*, each separate violation) resulted in substantial losses. This could be difficult in some contexts, such as a pump-and-dump penny stock fraud scheme where the amount of loss in connection with each sale could be small even if the aggregate loss to investors across all sales is large. On the other hand, if the violation is the entire scheme to defraud, then the Commission could obtain only a single Second- or Third-Tier penalty for the violation. That is, the SEC could establish the additional factors to justify a higher tier penalty by defining the unit of violation broadly, but the result is that there would be only one violation. If a given individual defendant in the fraud scheme constituting the violation did not personally benefit from the scheme (or if the defendant's personal benefit was relatively modest), then the maximum penalty to which that

145. 15 U.S.C. § 78j(b) (2012).

146. 17 C.F.R. § 240.10b-5 (2012).

147. *Compare* United States v. Schlei, 122 F.3d 944, 978 (11th Cir. 1997) (holding that the unit of prosecution for securities fraud under Section 17(a) is each separate offer or sale of securities in connection with an instrumentality of interstate commerce), *and* United States v. Langford, 946 F.2d 798, 804 (11th Cir. 1991) (holding that the unit of prosecution for Section 10(b) securities fraud is each individual purchase or sale of securities), *with* United States v. Haddy, 134 F.3d 542, 549 (3d Cir. 1998) (rejecting the notion that the appropriate unit of prosecution for securities fraud is each individual purchase or sale, but recognizing that the appropriate unit of prosecution for securities fraud is fact-specific), United States v. Phillips, 726 F.2d 417, 419 n.6 (8th Cir. 1984) (holding that the appropriate unit of prosecution for securities fraud is each individual securities transaction accompanied by the use of the mails), *and* United States v. Waldman, 579 F.2d 649, 654 (1st Cir. 1978) (holding that the appropriate unit of prosecution for securities fraud is each individual securities transaction accompanied by the use of the mails).

defendant would be subject is $100,000.[148] Depending on how the math works out (*i.e.*, number of violations multiplied by the maximum penalty), the punishment a defendant faces could be more severe, at least as measured by the size of the ultimate penalty imposed, if there were more violations but only a First-Tier penalty.

Other federal securities law provisions pose similar challenges in defining the unit of violation. For example, Section 15(a) of the Exchange Act makes it unlawful for a broker or dealer not registered with the SEC to use an instrumentality of interstate commerce to effect a transaction in securities.[149] Again, is it the failure to register or each individual securities transaction that constitutes the violation of this provision? Section 17(a)(3) of the Securities Act makes it unlawful to engage in a "practice, or course of business" that operates as a fraud or deceit in the offer or sale of securities.[150] Is this provision's unit of violation the offer or sale of securities or is it engaging in a practice or course of business that operates as a fraud or deceit?[151] These and related questions under other provisions of the federal securities laws will need to be resolved so that the judge can instruct the jury on how to determine the number of violations committed by a given defendant. The rule of lenity counsels that these questions are likely to be resolved in favor of a single violation (and thus a single penalty), rather than multiple ones.[152]

148. *See supra* note 103–04 and accompanying text.

149. Securities Exchange Act of 1934 § 15(a)(1), 15 U.S.C. § 78o(a)(1).

150. Securities Act of 1933 § 17(a)(3), 15 U.S.C. § 77q(a)(3).

151. *See* Flannery, Securities Act Release No. 9689, Exchange Act Release No. 73840, Investment Advisers Act Release No. 3981, Investment Company Act Release No. 31374, 2014 WL 7145625, at *25–26 (Dec. 15, 2014) (contemplating the language of Section 17(a)(3)), *rev'd on other grounds sub nom.* Flannery v. SEC, 810 F.3d 1 (1st Cir. 2015).

152. *See* Bell v. United States, 349 U.S. 81, 83 (1955) (holding that when a statute is ambiguous as to the unit of prosecution, "the ambiguity should be resolved in favor of lenity"). Although the rule of lenity was originally developed as a rule of construction in the criminal context, it applies when interpreting statutes that have both civil and criminal applications. *See* Leocal v. Ashcroft, 543 U.S. 1, 11–12 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 727 (6th Cir. 2013) ("A single statute with civil and criminal applications receives a single interpretation."). Thus, the rule of lenity should apply when interpreting the federal securities laws, *Whitman v. United States*, 135 S. Ct. 352, 353–54 (2014) (Scalia, J., statement respecting the denial of certiorari) (arguing that the rule of lenity, rather than *Chevron* deference, should govern the interpretation of the federal securities laws), as every provision of those laws may be pursued both civilly by the SEC and criminally by the U.S. Department of Justice, 15 U.S.C. §§ 77x, 78ff, 80a-48, 80b-17 (2012). For a further discussion of the interaction between the rule of

B. Loss (or Gain) Amount, Reliance, and Causation

Another issue that must be considered is whether the SEC is required to prove, and the jury to find, loss (or gain) amount, reliance, and causation in order for a court to impose either a Third-Tier penalty or a penalty of any tier that is based on gross pecuniary gain. Third-Tier penalties are permitted when a violation involves "fraud [or] deceit" and "resulted in substantial losses or created a significant risk of substantial losses to other persons."[153] Under any penalty tier, a defendant is subject to a maximum penalty up to the "gross amount of pecuniary gain to [the] defendant as a result of the violation."[154]

