

## **SECURITIES ENFORCEMENT HAS CROSSED THE BORDER: REGULATORY AUTHORITIES RESPOND TO THE FINANCIAL CRISIS WITH A CALL FOR GREATER INTERNATIONAL COOPERATION, BUT WHERE WILL THAT LEAD?**

Henry Klehm III\*  
Joan E. McKown  
Emily A. Posner

### I. INTRODUCTION

As the effects of the financial crisis continue to unravel before us, it is ever more apparent how interlinked our economies are throughout the world, and regulators have become increasingly concerned regarding corruption that is international in scope. Huge amounts of money are being shifted and transferred every day, often through multiple borders and

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\* Henry Klehm III is a Partner in the New York office of Jones Day, where he chairs the firm's Corporate Compliance Initiative and is a member of the Securities Litigation and SEC Enforcement practice. His practice focuses on regulatory examinations, investigations, enforcement actions, and other proceedings with United States and foreign regulators and on corporate governance matters. He is a former global head of compliance for an international investment bank and a Senior Associate Regional Director for the SEC. Henry may be contacted by e-mail at [hklehm@jonesday.com](mailto:hklehm@jonesday.com).

Joan E. McKown is a Partner in the Washington office of Jones Day, where she is a member of the Securities Litigation and SEC Enforcement group. Her practice focuses on counseling and defending entities and individuals in matters before the SEC and other regulators. She is a former Chief Counsel of the Division of Enforcement at the U.S. Securities and Exchange Commission. Joan may be contacted by e-mail at [jemckown@jonesday.com](mailto:jemckown@jonesday.com).

Emily A. Posner is an Associate in the New York office of Jones Day, where she is a member of the Trial Practice group. Her practice focuses on enforcement actions, regulatory examinations, investigations, and commercial litigation in federal and state courts. Emily may be contacted by e-mail at [eposner@jonesday.com](mailto:eposner@jonesday.com).

I-Heng Hsu, an Associate in the New York office of Jones Day, assisted in the research and preparation of this article.

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jurisdictions. Regulatory authorities are realizing that they must cross their borders to pursue enforcement actions; the “post-financial crisis” jurisdiction is the globe. And in particular, securities enforcement trends post-financial crisis show that regulatory authorities worldwide have almost universally agreed to coordinate and cooperate with each other as they pursue enforcement actions. The financial crisis has brought to the forefront various regulators that are speaking out for greater cross-border cooperation and a more robust, collaborative oversight of the world’s financial system. Time will tell where that leads.

Regulators, in part shocked into action by the global nature of the financial crisis, have recently started to make increased efforts to combat corruption and bribery at a global level. Authorities in the United States and throughout the world have almost universally articulated a need for heightened international cooperation in the last few years. The Securities and Exchange Commission (“SEC”), the United States Treasury, and the Organisation of Economic Cooperation and Development (“OECD”), among others, have set the tone for new principles. With the goal of more effective supervision of global markets, they are pursuing a common agenda. For example, regulators and other authorities or organizations have realized that the “economies struggled to recover from a global economic and financial crisis that was closely linked to questions of honesty, propriety and transparency in business conduct.”<sup>1</sup> Chairman of the SEC, Mary Schapiro, testifying before the Senate Committee on Banking, Housing, and Urban Affairs in 2009, explained that the financial crisis has demonstrated how “traditional processes evolved into questionable business practices, that, when combined with leverage and global markets, created extensive systemic risk.”<sup>2</sup> She then articulated a need for “active enforcement that serves as a ready reminder” of the rules and “why we need [the rules] to protect consumers, investors, and taxpayers—and . . . the system itself.”<sup>3</sup> Also in 2009, SEC Commissioner Luis Aguilar said, “As the recent financial crisis has demonstrated, misconduct can have a global effect. As a result, international cooperation in combating fraud is more crucial than ever before.”<sup>4</sup> Similarly, SEC Commissioner Kathleen Casey stated that the financial crisis has “shaken

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1. Org. for Econ. Co-operation & Dev. Working Group on Bribery (“OECD Working Group”), 2009 ANNUAL REPORT 3 (2010) [hereinafter OECD Working Group, 2009 ANNUAL REPORT], <http://www.oecd.org/dataoecd/23/20/45460981.pdf>.

2. *Establishing a Framework for Systematic Risk Regulation: Hearing before the S. Comm. on Banking, Hous. and Urban Affairs*, 111th Cong. (2009) (statement of Mary L. Schapiro, Chairman, SEC), <http://www.sec.gov/news/testimony/2009/ts072309mls.htm>.

3. *Id.*

4. Luis A. Aguilar, Comm’r, SEC, Speech at the Third Annual Fraud and Forensic Accounting Education Conference: Combating Securities Fraud at Home and Abroad (May 28, 2009), <http://www.sec.gov/news/speech/2009/spch052809laa.htm>.

the foundations of our markets, and acutely demonstrated their truly interdependent and connected nature . . . trigger[ing] a fundamental rethinking of the adequacy of regulatory supervision at both the national and international levels.”<sup>5</sup> At the United States Department of Treasury, Under Secretary Lael Brainard remarked in 2010: “America . . . cannot act alone. Other nations must also undertake the difficult reforms required to rebalance global growth as well as to strengthen their own economies.”<sup>6</sup> Although regulators have recognized the need to engage in international cooperation to combat corruption and bribery at a global level, it remains to be seen if this understanding will lead to a meaningful transformation in the area of enforcement.

## II. RECENT TRENDS AND DEVELOPMENTS IN CROSS-BORDER ENFORCEMENT

### A. *Organisation of Economic Cooperation and Development*

In response to the financial crisis, international and national bodies have placed the issues surrounding global corruption near the top of their agendas. Through its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the OECD, for example, attempts to reign in corruption in global business practices with standards criminalizing bribery of foreign public officials in international business transactions.<sup>7</sup> On June 15, 2010, the OECD Working Group on Bribery in International Business Transactions (“OECD Working Group”) released an Annual Report indicating the progress made by its thirty-eight signatories (including thirty-three OECD members and five other countries) in the past year.<sup>8</sup> Twenty-one parties to the Convention reported 280 ongoing investigations, with 150 of the investigations being conducted in one

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5. Kathleen L. Casey, Comm’r, SEC, Welcoming Remarks Before the 34th IOSCO Annual Conference (June 10, 2009), <http://www.oceq.org/blog/welcoming-remarks-34th-iosco-annual-conference>.

6. Press Release, Lael Brainard, Under Sec’y, U.S. Dep’t of Treasury, Rebuilding Together: Europe and the United States after the Global Financial Crisis (Sept. 29, 2010), <http://www.uspolicy.be/headline/us-official-us-europe-rebuilding-after-financial-crisis>.

7. Org. for Econ. Co-operation & Dev. (“OECD”), *Convention on Combating Bribery of Foreign Public Officials in International Transactions* (2011), <http://www.oecd.org/dataoecd/4/18/38028044.pdf>; see also OECD, *Country Reports on the Implementation of the OECD Anti-Bribery Convention* (Mar. 25, 2011, 2:27 PM), [http://www.oecd.org/document/24/0,3343,3n\\_2649\\_34859\\_1933144\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,3343,3n_2649_34859_1933144_1_1_1_1,00.html) (providing country-by-country reports on the implementation of the convention).

8. OECD Working Group, 2009 ANNUAL REPORT, *supra* note 1; see also David A. Wilson, *Leveling the Anti-Corruption Playing Field*, LAW360 (July 19, 2010), available at <http://www.law360.com/web/articles/180065> (discussing OECD’s progress in combating bribery).

country.<sup>9</sup> The Annual Report also highlights the challenges of changing the international business culture, where bribery is a common element and some governments are reluctant to enforce anti-bribery policies.<sup>10</sup>

In November 2009, the OECD Working Group issued the Anti-Bribery Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Recommendation”).<sup>11</sup> It encourages signatories to cooperate with other countries to prosecute allegations of bribery, strengthen their whistleblower protections, and review policies on small facilitation payments, among other things. The OECD also issued guidance called “Good Practice Guidance on Internal Controls, Ethics and Compliance” (“OECD Good Practice Guidance”), adopted on February 18, 2010.<sup>12</sup> The OECD Good Practice Guidance asks the private sector to adopt clear anti-bribery policies, assume responsibility for the oversight of ethics and compliance programs, conduct regular training and communication programs on foreign bribery with employees and business partners, and implement disciplinary procedures for violations of anti-bribery rules.<sup>13</sup> It also includes considerable emphasis on third-party compliance measures, such as a recommendation that companies institute measures to prevent foreign bribery with third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners.<sup>14</sup> The OECD Working Group has implemented a peer review process to assess a signatory’s implementation of the recommendations described above.<sup>15</sup> The review process is intended to measure a country’s enforcement and institutional mechanisms and review its legislation. The OECD Good Practice Guidance is not legally binding; however, like the DOJ Sentencing Guidelines, it presents incentives and methodologies for adopting strong compliance programs,<sup>16</sup> and sets forth a global standard.

The OECD Working Group has grown since the financial crisis. In 2009, Russia asked to join the Anti-Bribery Convention as part of the OECD membership drive.<sup>17</sup> The OECD Working Group is also deepening

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9. OECD Working Group, 2009 ANNUAL REPORT, *supra* note 1.

10. *Id.*

11. OECD Working Group in Int’l Bus. Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (Nov. 26, 2009), <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.

12. OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (Feb. 18, 2010), <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.

13. *Id.*

14. *Id.*

15. OECD Working Group, 2009 ANNUAL REPORT, *supra* note 1, at 10–11.

16. U.S. SENTENCING GUIDELINES MANUAL § 8C2.4 cmt. background (2010).

17. OECD Working Group, 2009 ANNUAL REPORT, *supra* note 1, at 11.

relations on anti-bribery issues with China, India, Indonesia and Thailand through the exchange of information and official missions, and it aims to eventually offer memberships to these countries.<sup>18</sup> In December 2009, the OECD Working Group launched a new three-year Initiative to Raise Global Awareness of Foreign Bribery.<sup>19</sup> The three-year initiative includes plans for a global media outreach campaign, a “Foreign Bribery Impact Study” of the harm caused by bribery, and the development of academic courses on foreign bribery for law and business schools.<sup>20</sup> Also in 2009, the OECD Working Group strengthened its anti-corruption ties with the World Bank regarding the quantification of the proceeds of bribery and asset recovery.<sup>21</sup>

On October 15, 2010, after conducting a review, the OECD Working Group commended United States regulators on their enforcement efforts.<sup>22</sup> OECD findings were summarized, in part, as follows:

U.S. enforcement has increased steadily and resulted in increasingly significant prison sentences, monetary penalties and disgorgement. Increased enforcement was enabled by the good practices developed within the U.S. legal and policy framework, including the dedication of resources to specialized units in the Department of Justice, the Federal Bureau of Investigation and the Securities and Exchange Commission. New legislation has also strengthened accounting and auditing standards, including those introduced in the 2002 Sarbanes-Oxley Act and whistleblower protections under the July 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>23</sup>

Most recently, the OECD Working Group issued reports regarding anti-corruption measures in Iceland and the Ukraine.<sup>24</sup> It concluded that

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18. *Id.* at 33–36.

19. *Id.* at 12–13.

20. *Id.* at 13.

21. *Id.* at 45–46.

22. See OECD Directorate for Fin. and Enter. Affairs, *United States: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions* (Oct. 15, 2010) (commenting on the visible and high level of support for the fight against bribery from the United States), <http://www.oecd.org/dataoecd/10/49/46213841.pdf>.

23. *Id.* at 4.

24. OECD Directorate for Fin. and Enter. Affairs, *Iceland: Phase 3 : Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions* (Dec. 15, 2010) [hereinafter OECD, *Iceland: Phase 3*], <http://www.oecd.org/dataoecd/19/41/46861415.pdf>; OECD Anti-Corruption Network for Eastern and Central Asia, *Second Round of Monitoring: Ukraine Monitoring Report* (Dec. 9, 2010) [hereinafter OECD ACN, *Ukraine Monitoring Report*], <http://www.oecd.org/dataoecd/31/55/46832397.pdf>.

Iceland must work to ensure its law enforcement authorities are coordinated and adequately resourced to investigate and prosecute economic crimes.<sup>25</sup> Specifically, it recommended that Iceland should strengthen sanctions for foreign bribery offenses and ensure that private sector whistleblowers are adequately protected when reporting suspected acts of bribery.<sup>26</sup> The OECD also concluded that the Ukraine had made little progress after the financial crisis, despite pledges from the country's leaders to take action.<sup>27</sup> It recommended, among other things, that the Ukraine should ensure effective international mutual legal assistance in the investigation and prosecution of corruption cases, strengthen the public institutions responsible for combating corruption, and establish a dedicated anti-corruption investigative body with specialist prosecutors.<sup>28</sup>

Strong United States support has accompanied the OECD's burgeoning efforts. During his remarks to the OECD in May 2010 in Paris, Attorney General Eric Holder expressed concerted and ever-increasing United States support for the OECD and the Anti-Bribery Convention.<sup>29</sup> He said:

For years, the OECD has been at the forefront of efforts to combat corruption wherever and however it occurs . . . . [N]one of the progress the United States has made would have been possible without the long-term cooperation of our law enforcement partners around the globe—cooperation fostered by relationships established through the OECD . . . . Every member of the Working Group, including the United States, can do more to engage in robust international cooperation.<sup>30</sup>

Holder pointed out that one reason authorities should cooperate is because bribery takes a large toll on the economy.<sup>31</sup> “The World Bank estimates that more than one trillion dollars in bribes are paid each year out of a world economy of 30 trillion dollars. That's a staggering three percent of the world's economy. And the impact is particularly severe on foreign investment,” Holder told the OECD.<sup>32</sup> In particular, the impact on developing countries, such as Bangladesh, where “foreign bribery imposes huge costs on [the country] and also taints politics and democratic

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25. OECD, *Iceland: Phase 3*, *supra* note 24, at 4.

26. *Id.*

27. OECD ACN, *Ukraine Monitoring Report*, *supra* note 24, at 40.

28. *Id.* at 43–44.

29. Eric Holder, U.S. Attorney Gen., Attorney General Holder Delivers Remarks at the Organisation for Economic Co-Operation and Development (May 31, 2010), <http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html>.

30. *Id.*

31. *Id.*

32. *Id.*

governance,” can reportedly be devastating.<sup>33</sup>

*B. G-20 Working Group on Anti-Corruption*

The OECD is not alone in bolstering its anti-bribery efforts and post-financial crisis recommendations: recently, the G-20 has taken on a leadership role as a forum to promote international economic cooperation.<sup>34</sup> In June 2010, at the G-20 Summit in Toronto, the G-20 announced the creation of a G-20 Working Group on Anti-Corruption (“WGAC”) to examine and make recommendations regarding international cooperation to combat corruption.<sup>35</sup> The G-20 mandated the WGAC to make recommendations on how the G-20 could continue to make practical and valuable contributions to international efforts to combat corruption. The G-20 now seeks to lead by example in key areas that include, but are not limited to, adopting and enforcing strong and effective anti-bribery rules, fighting corruption in the public and private sectors, preventing access of corrupt persons to global financial systems, cooperating in visa denial, extradition and asset recovery, and protecting whistleblowers from retaliation.<sup>36</sup>

These steps occurred in connection with the G-20’s earlier directives to strengthen international standards and promote international cooperation among national regulators as a necessary outcome in current global financial markets.<sup>37</sup> In November 2008, the G-20 leaders set forth five principles to guide policy implementation: (1) strengthening transparency and accountability; (2) enhancing sound regulation; (3) promoting integrity in financial markets; (4) reinforcing international cooperation; and (5) reforming international financial institutions.<sup>38</sup>

WGAC also achieved consensus on the idea of strengthening the United Nations Convention Against Corruption (“UNCAC”).<sup>39</sup> As a result, the G-20 called on all G-20 members to fully implement the UNCAC. In September 2010, WGAC met in Jakarta and agreed on an action plan that

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33. Transparency Int’l, *2010 Progress Report: Enforcement of the OECD Anti-Bribery Convention* 76 (July 28, 2010), <http://www.transparency.org/content/download/53670/856410/file/2010+PROGRESS+REPORT.pdf>.

34. John W. Head, *The Global Financial Crisis of 2008–2009 in Context—Reflections on International Legal and Institutional Failings, “Fixes,” and Fundamentals*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 43, 56–62 (2010).