The courts have long held that the "SEC does not need to prove investor reliance, loss causation, or damages in an action under Section 10(b) of the Exchange Act, Rule 10b-5, or Section 17(a) of the Securities Act."[155] An early Second Circuit decision noted that the SEC need not prove reliance or loss causation because the "Commission's duty is to enforce the remedial and preventative terms of the statute in the public interest, and not merely

lenity and *Chevron* deference in the interpretation of the federal securities laws, *see* Matthew Martens et al., *Scalia's Deference Argument Could Have Dramatic Effects*, LAW360 (Nov. 18, 2014, 11:57 AM), http://www.law360.com/articles/597223/scalia-s-deference-argument-could-have-dramatic-effects.

153. Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(B)(iii) (2012).

154. *See supra* notes 100–03 and accompanying text.

155. SEC v. Credit Bancorp, Ltd., 195 F. Supp. 2d 475, 490–91 (S.D.N.Y. 2002); *see also* SEC v. Teo, 746 F.3d 90, 102 (3d Cir. 2014) (holding that, in an SEC enforcement action under Section 10(b), "the Commission need not prove reliance, nor must it show that any investor lost money as a result of the violation"); SEC v. Goble, 682 F.3d 934, 943 (11th Cir. 2012) ("Because this is a civil enforcement action brought by the SEC, reliance, damages, and loss causation are not required elements."); SEC v. Tambone, 550 F.3d 106, 130 (1st Cir. 2009) ("Because this is an SEC enforcement action rather than a private claim, the Commission need not allege any of the elements required to establish a direct link between a defendant's misrepresentation and an investor's injury—including reliance by the investor on an explicit misstatement, economic loss, and loss causation."); Geman v. SEC, 334 F.3d 1183, 1191 (10th Cir. 2003) ("The SEC is not required to prove reliance or injury in enforcement actions."); SEC v. Rana Research, Inc., 8 F.3d 1358, 1363 n.4, 1364 (9th Cir. 1993) (holding that "reliance is not an element the SEC must prove to enjoin violations of the securities laws"); SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985) (per curiam) (holding that "the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money"); SEC v. Constantin, 939 F. Supp. 2d 288, 303 (S.D.N.Y. 2013) (stating that the SEC need not prove reliance or loss causation to "prevail on any of its claims for primary liability under the securities laws").

to police those whose plain violations have already caused demonstrable loss or injury."[156]

These decisions may be correct[157] insofar as they go. The SEC may not be required to show reliance (sometimes thought of as transaction causation) or loss causation in an enforcement action brought to enjoin a violation.[158] But, if this Article's Seventh Amendment analysis is correct regarding the scope of a defendant's jury trial right, then it is likely that the jury must find a type of reliance and loss (or gain)[159] causation when the SEC goes further and seeks a monetary penalty.[160] Under any penalty tier, if the SEC seeks to set the maximum penalty amount by reference to gross pecuniary gain, the statute requires that such gain be the gain that was a "result of the violation."[161] Similarly, a Third-Tier penalty requires proof that the violation "resulted in" substantial losses, or at least created a significant risk of such.[162] The "resulted in" and "result of" language sound in both reliance and causation.[163] Even the

156. Berko v. SEC, 316 F.2d 137, 143 (2d Cir. 1963); *see also* SEC v. North Am. Research & Dev. Corp., 424 F.2d 63, 84 (2d Cir. 1970) (holding that "reliance is immaterial because it is not an element of fraudulent representation under Rule 10b-5 in the context of an SEC proceeding against a broker").

157. *But see Flannery*, *supra* note 151, at 48 (holding that, with regard to a claim under Section 17(a)(2), the SEC must prove a causal connection between the false statement and the defendant's obtaining money or property in the sale of securities).

158. The federal securities laws authorize the SEC to obtain an injunction whenever it appears that someone "is engaged or about to engage in" a violation of the federal securities laws. *See* 15 U.S.C. § 77t(b). But that is a separate question from whether the SEC has proven a "violation" as required to obtain monetary penalties.

159. By "gain causation," we mean the degree to which the defendant's gain is the result of the securities law violation, as compared to other factors.

160. Even in the administrative proceeding context, it would seem that loss causation and reliance are elements that the administrative law judge and ultimately the Commission would need to find in order to impose Third-Tier penalties. In *Rockies Fund, Inc. v. SEC*, 428 F.3d 1088 (D.C. Cir. 2005), the D.C. Circuit refused to uphold an SEC decision levying Third-Tier penalties against the defendant because the "SEC did not explain its reasoning" or show that the defendant's actions either (a) involved fraud or deceit or (b) resulted in significant losses. *Id.* at 1099. The court chided the SEC's analysis as "nonexistent," and held that the SEC "arbitrarily and capriciously imposed third-tier sanctions," indicating that in order to impose Third-Tier sanctions, the SEC might be required to prove causation. *Id.*

161. *See supra* notes 100–03 and accompanying text.

162. Securities Exchange Act of 1934 § 20(d), 15 U.S.C. § 78u(d)(3)(B)(iii) (2012).

163. *See* Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179, 2187 (2011) (explaining that "resulted in the losses" language refers to loss

alternative statutory showing of a significant risk of losses requires showing a causal connection, because conduct cannot create a significant risk of losses if it would not be the cause of those losses.[164]

Our view that a defendant in an SEC enforcement action in federal court is entitled to a jury finding on the question of the amount of gross pecuniary gain caused by the violation when calculating the maximum statutory penalty is not inconsistent with the observation in *Tull* that the defendant was entitled to a jury trial because the statutory penalty provision in that case did "not direct that the 'civil penalty' imposed be calculated solely on the basis of equitable determinations, such as the profits gained from violations of the statute, but simply imposes a maximum penalty of $10,000 per day of violation."[165] First, the statement in *Tull* was dicta, as the Court was not presented with the question of whether a monetary penalty based on the amount of profits to the defendant would be an action on which the defendant would be entitled to a jury trial. Second, the Court made this statement in the context of distinguishing remedies "intended . . . simply to disgorge profits" from those designed "to impose punishment."[166] The Court observed that the penalty statute at issue in *Tull* gave rise to a legal remedy to which the jury right attached because it was a "punishment to further retribution and deterrence," rather than the authorization of

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causation); Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 344 (2005) (explaining that "as a result" language is causation language); *In re* Reserve Fund Secs. & Derivative Litig., Nos. 09 MD.2011(PGG), 09 Civ. 4346(PGG), 2013 WL 5432334, at *18 (S.D.N.Y. Sept. 30, 2013) (refusing to impose Third-Tier penalties given the absence of proof of transaction causation); SEC v. Razmilovic, 822 F. Supp. 2d 234, 260 n.22 (E.D.N.Y. 2011) ("The determination of the extent to which the value of a security was inflated due to fraud is the same regardless of whether the plaintiff must demonstrate loss causation, i.e., that its loss was causally connected to the fraud, or, in essence, gain causation, i.e., that the defendant's ill-gotten gain is causally connected to the fraud."); SEC v. Huff, No. 08-60315-CIV, 2010 WL 148232, at *4 (S.D. Fla. Jan. 12, 2010) (requiring proof of "gain causation" under penalty provision); RESTATEMENT (SECOND) OF TORTS § 548A (Am. Law. Inst. 1977) (explaining that "[a] fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance"); Pietro M. deVolpi, Jr., *Showing Loss in Securities Enforcement Actions*, 12 BARRY L. REV. 1, 12–16 (2009) (arguing that loss causation showing should be required for Third-Tier penalties).

164. Of course, whether losses did or did not result from the violation is relevant to the question of whether the violation created a significant risk of losses. *See In re Reserve Fund*, 2013 WL 5432334, at *18 ("Actual investor losses have a bearing on whether Defendants' conduct presented a risk of substantial investor losses, however.").

165. Tull v. United States, 481 U.S. 412, 422 (1987).

166. *Id.* at 423.

"equitable relief."[167] That the penalty at issue in *Tull* was not tied to profits merely confirmed its punitive, rather than equitable, purposes.[168] In other words, the *Tull* Court was not establishing an absolute rule that penalties based on profits to the defendant from a violation are not within the scope of the jury trial right. Rather, the Court was simply observing that the fact that the penalty in that case was not tied to profits was evidence of its punitive (and thus legal) rather than equitable nature.[169]

With regard to the monetary penalties authorized under the federal securities laws, there is no question that they are punitive in nature, meant to "further retribution and deterrence,"[170] and thus legal remedies that give rise to a Seventh Amendment jury trial right. This is so even as to the authorization of penalties up to the amount of the gross pecuniary gain to the defendant resulting from the violation. Those penalties are authorized in addition to disgorgement of any gains, with disgorgement being a remedy distinct from statutory penalties under the federal securities laws.[171] A court, with separate authority to award disgorgement cannot reasonably be seen to be granting equitable relief by imposing a distinct penalty measured by the amount of the gross pecuniary gain. Rather, such a penalty, regardless of the method by which its amount is determined, is a punitive remedy that is legal in nature and thus within the scope of the Seventh Amendment jury trial right.[172]

167. *Id.*

168. *Id.* at 422–23.

169. There is also a question as to whether the calculation of the "gross pecuniary gain" for purposes of the penalty calculation is measured by profits, after expenses, from the misconduct. The SEC has argued that the reference to "gross" gain in the penalty statute does not allow for the deduction of at least certain expenses. *See* SEC v. Amerindo Inv. Advisors Inc., No. 05 Civ. 5231(RJS), 2014 WL 2112032, at *11 (S.D.N.Y. 2014); SEC v. Credit Bancorp, Ltd., 2002 WL 31422602, at *3 (S.D.N.Y. 2002). If this is correct—and it is by no means clear that it is—then this measure of "gain" is not the same as the equitable concept of profits. *See* SEC. v. Teo, 746 F.3d 90,106 n.29 (3d Cir. 2014) ("[R]evenue disgorgement (gross benefit) is generally understood as outside the traditional realm of equity.").