35. Press Release, Republic of Indonesia, G-20 Working Group on Anti-Corruption, Jakarta, 27–28 September 2010 (Sept. 29, 2010), <http://www.deplu.go.id/Pages/PressRelease.aspx?IDP=1002&l=en> [hereinafter Press Release, Republic of Indonesia].

36. *Id.*

37. G-20, *Declaration: Summit on Financial Markets and the World Economy* (Nov. 15, 2008), [http://www.g20.org/documents/g20\\_summit\\_declaration.pdf](http://www.g20.org/documents/g20_summit_declaration.pdf).

38. *Id.* at 3.

39. Press Release, Republic of Indonesia, *supra* note 35.

the G-20 leaders later endorsed at the G-20 Summit in Seoul, South Korea in November 2010.<sup>40</sup> As WGAC developed the action plan, WGAC members bridged differences and reached consensus on its elements, such as (1) adopting and enforcing legal and other measures against international bribery; and (2) preventing corrupt officials from laundering their proceeds of corruption and accessing the global financial system.<sup>41</sup>

The G-20 is encouraging all major economies to adopt the standards set forth in the OECD Anti-Bribery Convention. Lastly, the leaders of the G-20 and the International Organization of Securities Commissions (“IOSCO”) established the Financial Stability Board (“FSB”) to monitor the progress of “needed reforms.”<sup>42</sup> In a world without a global financial regulator, the FSB was mandated in April 2009 to serve as “a mechanism for national authorities, standard setting bodies . . . and international financial institutions to address vulnerabilities and to develop and implement strong regulatory, supervisory and other policies in the interest of financial stability.”<sup>43</sup> In March 2010, the FSB launched an initiative to incentivize jurisdictions to engage in international cooperation and adhere to information exchange standards in the financial regulatory and supervisory area.<sup>44</sup> The FSB is set to play an integral role in developing a framework for international cooperation throughout the global financial system.<sup>45</sup>

### C. *International Organization of Securities Commissions (IOSCO)*

Aside from its creation of the FSB with the G-20, IOSCO is also building a regulatory framework to combat cross-border market abuse. On January 22, 2010, IOSCO announced that it achieved its 2005 goal of having its eligible membership sign onto, or commit to signing, the IOSCO Multilateral Memorandum of Understanding concerning Consultation, Cooperation, and the Exchange of Information (“MMoU”).<sup>46</sup> This achievement means that 96% of IOSCO’s eligible membership of 115

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40. *Id.*

41. *Id.*

42. Financial Stability Board, *Progress since the St. Andrews Meeting in Implementing the G20 Recommendations for Strengthening Financial Stability* 4 (Apr. 19, 2010), [http://www.financialstabilityboard.org/publications/r\\_100419.pdf](http://www.financialstabilityboard.org/publications/r_100419.pdf).

43. Press Release, Financial Stability Forum, Financial Stability Forum Re-established as the Financial Stability Board (Apr. 2, 2009), [http://www.financialstabilityboard.org/press/pr\\_090402b.pdf](http://www.financialstabilityboard.org/press/pr_090402b.pdf).

44. Financial Stability Board, *supra* note 42, at 11.

45. G-20, *The Global Plan for Recovery and Reform*, ¶ 15 (Apr. 2 2009), <http://www.g20.org/Documents/final-communique.pdf>.

46. Media Release, Int’l Org. of Sec. Comm’ns (“IOSCO”), IOSCO Completes Global Framework to Fight Against Cross-Border Market Abuse (Jan. 22, 2010), <http://www.iosco.org/news/pdf/IOSCONEWS176.pdf>.



securities regulators now meet the requirements needed to become a signatory of the MMoU, or have made the necessary commitment to seek national legislative changes in order to become eligible in the near future.<sup>47</sup> The MMoU provides a mechanism through which securities regulators can share essential investigative material while also setting out specific requirements for the exchange of information. The sixty-four full MMoU signatories can request and share confidential information in pursuit of cross-border securities offenses. In 2009, IOSCO saw 1261 information requests made by its members to fellow regulators via the MMoU, an increase from 867 in 2008, a figure that was itself an increase of eighteen percent from 2006.<sup>48</sup> Jane Diplock, Chairman of the IOSCO Executive Committee, said at the 2010 Global Financial Crisis Conference: “The new post-crisis global financial architecture may still be under construction, but promising characteristics are already emerging. Standards are likely to be more convergent, and greater enforcement cooperation across jurisdictions will leave transgressors with fewer places to hide.”<sup>49</sup>

#### D. *Financial Action Task Force*

The Financial Action Task Force (“FATF”), an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing through legislative and regulatory reforms, also responded to the financial crisis.<sup>50</sup> The FATF examined the impact of the crisis on anti-money laundering/counter-terrorist financing efforts and reported on the results of its study to the G-20 Ministers of Finance in August 2009. At the G-20 leaders’ request, the FATF then publicly identified twenty-eight high-risk and non-cooperating jurisdictions in February 2010.<sup>51</sup> A few months later, twenty of these jurisdictions had already provided written high-level commitments to address the deficiencies identified.<sup>52</sup>

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47. *Id.* at 1.

48. *Id.* at 2–3.

49. Jane Diplock, Chairman, IOSCO Exec. Comm., Speech at the Global Financial Crisis Conference at Bond University, Sydney, Australia: The Work of IOSCO and the Financial Regulatory Framework (Apr. 9, 2010) (on file with author).

50. Financial Action Task Force (“FATF”), *Annual Report 2009–2010* (2010), <http://www.fatf-gafi.org/dataoecd/50/53/45712700.pdf>; see also Paul Vlaanderen, President, FATF, Speech to the Association of Banks in Singapore: Global Threats and Challenges for Financial Institutions (Mar. 16, 2010), [http://www.fatf-gafi.org/document/5/0,3746,en\\_32250379\\_32236879\\_44902085\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/5/0,3746,en_32250379_32236879_44902085_1_1_1_1,00.html).

51. FATF *Annual Report*, *supra* note 50, at 28–29.

52. *Id.*

*E. The Dodd-Frank Act*

The financial crisis also triggered ambitious legislative reform by the United States Congress, culminating in the historic Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) being signed into law by President Obama on July 21, 2010.<sup>53</sup> Many elements of the Dodd-Frank Act attain synergy with the efforts of the G-20 leaders, Basel and the FSB, and indicate an intensified acceleration of information sharing.<sup>54</sup> In order to combat fraud, the Dodd-Frank Act includes a whistleblower program that provides monetary rewards to employees who report securities violations, such as illegal payments to foreign officials.<sup>55</sup> Section 922 of the Dodd-Frank Act appends the Securities Exchange Act of 1934 with a new provision, Section 21F: if someone provides the SEC with “original information” regarding any violation of securities laws resulting in monetary sanctions over \$1 million, the SEC has the discretion to award the whistleblower ten to thirty percent of the monetary payment collected.<sup>56</sup> Under the Dodd-Frank Act, whistleblowers could potentially receive very large cash rewards, especially when settlements reach the billion-dollar range. On May 25, 2011, the SEC adopted final rules related to implementing the whistleblower provisions of the Dodd-Frank Act scheduled to go into effect on August 12, 2011.<sup>57</sup> One anticipated result of the new whistleblower program may be an increase in the number of investigations and prosecutions under the Foreign Corrupt Practices Act (the “FCPA”), which at the same time raises concerns that corporate employees may be tempted to forego their own internal compliance programs.<sup>58</sup>

The Dodd-Frank Act’s whistleblower program also contemplates international cooperation among regulatory authorities. The whistleblower provisions authorize the disclosure of information that could reasonably be expected to reveal the identity of a whistleblower to foreign securities and law enforcement authorities subject to appropriate assurances of

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53. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter “Dodd-Frank Act”].

54. *Continuing Oversight on International Cooperation to Modernize Financial Regulation: Hearing Before the Subcomm. on Sec. & Int’l Trade and Fin. of the S. Comm. on Banking, Housing & Urban Affairs*, 111th Cong. 45 (2010) (statement of Daniel K. Tarullo, Member, Board of Governors of the Federal Reserve System).

55. Dodd-Frank Act, *supra* note 53, at 1843–49.

56. *Id.* at § 922.

57. *See* Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545 (May 25, 2011), available at [www.sec.gov/rules/final/2011/34-64545.pdf](http://www.sec.gov/rules/final/2011/34-64545.pdf).

58. T. Markus Funk, *Meeting (and Exceeding) Our Obligations: Will OECD’s Anti-Bribery Convention Cause the Dodd-Frank Act’s ‘Whistleblower Bounty’ Incentives to Go Global?*, 5 WHITE COLLAR CRIME REPORT 711 (Oct. 8, 2010).

confidentiality as determined by the SEC. The Dodd-Frank Act also establishes the Financial Stability Oversight Council (“FSOC”) to identify risks to financial stability, promote market discipline, and respond to any emerging threats in the system.<sup>59</sup> In light of the Dodd-Frank Act’s impact on foreign entities that do business with the United States, SEC Chairman Schapiro, while testifying before the Senate Committee on Banking regarding the implementation of the Dodd-Frank Act, said the SEC Office of International Affairs was “consulting bilaterally and through multilateral organizations with counterparts abroad, and is meeting bi-weekly with . . . [the] rule writing staff [at the SEC] to ensure appropriate coordination with our foreign counterparts.”<sup>60</sup>

#### F. *The Volcker Rule*

New U.S. banking regulations after the financial crisis will also test the extent of international cooperation. Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act adopted the “Volcker Rule” as new Section 13 of the Bank Holding Company Act.<sup>61</sup> As proposed by Paul Volcker, former Federal Reserve Chairman who served as Chairman of the President’s Economic Recovery Advisory Board, the Volcker Rule is “particularly designed to deal with the problem of ‘too big to fail’ and the related moral hazard that looms so large as an aftermath of the emergency rescues of financial institutions, bank and non-bank, in the midst of crises.”<sup>62</sup> The Volcker Rule aims to achieve its objective by prohibiting any banking entity from engaging in proprietary trading or acquiring or retaining any equity, partnership, or other ownership interest in or controlling relationship over, or sponsorship of a hedge fund or a

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59. Financial Stability Oversight Counsel, *Financial Stability Oversight Council Created Under the Dodd-Frank Wall Street Reform and Consumer Protection Act: Frequently Asked Questions*, U.S. Dep’t of Treasury, <http://www.treasury.gov/initiatives/Documents/FAQ%20-%20FinancialStabilityOversightCouncilOctober2010FINALv2.pdf>; see also Press Release, U.S. Dep’t of Treasury, Financial Stability Council Holds Inaugural Meeting (Oct. 1, 2010), <http://www.treasury.gov/press-center/press-releases/Pages/tg888.aspx>.

60. *Testimony on Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act by the U.S. Securities and Exchange Commission: Hearing before the S. Comm. on Banking, Hous. and Urban Affairs*, 111th Cong. (2010) (statement of Mary L. Schapiro, Chairman, SEC), <http://www.sec.gov/news/testimony/2010/ts093010mls.htm>.

61. Dodd-Frank Act, *supra* note 53, at 1620.

62. *Prohibiting Certain High-Risk Investment Activities by Banks and Bank Holding Companies: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. 1 (2010) [hereinafter *Prohibiting High-Risk Investment Activities*] (statement of Paul Volcker, Chairman of President’s Economic Recovery Advisory Board), available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=ec787c56-dbd2-4498-bbbd-ddd23b58c1c4](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=ec787c56-dbd2-4498-bbbd-ddd23b58c1c4).

private equity fund.<sup>63</sup> Aside from the above prohibitions, the Volcker Rule also places restrictions on other activities by banking entities, such as relationships with private equity funds and hedge funds.<sup>64</sup>

In 2011, the Volcker Rule continues to move toward implementation. On January 18, the FSOC released its report about the Volcker Rule entitled “Study & Recommendation on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds.”<sup>65</sup> The study responds to the mandate in the Dodd-Frank Act requiring the FSOC to study and make recommendations for the implementation of the Dodd-Frank Act within six months after the Act is enacted.<sup>66</sup> In the study, the FSOC acknowledges the concerns of the financial industry regarding the vague areas of the Volcker Rule, particularly the blurry line between permitted and prohibited activities.<sup>67</sup> While the Volcker Rule prohibits banking entities from proprietary trading and investment or sponsorship in hedge funds and private equity funds, it also provides several exceptions to the prohibition.<sup>68</sup> The FSOC study notably recommends that banking entities implement robust compliance programs, including the CEO’s public attestation of the regime’s effectiveness.<sup>69</sup> The FSOC also acknowledges concerns that the Volcker Rule places U.S. banks at a competitive disadvantage, but does not actually address those concerns.<sup>70</sup>

Meanwhile, the architect of the Volcker Rule is no longer a part of the administration, which appears to be seeking closer ties with the business sector.<sup>71</sup> On January 21, 2011, President Obama named Jeffrey R. Immelt as Paul Volcker’s successor as the leader of the President’s outside panel of economic advisers.<sup>72</sup> The panel has been reconfigured from the Economic Recovery Advisory Board into the new Council on Jobs and Competitiveness, whose creation reflects the shift of the administration’s

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63. FIN. STABILITY OVERSIGHT COUNCIL (“FSOC”), STUDY & RECOMMENDATIONS ON PROHIBITIONS ON PROPRIETARY TRADING & CERTAIN RELATIONSHIPS WITH HEDGE FUNDS & PRIVATE EQUITY FUNDS (2011) [hereinafter FSOC REPORT].

64. *Id.* at 1.

65. *Id.*

66. Dodd-Frank Act, *supra* note 53, at § 619.

67. FSOC REPORT, *supra* note 63.

68. *Id.* at 1. The Volcker Rule allows banks to conduct certain trading activities as market makers, underwriters, and hedging activities. The Volcker Rule also allows *de minimis* investment in hedge funds and private equity funds and provides exemptions to the prohibition when the banks provide fund investment services to their customers. *Id.* at 56. The precise meaning of “customer” has yet to be defined.

69. *Id.* at 69.

70. *Id.* at 11.

71. Sheryl Gay Stolberg & Anahad O’Connor, *Obama Picks G.E. Chief for Board as Focus Turns to Jobs*, N.Y. TIMES, Jan. 21, 2011, available at <http://www.nytimes.com/2011/01/22/business/economy/22immelt.html>.

72. *Id.*

economic focus from crisis aversion to job creation.<sup>73</sup>

Although the implementation of the Volcker Rule will depend on the rulemaking of other federal agencies, it has already led to changes or plans to change at major banks.<sup>74</sup> For example, the chief of proprietary trading at Morgan Stanley resigned along with sixty employees.<sup>75</sup> He pledged to form a new firm with his team of traders by the end of 2012.<sup>76</sup> And as other countries are unlikely to implement the provisions of the Volcker Rule, investment firms such as JPMorgan have commented that European investment banks may gain “material positive earnings potential” as a result of its implementation.<sup>77</sup> It is no surprise that the Volcker Rule faces fierce opposition from banks and Wall Street firms. However, according to Paul Volcker, the Volcker Rule presents another opportunity for international cooperation. In his statement before the Senate Committee on Banking, Housing and Urban Affairs, Paul Volcker said:

[A] strong international consensus on the proposed approach would be appropriate, particularly across those few nations hosting large multi-national banks and active financial markets. The needed consensus remains to be tested. However, judging from what we know and read about the attitude of a number of responsible officials and commentators, I believe there are substantial grounds to anticipate success as the approach is fully understood.<sup>78</sup>

Without this international cooperation among regulators, the Volcker Rule could harm United States banks and other firms.

Despite the long list of recommendations and the FSOC’s full support for the “robust implementation” of the Volcker Rule, the new FSOC study does little to further the implementation of the rule. Press reports have noted that the study is being criticized as largely “open-ended” and too deferential to regulators with regard to key decisions.<sup>79</sup> The task of implementing the Volcker Rule has been delegated to the federal agencies responsible for designing the rules, which “have nine months to implement

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73. *Id.*

74. *See, e.g.,* Aaron Lucchetti, *Morgan Stanley Team to Exit in Fallout From Volcker Rule*, WALL ST. J., Jan. 11, 2011, at C1 (discussing the responses to the Volcker Rule at major banks such as Goldman Sachs and Morgan Stanley).

75. *Id.*

76. *Id.*

77. Elisa Martinuzzi, *Volcker Rule Favors European Investment Banks*, JPMorgan Says, BLOOMBERG, Jan. 12, 2011, <http://www.bloomberg.com/news/2011-01-12/volcker-rule-favors-european-investment-banks-jpmorgan-says.html>.