170. *Tull*, 481 U.S. at 423.

171. *See supra* note 87; *see also* SEC v. Tanner, No. 02 Civ. 0306(WHP), 2003 WL 21523978, at *2 (S.D.N.Y. July 3, 2003) ("Congress enacted civil penalties to punish and deter securities law violations, and such penalties may be imposed in addition to disgorgement and injunctive relief.").

172. Defendants have rarely, if ever, insisted that the jury determine their gross pecuniary gain, if any, for penalty purposes. *See, e.g.*, SEC v. Conway, 697 F. Supp. 2d 733, 772 (E.D. Mich. 2010) (concluding that the penalty amount should be the same amount as the amount of disgorgement determined by the court). Defendants' acquiescence in a determination by the judge (rather than a jury) of

Even when a judge makes the factual findings requisite to imposition of a penalty in SEC enforcement actions, courts have paid scant attention to these reliance/causation requirements in the context of the penalty determination.[173] In an effort to prove the amount of investor loss in a case involving fraud, the SEC often argues that, because a defendant made a false statement after which people invested, the entire investment loss is the amount of loss resulting from the violation.[174] However, the mere existence of a false statement in a broader investment presentation or set of disclosures does not establish that the statement caused losses, particularly given that materiality is determined on an objective, rather than subjective, basis.[175] In other words, causation of loss in the case of fraud necessarily requires a showing of (i) reliance (for with-

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the gain amount for penalty purposes is probably due to the fact that the judge typically determines the amount of the equitable remedy of disgorgement (which is also defined as the gain to the defendant from the violation), *see, e.g.*, SEC v. Cavanaugh, 445 F.3d 105, 116–20 (2d Cir. 2006) (discussing the court's authority to calculate disgorgement as an equitable remedy), and defendants have apparently assumed that because the judge can determine disgorgement amounts the judge can also determine the gain amount for penalty purposes. But this assumption is most likely incorrect. The issue presented is how the Seventh Amendment jury trial right applies to facts, like the amount of gross pecuniary gain resulting from a violation, that support both an equitable remedy (such as disgorgement) and a legal remedy (such as a monetary penalty). The *Tull* opinion answers that question, holding that "if a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought.'" *Tull*, 481 U.S. at 425 (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974)).

173. *But see In re* Reserve Fund Secs. & Derivative Litig., Nos. 09 MD 2011(PGG), 09 Civ. 4346(PGG), 2013 WL 5432334, at *18 (S.D.N.Y. Sept. 30, 2013) (refusing to impose Third-Tier penalties given the absence of proof of transaction causation); SEC v. Razmilovic, 822 F. Supp. 2d 234, 260 n.22 ("The determination of the extent to which the value of a security was inflated due to fraud is the same regardless of whether the plaintiff must demonstrate loss causation, i.e., that its loss was causally connected to the fraud, or, in essence, gain causation, i.e., that the defendant's ill-gotten gain is causally connected to the fraud."); SEC v. Huff, No. 08-60315-CIV, 2010 WL 148232, at *4 (S.D. Fla. Jan. 12, 2010) (requiring proof of "gain causation" under penalty provision).

174. *See, e.g.*, SEC v. Tourre, 4 F. Supp. 3d 579, 595 (S.D.N.Y. 2014); SEC v. Capital Solutions Monthly Income Fund, LP, 28 F. Supp. 3d 887, 902 (D. Minn. 2014) (holding that jury had, simply by finding defendant liable for securities fraud, rejected the argument that some losses were due to market conditions).

175. Amgen Inc. v. Conn. Retirement Plans and Tr. Funds, 133 S. Ct. 1184, 1191 (2013) (holding that "materiality is judged according to an objective standard"); Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988) (applying a "reasonable investor" materiality test under Section 10(b)).

out reliance the loss cannot have been caused by the violation)[176] and (ii) that the false statement itself is the reason for investor losses as compared to other factors, such as a general downturn in the market, a tough business climate, or a product failure.[177]

To be sure, cases may arise where a defendant's securities law violation may carry with it a high degree of blameworthiness despite the fact that the SEC is unable to show reliance by victims or loss causation. The argument made here does not mean that, in such an instance, the district judge is precluded from considering the defendant's blameworthiness in crafting the appropriate penalty.[178] However, this argument does suggest that the judge be precluded from imposing a penalty that exceeds the statutory maximum penalty allowed based on the facts found by the jury. If the jury fails to find either reliance or loss causation, then the judge will be limited to imposing an appropriate Second-Tier, rather than Third-Tier, penalty to address the defendant's culpability.