78. *Prohibiting High Risk Investments*, *supra* note 62, at 3.

79. Victoria McGrane & Aaron Lucchetti, *Oversight Plan Seen to Lack Specifics*, WALL ST. J., Jan. 18, 2011.

detailed regulations for the institutions they oversee.”<sup>80</sup> It is still hard to say how effective the Volcker Rule will be and how it will complement trends toward international cooperation among enforcement authorities.

*G. Securities and Exchange Commission*

As expected, the SEC also features prominently in the view toward cooperation in cross-border securities enforcement. In November 2008, the then-SEC Chairman Christopher Cox said, “As the credit crisis has unfolded throughout the world during 2008, the SEC has been working closely with our international . . . counterparts . . . to coordinate our actions and align our strategies. Nowhere was this more important than in the area of enforcement.”<sup>81</sup> Cox reported that as of November 2008, the SEC made 556 requests to foreign regulators for assistance in SEC investigations over the year, “more than one [request] a day on average.”<sup>82</sup> He added that many of the investigations related to possible wrongdoing in the subprime mortgage area. Reciprocally, the SEC received 454 requests from foreign regulators for cooperative law enforcement help in the past year.<sup>83</sup> Enforcement in the FCPA area took off for the SEC after 2006, likely as a result of the CEO certification required by the Sarbanes-Oxley Act<sup>84</sup> and increasing globalization.<sup>85</sup> The SEC brought more cases in the last five years than in the twenty-eight years prior to 2005, when the FCPA was enacted.<sup>86</sup> At the 24th National Conference on the Foreign Corrupt Practice Act in November 2010, Assistant Attorney General Lanny Breuer proclaimed that the “FCPA enforcement is stronger than it’s ever been—and getting stronger.”<sup>87</sup> The United States Congress has reportedly appropriated substantial additional resources in the billions of dollars to the

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80. *Id.*

81. Christopher Cox, Chairman, SEC, Speech at the SEC Int’l Enforcement Institute: The Importance of International Enforcement Cooperation in Today’s Markets (Nov. 7, 2008).

82. *Id.*

83. *Id.*

84. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 906, 116 Stat. 745, 806 (requiring CEOs and CFOs to certify periodic financial reports).

85. Since the DOJ created the FCPA unit in 2006, the government has “collected billions of dollars in civil and criminal penalties” by prosecuting more cases since 2006 than in the first twenty-eight years of the FCPA’s existence. Funk, *supra* note 58, at 3.

86. Press Release, Dep’t of Justice, Response of the United States to Questions Concerning Phase 3 OECD Working Group on Bribery 13 (May 3, 2010), <http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf>.

87. Press Release, Dep’t of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html> [hereinafter Breuer FCPA Conference].

US Department of Justice and FBI for the pursuit of white-collar crime since 2009.<sup>88</sup> In January 2011, Breuer discussed some of the steps taken by the DOJ to significantly increase its FCPA enforcement capabilities.<sup>89</sup> For example, in the FCPA Unit, the DOJ promoted a new head of the unit and two assistant chiefs.<sup>90</sup> Additionally, Breuer said the DOJ increased the number of prosecutors in the FCPA unit, “attracting high caliber attorneys with extensive experience—including Assistant U.S. Attorneys with significant trial and prosecutorial experience and attorneys from private practice with defense-side knowledge and experience.”<sup>91</sup> The SEC has similarly been provided with additional resources, including the 2010 creation of a division dedicated to FCPA enforcement.<sup>92</sup> In her remarks at a news conference in January 2011, Cheryl Scarboro, Chief of the SEC’s new FCPA Unit, vigorously expressed the Enforcement Division’s commitment to work with regulatory authorities around the world “to level the playing field worldwide.”<sup>93</sup> She said:

[T]he FCPA Unit will raise the Commission’s profile on the global stage by playing a more active role in international regulatory working groups and building closer relationships with our regulatory counterparts in other countries. Aggressive enforcement of the FCPA is essential in a world of increasing interdependence . . . . The [FCPA] Unit will leverage the efforts of the SEC, the Department of Justice and our foreign counterparts to level the playing field worldwide. Together we will send a clear message that wrongdoers will face a strong and united front around the world.<sup>94</sup>

Similarly, Breuer has noted that by strong enforcement of the FCPA, the United States leads by example and demonstrates a strong anti-corruption program to our foreign counterparts.<sup>95</sup>

Referring to the progress in securities enforcement made by the United States agencies in 2010, Breuer said there has been a substantial increase in United States cooperation with our foreign counterparts. United States participation in the OECD review process, for example, has forged

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88. Transparency Int’l, *supra* note 33, at 65.

89. Lanny A. Breuer, Assistant Att’y Gen. of the Criminal Div., Dep’t of Justice, Keynote Address at the Annual Meeting of the Washington Area Corporate Counsel Association (Jan. 26, 2011), <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html>.

90. *Id.*

91. *Id.*

92. Transparency Int’l, *supra* note 33, at 65.

93. Cheryl Scarboro, Chief of the FCPA Unit, SEC, Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2011), <http://www.sec.gov/news/speech/2010/spch011310newsconf.htm#scarboro>.

94. *Id.*

95. Breuer FCPA Conference, *supra* note 89.

closer relationships between United States and foreign enforcement agencies.<sup>96</sup>

The SEC has also changed its focus in this area and is seeking disgorgement, suing individuals and working closely with DOJ and foreign regulators.<sup>97</sup> Moreover, the SEC began entering into enforcement MOUs with foreign enforcement authorities such as the Australian Securities and Investments Commission.<sup>98</sup> The SEC has recently placed more emphasis on enhanced MOUs that go beyond its existing agreements or the IOSCO Multilateral MOU. Now, approximately one third of the SEC's insider trading and market manipulation cases require the Commission to go abroad for the evidence. The current trajectory continues the trend since the insider trading scandals of the 1980s toward greater information sharing between the SEC and its foreign counterparts. Realizing that one needs to share information to get information, Congress granted the SEC the authority to obtain and share information on behalf of a foreign government and to keep information it receives from a foreign government confidential.<sup>99</sup>

In January 2011, press reports indicated that the SEC has been investigating whether several banks, hedge funds, and private equity firms have run afoul of the FCPA by making improper payments to secure investments from sovereign wealth funds.<sup>100</sup> A placement agent working with a sovereign wealth fund may be considered a government official and therefore covered by the FCPA.<sup>101</sup>

Companies that reportedly received letters of inquiry from the SEC included Citigroup, The Blackstone Group, Bank of America, and Morgan Stanley.<sup>102</sup> These firms had sought funding from sovereign wealth funds, raising billions of dollars in capital to strengthen their balance sheets in recent years.<sup>103</sup> The investigation presumably focuses on whether these

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96. *Id.* Breuer explained that the cooperation had yielded results such as the successful resolution of the BAE Systems PLC case.

97. *Id.*

98. Austl. Sec. & Inv. Comm'n, Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Enforcement of Securities Laws, (Aug. 25, 2008), [http://www.sec.gov/about/offices/oia/oia\\_mutual\\_recognition/australia/enhanced\\_enforcement\\_mou.pdf](http://www.sec.gov/about/offices/oia/oia_mutual_recognition/australia/enhanced_enforcement_mou.pdf).

99. Dodd-Frank Act, *supra* note 53, at 1843–49.

100. Dionne Searcey & Randall Smith, *SEC Probes Banks, Buyout Shops Over Dealings with Sovereign Funds*, WALL ST. J. (Jan. 14, 2011), <http://online.wsj.com/article/SB10001424052748704307404576080403625366100.html>.

101. *Id.*

102. Joshua Gallu, *SEC Probes Financial Firms on Sovereign Fund Bribes*, BLOOMBERG (Jan. 14, 2011, 6:59 PM), <http://www.bloomberg.com/news/2011-01-14/sec-probes-financial-firms-on-possible-bribes-to-sovereign-wealth-funds.html>.

103. Peter Lattman & Michael J. De La Merced, *S.E.C. Looking Into Deals With*



entities paid placement agents to win access to the state-owned money, with benefits like entertainment and travel.<sup>104</sup> This would mark the first time the SEC has applied the anti-bribery provision of the FCPA to the financial services industry. In light of cross-border regulation and increased cooperation between the SEC, the DOJ, and law enforcement and regulatory authorities throughout the world, financial firms need to remain alert and bolster their FCPA compliance programs because they now face increased risk of coordinated international enforcement actions.

#### H. *United Kingdom Bribery Act*

In the United Kingdom, the government has recently taken legislative action to address the problem of corruption in international business transactions. The United Kingdom Bribery Act 2010 (the “UKBA”) went into effect on July 1, 2011.<sup>105</sup> The UKBA is much like the FCPA, but it has both a broader scope and jurisdictional reach.<sup>106</sup> It will be relevant to any organization that does business in the U.K. or with U.K. counterparties.

On March 30, 2011, the United Kingdom’s Ministry of Justice (“MoJ”) published guidance for businesses regarding the proper scope of adequate procedures and the extent to which it will exercise prosecutorial discretion under the new legislation.<sup>107</sup> The guidance is based on six principles each commercial organization should have, which are “intended to be flexible and outcome focused:” (1) proportionate procedures for preventing bribery; (2) top-level commitment to preventing bribery; (3) a periodic, informed, and documented risk assessment; (4) due diligence procedures with a proportionate and risk-based approach; (5) communication, including training, that is proportionate to the risks faced; and (6) monitoring and review of procedures designated to prevent bribery.<sup>108</sup>

Each principle is followed by commentary and examples.

The UKBA will likely increase the number of prosecutions and investigations originating in the U.K. and also encourage the U.K. Serious Fraud Office (“SFO”) to cooperate in anti-corruption investigations.

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*Sovereign Funds*, N.Y. TIMES DEALBOOK BLOG (Jan. 13, 2011, 12:08 PM), <http://dealbook.nytimes.com/2011/01/13/s-e-c-looking-into-deals-with-sovereign-funds>.

104. *Id.*

105. United Kingdom Bribery Act, 2010, c. 23; *see also* Michael T. Gass & Anita M. Christy, *UK Bribery Act: Corporate Exposure Beyond the FCPA*, LAW 360, June 22, 2010, <http://www.law360.com/web/articles/173718>.

106. Gass & Christy, *supra* note 105.

107. United Kingdom Ministry of Justice, *The Bribery Act 2010—Guidance*, <http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf>.

108. *See id.* (NOTE: *id.* is the UKBA guidance document).

Significantly, the UKBA permits the United Kingdom to bring enforcement actions against firms and/or conduct outside of the United Kingdom.<sup>109</sup> The UKBA extends jurisdiction to any company with a business connection to the United Kingdom, regardless of where it is incorporated or where the offending conduct occurs.<sup>110</sup>

Unlike the FCPA, the UKBA reaches wholly private transactions and does not create an exception for facilitation payments. Further, the UKBA does not take into account local practice and custom in another country, even if it is necessary or customary to make facilitation payments in order to do business there.<sup>111</sup> The UKBA is narrower than the FCPA in one respect in that a company with an appropriate compliance program would have corporate immunity from liability for failure to prevent bribery as long as it maintains “adequate procedures” to prevent bribery.<sup>112</sup>

### III. RECENT, LARGE JOINT SETTLEMENTS AND INCREASED INTERNATIONAL COOPERATION

In light of the increasing rhetoric calling for international cooperation among regulatory authorities, some settlements have indeed reached into the billion-dollar range. In December 2008, shortly after the Madoff case erupted, regulators reached a settlement with Siemens AG (“Siemens”), a manufacturer of industrial and consumer products, that exceeded \$1 billion in disgorgement and fines—over \$1.6 billion, in fact—the largest amount a company had ever had to pay to resolve corruption-related charges.<sup>113</sup> The DOJ characterized the Siemens case as “unprecedented in scale and geographic reach.”<sup>114</sup> Although it was in part overshadowed by the Madoff case and received little press attention at the time, the Siemens settlement marked the beginning of a wave of truly enormous FCPA cases.<sup>115</sup>

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. SEC v. Siemens Aktiengesellschaft, Civil Action No. 08 CV 02167 (D.D.C) SEC Litig. Release No. 20829 (Dec. 15, 2008), <http://www.sec.gov/litigation/litreleases/2008/lr20829.htm>.

114. Press Release, Dept. of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

115. The largest FCPA settlement to date prior to the Siemens case was Baker Hughes \$44 million settlement with the DOJ and SEC in 2007. See, e.g., Peter B. Clark & Jennifer A. Suprenant, *Siemens—Potential Interplay of FCPA Charges and Mandatory Debarment under the Public Procurement Directive of the European Union*, Cadwalader Wickersham & Taft, <http://www.cadwalader.com/assets/article/030409ABASiemensPotentialInterplay.pdf>.

Siemens was charged with violating the FCPA's anti-bribery, books and records, and internal controls provisions.<sup>116</sup> It had paid thousands of bribes totaling over \$1 billion to foreign officials between 2001 and 2007 in order to obtain business around the world.<sup>117</sup> Among the improper payments Siemens paid were bribes for opportunities to build metro trains in China, national identity cards in Argentina, and medical devices in Vietnam and Russia.<sup>118</sup> The investigation also revealed that Siemens' managing board was ineffective in ensuring the company complied with U.S. regulatory and anti-bribery requirements as well as the constraints imposed by Germany's adoption of the OECD anti-bribery convention.<sup>119</sup> The SEC, for example, concluded that "the company's tone at the top was inconsistent with an effective FCPA compliance program and created a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company."<sup>120</sup>

The SEC leveraged the prior investigation of German prosecutors and conducted a further joint investigation, resulting in a global settlement with Siemens.<sup>121</sup> Together, the SEC, the DOJ, and the Office of the Prosecutor General in Munich, Germany, reached a coordinated settlement for monetary relief and other remedies.<sup>122</sup> The U.K. Financial Services Authority and the Hong Kong Securities and Futures Commission also cooperated and provided assistance in the investigation.<sup>123</sup> The SEC obtained \$350 million in disgorgement penalties for FCPA violations.<sup>124</sup> Relatedly, Siemens paid a \$450 million criminal fine to the DOJ.<sup>125</sup> In October 2007, Siemens paid a criminal fine of approximately \$285 million, and in December 2008 the company was ordered to pay an additional \$569 million criminal fine, both to the Office of the Prosecutor General in Munich.<sup>126</sup> Further, under the terms of Siemens' plea agreement with the DOJ, it had to retain an independent compliance monitor for four years to oversee the company's implementation of a robust compliance report and to report back on the company's progress.<sup>127</sup> Notably, "the DOJ for the first time . . . approved a non-American compliance monitor" to handle this responsibility—"Dr. Theo Waigel, a German lawyer and the country's

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116. SEC v. Siemens Aktiengesellschaft, *supra* note 113.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

former Minister of Finance.”<sup>128</sup> As part of Siemens’ integrity initiative following the settlement, it launched a “multi-project anti-corruption initiative.”<sup>129</sup> Among other projects, it is partnering with the OECD to carry out a three-year project to promote business integrity in the Middle East and North Africa, holding training sessions and public-private conferences there.<sup>130</sup>

At a press conference announcing the global settlement, the then Acting Assistant Attorney General, Matthew Friedrich, took the opportunity to acknowledge the DOJ’s significant FCPA enforcement in recent years.<sup>131</sup> He noted that “[f]rom 2001 to 2004, the Department [of Justice] resolved or charged 17 FCPA cases.”<sup>132</sup> From 2005 to 2008, however, it had resolved forty-two cases, “representing an increase of more than 200 percent within these four years compared to the prior four-year period.”<sup>133</sup> He added that the “potentially even more significant” aspect of the Siemens settlement is “that the United States is not the only player at the table.”<sup>134</sup> “We aren’t the only ones fighting global corruption,” he said. “Other nations are joining us in this effort, and I’m here to tell you that’s a good thing, and something that we will only see more of in the future.”<sup>135</sup> At the same press conference, Linda Chatman Thomsen, then Director of the Division of Enforcement at the SEC, said about the Siemens settlement: “This marks the first time that United States and foreign prosecutors have coordinated their law enforcement efforts as extensively as they have here today to address violations of the anti-bribery laws. I expect it will not be the last.”<sup>136</sup>

In March 2010, BAE Systems PLC (“BAES”), a multinational defense

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128. See Alexandra Wrage & Anne Richardson, *Siemens AG—Violations of the Foreign Corrupt Practices Act*, 48 INT’L LEGAL MATERIALS 232, 234 (2009) (questioning Mr. Waigel’s qualifications as Siemens’ monitor).