It is also worth underscoring a point alluded to earlier: that the question of whether a violation resulted in substantial losses is bound up with the question of how the unit of violation is defined, because Third-Tier penalties are authorized for "each violation" that meets the statutory requisites.[179] Thus, for example, if the vio-

176. *Halliburton I*, 131 S. Ct. 2179, 2184 (2005) ("[P]roof of reliance ensures that there is a proper 'connection between a defendant's misrepresentation and a plaintiff's injury.'" (quoting *Levinson*, 485 U.S. at 243)); Nuveen Mun. High Income Opportunity Fund v. City of Alameda, 730 F.3d 1111, 1118 (9th Cir. 2013) (discussing and distinguishing transaction causation and loss causation).

177. *See generally* Dura Pharm. Inc. v. Broudo, 544 U.S. 336 (2005) (describing loss causation in terms of the losses that investors suffer as a result of a misleading statement when the truth becomes known (i.e., there is a corrective disclosure) and the price of a company's stock decreases as a result). Indeed, even in the criminal sentencing context, the government must prove that the losses suffered on an investment in securities were causally related to the fraud. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n. 3(F)(ix) (U.S. SENTENCING COMM'N 2014) (explaining that, for purposes of a securities fraud crime, the loss that "resulted from the offense" should not include "significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events)"); *see also* United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007) (reaching same conclusion under prior version of Sentencing Guidelines); United States v. Olis, 429 F.3d 540, 546 (5th Cir. 2005) (same).

178. *See supra* note 100–03 and accompanying text.

179. *See* Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d) (2012); Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d) (2012); Investment Company Act of 1940 § 42(e), 15 U.S.C. § 80a-41(e) (2012); Investment Advisers Act of 1940 § 209(e), 15 U.S.C. § 80b-9(e) (2012).

lation is defined as each purchase or sale, it may be that no single violation resulted in substantial losses. In that case, multiple First- or Second-Tier penalties (but not a Third-Tier) can be imposed. Or it may be that some investors relied on the misstatements, while others did not, thus precluding the imposition of Third-Tier penalties as to some violations but not others.[180] On the other hand, if the violation is defined as the entire fraud scheme, then the SEC may be able to show substantial losses from that violation but could obtain only one Third-Tier penalty.[181]

C. *Violation Involving Fraud or Deceit*

The final question this Article raises is whether Second- or Third-Tier penalties may be imposed in the absence of a jury finding of scienter or reckless disregard of a regulatory requirement. Stated another way, can Second- or Third-Tier penalties be imposed based only on a jury finding of negligence? These authors believe that they may not.

This question is framed most starkly by negligence-based violations under Section 17(a)(2) or (3) of the Securities Act. Section 17(a)(2) prohibits a person from obtaining money or property by means of a false statement,[182] while Section 17(a)(3) prohibits a person from engaging in a transaction, practice, or course of business that "operates or would operate as a fraud or deceit."[183] In *Aaron v. SEC*,[184] the Supreme Court addressed the question of "whether the Commission[,] in seeking injunctive relief . . . for vio-

180. What remains to be seen is the degree to which the efficient market hypothesis will be adopted by courts for purposes of determining whether there was reliance on a material misrepresentation or omission involving publicly-traded securities such that it can be said, for penalty purposes, that the fraud "resulted in" substantial losses. *See* Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398, 2417 (2014) (reaffirming use of fraud-on-the-market theory to establish reliance element in a securities fraud class action).

181. Finally, it is important to keep in mind that the statutory requisites for the penalty must be shown for each defendant. *See supra* notes 100–03 and accompanying text. In the case of Third-Tier penalties, this requires showing that a given defendant's violation resulted in substantial losses; it is not adequate to show that substantial losses were the aggregate result of all violations by all defendants. *Cf.* Rapoport v. SEC, 682 F.3d 98, 108 (D.C. Cir. 2012) (holding that, in order to impose a Second-Tier penalty, the Commission "must determine how many violations occurred and how many violations are attributable to each person, as the statute instructs").

182. 15 U.S.C. § 77q(a)(2) (2012).

183. *Id.* § 77q(a)(3).

184. 446 U.S. 680 (1980).

lations of § 17(a) . . . is required to establish scienter."[185] The Court held that the SEC may obtain an injunction against violations of Section 17(a)(2) or (3) without a showing of scienter and based only on proof that the defendant acted negligently.[186] As the Court explained, "it was not necessary in a suit for 'equitable or prophylactic relief' to establish intent."[187] At the time *Aaron* was decided, the SEC had no authority to seek civil monetary penalties for violations.[188]

In recent years, the SEC has brought negligence-based claims under Section 17(a)(2) and (3) with increasing frequency[189] and has sought civil monetary penalties for these violations.[190] The

185. *Id.* at 689.

186. *Id.* at 702; *see also* SEC v. Ginder, 752 F.3d 569, 574 (2d Cir. 2014); SEC v. Smart, 678 F.3d 850, 857 (10th Cir. 2012); SEC v. Shanahan, 646 F.3d 536, 545 (8th Cir. 2011) ("Like other circuits, we construe the Supreme Court's decision in *Aaron* as requiring proof that a defendant acted negligently to establish a violation of § 17(a)(2) or (a)(3)."); SEC v. Ficken, 546 F.3d 45, 47 (1st Cir. 2008); SEC v. Seghers, F. App'x 319, 327 (5th Cir. 2008) ("To show that a defendant has violated § 17(a)(2) or (a)(3), the Commission need only show that the defendant acted with negligence."); SEC v. Merch. Capital, L.L.C., 483 F.3d 747, 766 (11th Cir. 2007) ("[T]o show that the defendants violated section 17(a)(2) or 17(a)(3), the SEC need only show (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence."); SEC v. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001) ("Violations of Sections 17(a)(2) and (3) require a showing of negligence."); SEC v. Hughes Capital Corp., 124 F.3d 449, 453–54 (3d Cir. 1997); Meadows v. SEC, 119 F.3d 1219, 1226 n.15 (5th Cir. 1997) ("Under these subsections, culpability is established merely by a showing of negligence."); SEC v. Steadman, 967 F.2d 636, 643 (D.C. Cir. 1992) (holding that Section 17(a)(2) and (3) violations require showing of negligence); Newcome v. Esrey, 862 F.2d 1099, 1102 n.7 (4th Cir. 1988) (en banc); Pagel, Inc. v. SEC, 803 F.2d 942, 946 (8th Cir. 1986) (stating that the Commission "need only prove negligence in actions under sections 17(a)(2) or (3)"); SEC v. Holschuh, 694 F.2d 130, 143 (7th Cir. 1982) (stating that "only negligence need be shown in actions under sections 17(a)(2) or (3)").

187. *Aaron*, 446 U.S. at 693 (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 (1963)).

188. *See supra* notes 89–95 and accompanying text.

189. *See* Julie DiMauro, *Negligence Charges Gain Clout in SEC Enforcement Arsenal*, REUTERS (May 9, 2012), http://blogs.reuters.com/financial-regulatory-forum/2012/05/09/negligence-charges-gain-clout-in-sec-enforcement-arsenal/ (noting that the SEC has a "greater willingness . . . to base charges on negligence findings"); Jean Eaglesham, *At SEC, Strategy Changes Course*, WALL ST. J. (Sept. 30, 2011), http://www.wsj.com/articles/SB10001424052970203405504576601251693560910 (stating that in a major strategy shift, the SEC would file "more civil cases in which defendants are accused of negligence").

190. *See, e.g.*, Complaint at 25, SEC v. Stoker, 865 F.Supp.2d 457 (S.D.N.Y. 2012) (No. 1:11-cv-7388); Complaint at 27, SEC v. Steffelin (S.D.N.Y 2011) (No. 11-cv-04204).

question is whether these violations are ones "involv[ing] fraud [or] deceit" such that the Commission can seek Second-Tier or Third-Tier penalties for these violations where the defendant only acted negligently.[191]

Section 17(a)(2) makes no mention of fraud, deceit, manipulation, or recklessness, which are statutory requisites for Second- or Third-Tier penalties. As for Section 17(a)(3), it would be easy to assume simplistically that, because Section 17(a)(3) applies to certain conduct that "operates or would operate as a fraud or deceit," it is covered by the Second-Tier and Third-Tier penalty provisions as a violation "involv[ing] fraud [or] deceit."[192] However, the Supreme Court made clear in *Aaron* that the "fraud or deceit" language means different things in different statutory contexts, even within the federal securities laws.[193] Indeed, the point of the *Aaron* holding is that the language of Section 17(a)(3) has a meaning different from the nearly identical language of Rule 10b-5(c).[194] Specifically, the *Aaron* Court reasoned that the "operates or would operate" language of Section 17(a)(3) emphasizes the effect of the conduct, rather than the intent, such that the provision only requires negligence to be violated.[195]

The question is whether the terms "fraud" and "deceit," as used in the penalty provisions, are meant to convey the presence of scienter. These authors believe the best reading of these terms in that context is that they do require proof of scienter in order to impose a Second- or Third-Tier penalty on a defendant. As an initial matter, the terms "fraud" and "deceit" generally refer to intentionally misleading conduct.[196] The Supreme Court has

191. Similar questions arise under other provisions of the securities laws that require no proof of intent in order to establish a violation.

192. 15 U.S.C. § 77q(a)(2)–(3) (2012).

193. *Aaron*, 446 U.S. at 696–97; *see also* Yates v. United States, 135 S. Ct. 1074, 1082 (2015) (plurality) ("[I]dentical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.").

194. *Aaron*, 446 U.S. at 696–97; *see also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 192 n.40 (1963) (holding that while the "operates as a fraud or deceit" language in Section 206(2) of the Investment Advisers Act does not require proof of scienter in an SEC enforcement action seeking an injunction, "[o]ther considerations may be relevant" if different remedies are sought).

195. *Aaron*, 446 U.S. at 697; *see also* SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992) (reaching same conclusion with respect to Section 206(4) of the Investment Advisers Act).