129. Press Release, OECD, Fighting Corruption: OECD Launches Business Integrity Project in Middle East and North Africa (Sept. 12, 2010), [http://www.oecd.org/document/58/0,3746,en\\_21571361\\_44315115\\_46664890\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,3746,en_21571361_44315115_46664890_1_1_1_1,00.html) [hereinafter OECD, Fighting Corruption]; see also Siemens Integrity Initiative: One Page Project Profiles Presentation (Dec. 9, 2010), available at [http://www.siemens.com/sustainability/pool/compliance/integrity\\_initiative/siemens\\_integrity\\_initiative\\_project\\_profiles\\_feb\\_1\\_2011.pdf](http://www.siemens.com/sustainability/pool/compliance/integrity_initiative/siemens_integrity_initiative_project_profiles_feb_1_2011.pdf) (profiling the projects funded in the first funding round).

130. OECD, Fighting Corruption, *supra* note 129.

131. Press Release, Dep’t of Justice, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html>.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

contractor with headquarters in the United Kingdom and with a U.S. subsidiary—BAE Systems Inc.—pleaded guilty to corruption-related offenses and agreed to pay \$400 million in criminal fines to resolve its case, “one of the largest criminal fines ever levied in the United States against a company for business related violations.”<sup>137</sup> BAES was charged with committing several FCPA violations. At the outset, BAES represented to various government agencies, including the DOJ, that it was complying with the FCPA’s anti-bribery provisions, as well as similar, foreign laws relating to the OECD Convention.<sup>138</sup> In fact, BAES took steps to conceal from the U.S. government a series of payments it had made to third party intermediaries and shell companies, according to court documents.<sup>139</sup> These payments “were not subjected to the degree of scrutiny . . . to which BAES told the . . . government [they] would be subjected.”<sup>140</sup> Additionally, beginning in the mid-1980s, BAES served as the prime contractor to the U.K. government after the conclusion of a formal understanding between the U.K. and the Kingdom of Saudi Arabia (“KSA”).<sup>141</sup> Under the formal understanding and related documents, BAES sold aircraft, military hardware, training, and services to the U.K. government, which then sold them to KSA.<sup>142</sup> As such, “BAES provid[ed] substantial benefits to a foreign public official of KSA, who was in a position of influence regarding sales of fighter jets, other defense materials and related support services.”<sup>143</sup> In addition to fines, “as part of its guilty plea, BAES . . . agreed to maintain a compliance program [that would] detect and deter [FCPA] violations” and other applicable bribery and anti-corruption laws.<sup>144</sup> BAES also “agreed to retain an independent compliance monitor for three years [to review] BAES’s compliance program” and report back to the company and the DOJ.<sup>145</sup>

American authorities announced that they benefited greatly from the backing of the U.K. SFO in carrying out the BAES investigation.<sup>146</sup> In a statement about the settlement, the DOJ expressed its appreciation for the SFO’s assistance, and “further expresse[d] its gratitude to that office for its

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137. Press Release, Dep’t of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

ongoing partnership in the fight against overseas corruption.”<sup>147</sup> The SFO also announced a settlement with BAES.<sup>148</sup> Unlike the DOJ settlement, however, which focused on BAES’s business dealings in multiple countries, “the SFO settlement concentrate[d] on the company’s operations in Tanzania.”<sup>149</sup> Investigations of BAES reportedly continue in Austria, the Czech Republic, Hungary, and Switzerland.<sup>150</sup>

Also in March 2010, the SEC charged Innospec, a specialty chemical company, with violating the FCPA by engaging in “widespread bribery of foreign government officials in Iraq and Indonesia to obtain . . . business.”<sup>151</sup> Specifically, Innospec paid kickbacks to Iraqi officials to obtain contracts for the United Nations Oil for Food Program.<sup>152</sup> It also “paid lavish travel and entertainment expenses for Iraqi . . . officials, including the seven-day honeymoon of one official,” “mobile phone cards and cameras,” and “thousands . . . in cash for ‘pocket money’” to officials.<sup>153</sup> In Indonesia, Innospec “paid millions of dollars in bribes [through an Indonesian agent to continue its chemical sales] to state-owned refineries and oil companies.”<sup>154</sup> One bribery scheme involved annual payments to a senior official at BP Migas, the Executive Agency for Upstream Oil and Gas Activity in the Republic of Indonesia.<sup>155</sup> Another scheme involved the payment of “special commissions” into a Swiss account, and a third scheme involved a “one off payment” of \$300,000.<sup>156</sup>

Innospec agreed to a \$40.2 million global settlement with the SEC, DOJ, the U.K.’s SFO, and the U.S. Treasury Department’s Office of Foreign Assets Control.<sup>157</sup> The SEC again cooperated with and acknowledged the assistance of the U.K. SFO in carrying out the investigation.<sup>158</sup>

In the U.K., Innospec settled with the government after “plead[ing] guilty to bribing employees of Pertamina (an Indonesian state[-]owned

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147. *Id.*

148. Press Release, Serious Fraud Office, BAE Systems PLC (Feb. 5, 2010), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx>.

149. *Id.*

150. Transparency Int’l, *supra* note 33, at 72.

151. Press Release, SEC, SEC Charges Innospec for Illegal Bribes to Iraqi and Indonesian Officials (Mar. 18, 2010), <http://www.sec.gov/news/press/2010/2010-40.htm> [hereinafter SEC, SEC Charges Innospec].

152. *Id.*

153. SEC v. Innospec, Inc., Civil Action No. 1:10-cv-00448 08 (D.D.C.), SEC Litig. Release No. 21454 (Mar. 18, 2010).

154. SEC, SEC Charges Innospec, *supra* note 151.

155. SEC v. Innospec, *supra* note 153.

156. *Id.*

157. *Id.*

158. *Id.*

refinery) and other [Indonesian] [g]overnment [o]fficials” in order to secure chemical sales agreements there.<sup>159</sup> The court approved a \$12.7 million financial penalty on Innospec.<sup>160</sup> Following the publication of a 2005 report regarding the United Nations Oil for Food Program, the DOJ started to investigate Innospec for both sanctions and corruption offenses.<sup>161</sup> In October 2007, the DOJ referred the investigation to the U.K. SFO.<sup>162</sup> The SFO formally accepted the case for investigation in May 2008, after which the company “disclosed to the SFO evidence that [it] had sought to influence [the decisions of Indonesian government officials in public contracts]” for the purchase of chemicals in Indonesia between 1999 and 2006.<sup>163</sup> Notably, this case marked the first time the SFO and DOJ agreed to the appointment of a joint monitor to investigate the company’s FCPA compliance program, agreeing that the joint monitor must be acceptable to both of them.<sup>164</sup>

A few months after the Innospec settlement, it became apparent that FCPA settlements were continuing to venture into the \$1 billion range. In July 2010, the SEC settled with Technip SA, Snamprogetti Netherlands BV, KBR, and JGC Corporation, the corporations behind the four-company joint venture TSKJ, in a matter where agents of the firms paid bribes to Nigerian government officials and corporations over a ten-year period in order to win construction contracts worth more than \$6 billion.<sup>165</sup> Allegedly, “senior executives at Snamprogetti and the other joint venture companies . . . [hired] two agents, a U.K. solicitor and a Japanese trading company,” who funneled more than \$180 million in bribes to Nigerian government officials to obtain these construction contracts.<sup>166</sup> Preceding the award of the contracts, the companies met with top-level executive branch officials in the Nigerian government to ask for the designation of a representative with whom the joint venture could confer regarding bribes to government officials.<sup>167</sup> The SEC also alleged that the U.K. solicitor hired

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159. Press Release, Serious Fraud Office, Innospec Limited Prosecuted for Corruption by the SFO (Mar. 18, 2010), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx>.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. SEC v. ENI, S.p.A. & Snamprogetti Netherlands, B.V., SEC Litig. Release No. 21588. (July 7, 2010) <http://www.sec.gov/litigation/litreleases/2010/lr21588.htm> (stating that “ENI and Snamprogetti are the latest to be charged in the decade-long Nigerian bribery scheme conducted by a joint venture of companies that also included Technip and KBR Inc. . . . The \$365 million to be paid by ENI and Snamprogetti brings the total sanctions against the companies involved in the scheme to be more than \$1.28 billion . . .”).