196. United States v. Neustadt, 366 U.S. 696, 707 (1961) (noting that the term "deceit" refers to "deliberately false representations"); BLACK'S LAW DICTIONARY 521 (2d ed. 1979) ("[Fraud] consists of some deceitful practice or willful device,

acknowledged as much.[197] This interpretation is confirmed by the maxim of statutory construction that a word is interpreted according to the company it keeps.[198] Here, the other words in the list of acts that trigger application of a Second-Tier penalty—viz., "manipulation" and "deliberate or reckless disregard of a regulatory requirement"—are clear words of intentionality.[199]

Validating this view, district courts have held that, if a jury finds a defendant liable for negligence, that alone is insufficient to impose Second- or Third-Tier civil penalties absent an additional jury finding of intentional or reckless "fraud" or "deceit."[200] Similarly,

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resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional."); *id.* at 336 (defining "deceit" as "[a] fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon"). At common law, "fraud at law" required a showing of intent. *See Capital Gains Research Bureau, Inc.*, 375 U.S. at 194–95.

197. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) ("When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct.").

198. Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (interpreting the federal securities laws according to the principle of statutory construction "that a word is known by the company it keeps (the doctrine of *noscitur a sociis*)").

199. *See, e.g.*, *Aaron*, 446 U.S. at 690 (observing that the term "manipulative" refers to "knowing or intentional misconduct"); *Hochfelder*, 425 U.S. at 199 (holding that "manipulative . . . connotes intentional or willful conduct designed to deceive or defraud investors"); *id.* at 197 ("Section 10(b) makes unlawful the use or employment of any manipulative or deceptive device or contrivance in contravention of Commission rules. The words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that Section 10(b) was intended to proscribe knowing or intentional misconduct."); *id.* at 193 n.12 ("In certain areas of the law, recklessness is considered to be a form of intentional conduct"); SEC v. Shanahan, 646 F.3d 536, 543–44 (8th Cir. 2011) (defining "recklessness" under the securities laws as "the functional equivalent for intent requiring proof of something more egregious than even white heart/empty head good faith" (citation omitted)); Dolphin and Bradbury, Inc. v. SEC, 512 F.3d 634, 639 (D.C. Cir. 2008) (holding that "extreme recklessness" is "'a lesser form of intent' implying that the danger was so obvious that the actor was aware of it and consciously disregarded it" (quoting *Steadman*, 967 F.2d at 642)); MERRIAM-WEBSTER'S DICTIONARY (2015) (defining "deliberate" as something "done or said in a way that is planned or intended").

200. *See In re* Reserve Fund Secs. & Derivative Litig., Nos. 09 MD 2011 (PGG), 09 Civ. 4346(PGG), 2013 WL 5432334, at *19 (imposing only First-Tier penalties on a defendant found liable for Section 17(a)(2) and (3) violations); SEC v. Mattera, No. 11 Civ. 8323, 2013 U.S. Dist. LEXIS 174163, at *46 (S.D.N.Y. Dec. 9, 2013) ("Negligence alone is not sufficient to warrant the imposition of a third-tier penalty on a defendant."); SEC v. Novus Techs., LLC, No. 2:07-CV-235-TC, 2010

one court has suggested that, when a jury returns a general verdict, it may not be appropriate to impose Second- or Third-Tier penalties if actual fraud or deceit was not found expressly by the jury. In *SEC v. Solow*,[201] the jury found the defendant liable for numerous violations through a general verdict, and the SEC sought Third-Tier penalties for the defendant's violations.[202] The defendant argued that the general verdict form did not show whether the jury found him liable for intentional fraud or rather mere negligence, and thus that Third-Tier penalties were improper.[203] The court undertook its own analysis and determined that, based on the facts and circumstances, Third-Tier penalties were merited, yet refused to award them, suggesting that a jury should find all facts related to assessing penalty amounts.[204]

In addition to the question of whether fraud or deceit are terms requiring proof of scienter, another issue is what it means for a violation to "involve" fraud or deceit. For example, is the answer to that question determined by looking to the elements of the violation or to the specific facts of the case? This issue has arisen in the criminal context with regard to sentencing enhancements based on crimes that "involve" conduct that presents a serious potential risk of physical injury. Courts have wrestled with whether to look to the offense as defined or the offense as committed in determining whether it "involves" a risk of physical injury.[205] After more than two decades of struggling with this question, the Supreme Court ultimately struck this provision down as unconstitutionally vague.[206]

U.S. Dist. LEXIS 111851, at *41 (D. Utah Oct. 20, 2010) ("Imposition of a third-tier penalty requires a finding that [the defendant] acted with a high degree of scienter."); SEC v. Moran, 944 F. Supp. 286, 297 (S.D.N.Y. 1996) ("While the language of the statute describing the Second-Tier penalty includes fraudulent conduct, there is an unmistakable difference between conduct which negligently operates as a fraud when compared to conduct engaged in with the intent to defraud clients."); *see also* Harding Advisory LLC, No. 3-15574, 2015 WL 137642, at *93 (ALJ Jan. 12, 2015) (holding that Third-Tier penalties require proof of "scienter"); *Flannery*, *supra* note 151, at 57–58 (holding that a negligence-based violation of Section 17(a)(3) warranted only a First-Tier penalty).

201. 554 F. Supp. 2d 1356, 1365–68 (S.D. Fla. 2008).

202. *Id.* at 1366.

203. *Id.*

204. *Id.* at 1366–67. *But see In re Reserve Fund*, 2013 WL 5432334, at *19 (asserting that the district court can impose Second-Tier and Third-Tier penalties for non-scienter based violations).

205. *See, e.g.*, Taylor v. United States, 495 U.S. 575, 600 (1990).

206. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). Similarly, the Immigration and Nationality Act defines an "aggravated felony," the commission of which subjects an alien to deportation, as an offense that "involves fraud or deceit." 8 U.S.C. § 1101(a)(43)(M)(i). The Supreme Court has held that whether

At least some courts seem to look at the facts of the case when determining whether a securities violation "involved fraud" for purposes of assessing a Second- or Third-Tier penalty. In *SEC v. CMKM Diamonds, Inc.*,[207] the defendants admitted to violating Sections 5(a) and 5(c) of the Securities Act, and the district court assessed Third-Tier penalties, finding based on the facts of the case that the defendants' business practices were "fraudulent, deceitful, and manipulative."[208] Accordingly, if the underlying violation does not require scienter, as a Section 5 violation does not, it may still be determined that fraud or deceit was involved based on the particular facts of the case; just because Section 5 is a strict liability offense does not mean that the defendant did not in fact act intentionally when violating the provision.[209] On the other hand, in some cases in which courts have found Section 5 violations—but not Section 10(b) or 17(a) violations—courts have refused to assess Third-Tier penalties because they have found that the facts of the case did not show that the defendant's actions amounted to fraud.[210]

The practical import of all of this is that neither a strict liability violation of Section 5 nor a negligence-based Section 17(a) violation would be the type of violation for which a judge could impose Second- or Third-Tier penalties under the federal securities laws unless a jury found that the defendant acted with the requisite intent. Indeed, it may be that Second- and Third-Tier penalties cannot be imposed for such violations even if the defendant acted with the intent required by the penalty statutes, unless that intent was an element of the underlying violation. Ultimately, these are questions that the courts must sort out. To date, however, these questions have not even been presented to the courts, or at least have not been presented with any frequency.

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an offense satisfies this test must be determined "by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime." Kawashima v. Holder, 132 U.S. 1166, 1172 (2012). The Supreme Court held that this test does not require that fraud or deceit be "formal elements" of the offense, but rather only that the offense elements "necessarily entail fraudulent or deceitful conduct." *Id.* at 1172.

207. 635 F. Supp. 2d 1185, 1189 (D. Nev. 2009).

208. *Id.* at 1192; *see also* SEC v. Verdiramo, 907 F. Supp. 367, 369 (S.D.N.Y. 2013) (imposing Second-Tier penalty for Section 5 violation); SEC v. East Delta Res. Corp., No. 10 Civ. 310(SJF), 2012 WL 3903478, at *9 (E.D.N.Y. Aug. 31, 2012) (same).

209. SEC v. StratoComm Corp., No. 1:11-CV-1188, 2015 WL 1013792, at *11 (N.D.N.Y. 2015) ("Defendants correctly argue that a finding of recklessness is necessary to justify second- or third-tier penalties for violations of Section 5.").

210. *See, e.g.*, SEC v. Alpha Telecom, Inc., 187 F. Supp. 2d 1250, 1263 (D. Or. 2002).

CONCLUSION

In the nearly three decades since the Supreme Court decided *Tull*, litigants and lower courts have paid little attention to the application of the Seventh Amendment jury trial right to facts that increase the statutory maximum penalty to which a defendant is exposed in a civil enforcement proceeding brought by the SEC. In the meantime, the Supreme Court has explained that the Sixth Amendment ensures a criminal defendant the right to a jury trial as to all facts that increase the maximum sentence to which the defendant is exposed. These authors think an analogous principle exists under the Seventh Amendment as interpreted in *Tull*—namely, a defendant is entitled to a jury finding as to all facts that increase the maximum civil money penalty to which the defendant is exposed.

If this Article is correct in its understanding of the import of *Tull*, the SEC's litigation of enforcement actions in federal court would be far more similar to private securities litigation than is currently the case. For example, while the SEC has historically avoided difficult issues of loss amount, reliance, and causation when bringing actions in federal court, those issues would, under this reading of *Tull*, be grounds on which a defendant could move for summary judgment and, failing that, would be issues presented to the jury to determine the maximum penalty to which a defendant could be exposed for a securities law violation. Presentation of these issues to the jury would typically necessitate expert testimony, and numerous special interrogatories might need to be presented to the jury for a verdict. What is more, the jury's resolution for penalty purposes of the question of the gain to the defendant from a violation could even limit the disgorgement that the judge could impose after trial.[211] In sum, defendants in SEC enforcement actions brought in federal district court would often be well-advised to insist on their jury trial right on these and other facts that could increase the maximum statutory penalty.

211. *See supra* note 165.