166. *Id.*

167. Press Release, Dep’t of Justice, Snamprogetti Netherlands B.V. Resolves Foreign

a subcontractor in Nigeria to transfer millions of dollars to a Nigerian government official to benefit a political party in Nigeria.<sup>168</sup> The subcontractor carried the U.S. cash in briefcases and personally delivered it to the Nigerian government official.<sup>169</sup> Some bribes were paid in local Nigerian currency as well. The fines and penalties in the settlement exceeded \$1.28 billion, with “Technip, KBR, and its former parent Halliburton Company pay[ing] . . . \$917 million to settle FCPA charges.”<sup>170</sup>

After the settlement, the SEC acknowledged the assistance of foreign authorities in Europe, Asia, Africa and the Americas, in addition to the FBI and the Fraud Section of the DOJ’s Criminal Division.<sup>171</sup> The DOJ acknowledged the “significant assistance” provided by authorities in France, Italy, Switzerland, and the United Kingdom.<sup>172</sup> Nigeria subsequently brought its own charges against Halliburton.<sup>173</sup> In December 2010, the Nigerian Economic and Financial Crimes Commission reached a \$32.5 million settlement with Halliburton regarding related conduct.<sup>174</sup> Regarding the settlement, the FBI Assistant Director involved in the matter said, “We will continue to investigate FCPA matters by working in partnership with other law enforcement agencies, both foreign and domestic, to ensure that both corporations and executives who bribe foreign officials in return for lucrative business contracts are punished.”<sup>175</sup> This settlement further exemplified the trend toward increased international partnerships among regulatory authorities.

In November 2010, the global logistics services firm Panalpina World Transport Holding Ltd. (“Panalpina”), and several of its clients in the oil and gas service industry (including Shell, Transocean, GlobalSantaFe, Tidewater, Pride, and Noble) agreed to resolve investigations of overseas bribery under the joint efforts of the DOJ and SEC.<sup>176</sup> Specifically,

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Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010), <http://www.justice.gov/opa/pr/2010/July/10-crm-780.html> [hereinafter Snamprogetti Press Release].

168. *SEC v. ENI*, *supra* note 165.

169. *Id.*

170. *Id.*

171. *Id.*

172. Snamprogetti Press Release, *supra* note 167.

173. Ryan Dezember & Tess Styne, *Halliburton To Pay Nigeria \$35 Million To Settle Bribery Case*, WALL ST. J. Dec. 22, 2010, at B4, available at <http://online.wsj.com/article/SB10001424052748703581204576033663462863014.html>.

174. *Id.* (stating that the \$35 million settlement included \$2.5 million for the Nigerian government’s legal fees).

175. Press Release, Dep’t of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>.

176. Press Release, Dep’t of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than \$156 million in Criminal Penalties (Nov. 4, 2010), <http://www.justice.gov/>



Panalpina admitted that it “engaged in a scheme” to bribe “numerous foreign officials on behalf of . . . its customers in the oil and gas industry . . . in order to circumvent local rules and regulations” regarding the importation of goods.<sup>177</sup> It paid these bribes in at least seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia and Turkmenistan.<sup>178</sup> Panalpina’s customers also admitted that they “approved of . . . the payment of [these] bribes on their behalf in Nigeria and [they had] falsely recorded the bribe payments . . . as legitimate business expenses in their corporate books [and] records.”<sup>179</sup> The companies agreed to pay over \$156 million in criminal fines and \$80 million in civil disgorgement, interest and penalties for FCPA violations in numerous countries.<sup>180</sup> Notably, settlements with the SEC and DOJ did not mean the end of the matter for offending companies. The deferred prosecution agreements with these companies require the companies “to fully cooperate with U.S. and foreign authorities in any ongoing investigations” of the companies’ bribes.<sup>181</sup> Additionally, each company is “required to implement and adhere to a set of enhanced corporate compliance and reporting obligations.”<sup>182</sup> The Panalpina settlement is also significant because it reflects the use of sweeps to find the violations instead of relying on self-reporting by the companies.<sup>183</sup> An SEC official said that the investigation started “after detecting widespread corruption in the oil services industry.”<sup>184</sup> In its statement about the settlements, the SEC said this settlement with seven companies in the same industry was “the first sweep of a particular industrial sector in order to crack down on public companies and third parties who are paying bribes abroad.”<sup>185</sup> And interestingly, in the DOJ’s statement regarding the settlement, it recognized the companies’ willingness to cooperate with the investigations and self-disclose their conduct:

The corporate resolutions announced today not only hold these companies accountable for the criminal conduct set forth in these charging instruments and agreements, but they also reflect the

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opa/pr/2010/November/10-crm-1251.html [hereinafter Oil Services Companies Press Release].

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Press Release, SEC, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), <http://www.sec.gov/news/press/2010/2010-214.htm>.

184. *Id.*

185. *Id.*

department giving appropriate and meaningful credit to these companies to the extent that they have voluntarily self-disclosed their conduct and commensurate with the quality and extent of their cooperation.<sup>186</sup>

Relatedly, since January 2010 when the SEC announced its Enforcement Cooperation Initiative—“a potential game-changer for the Division of Enforcement”—there has been a trend towards encouraging individuals and companies to assist in investigations.<sup>187</sup> In an announcement about the new initiative, the SEC said it “establishes incentives for individuals and companies to fully and truthfully cooperate and assist with SEC investigations and enforcement actions.”<sup>188</sup> As a result, it is easier to determine which companies cooperated most with the regulatory authorities based on the lighter sanctions in their settlements. The SEC cooperation initiative will likely be used as a way to increase the number of cases.

Cross-border regulatory cooperation can also be seen in the 2010 announcement by the technology firm Hewlett-Packard that American and foreign authorities have been probing its deals in several countries, including Russia and the former Soviet Republic.<sup>189</sup> It had previously been announced that German authorities were investigating matters involving Hewlett-Packard’s dealings in Russia and former Soviet Republics.<sup>190</sup> Specifically, there were allegations that Hewlett-Packard executives made bribes to win a contract to sell computer gear, through a German subsidiary, to the office of the prosecutor general of the Russian Federation.<sup>191</sup> In December 2010, Hewlett-Packard suggested that the investigation had expanded when it announced that U.S. authorities were looking at whether Hewlett-Packard employees in Russia, Germany, Austria, Serbia, or the Netherlands had paid kickbacks to the company’s distributors and customers.<sup>192</sup>

The expansiveness of the regulatory cooperation can be seen in this matter. At the request of German prosecutors, Russian investigators obtained a “large crate of evidence” from Hewlett Packard’s offices there,

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186. Oil Services Companies Press Release, *supra* note 176.

187. Press Release, SEC, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), <http://www.sec.gov/news/press/2010/2010-6.htm>.

188. *Id.*

189. Ben Worthen & David Crawford, *H-P Says Probe Has Expanded*, WALL ST. J., Dec. 17, 2010, *available at* <http://online.wsj.com/article/SB10001424052748703395204576023810621129214.html>.

190. Hewlett-Packard Co. Annual Report (Form 10-K), at 145 (Dec. 15, 2010) [hereinafter HP Form 10-K].

191. Worthen & Crawford, *supra* note 189.

192. *Id.*; *see also* HP Form 10-K, *supra* note 190.

and shared it with German investigators.<sup>193</sup> According to press reports, questions have been raised as to whether senior Hewlett-Packard officials hired agents to launder money to pay bribes through sham companies.<sup>194</sup> Additionally, German prosecutors have shared the evidence related to the German investigation with the DOJ and SEC.<sup>195</sup> As of December 2010, U.S. officials had traveled to Germany twice in connection with the investigation.<sup>196</sup>

Regulators are outspoken in their understanding that the increase in cooperation between foreign authorities in the post-financial crisis climate will be crucial to the FCPA's continued success. Parallel and cooperative enforcement actions in other jurisdictions regarding the same conduct at issue in a United States "FCPA prosecution is expected to become a new norm."<sup>197</sup> Still, American businesses have expressed concerns that the strong enforcement of the FCPA creates an uneven playing field for them internationally, particularly in the current difficult economic climate. At a recent Senate hearing, such concerns were addressed with the United States enforcement authorities, along with a desire for clearer guidelines on how companies can comply with the FCPA.<sup>198</sup>

Cooperation among foreign regulators can be seen outside the FCPA area in only a few instances. In March 2009, at the request of regulators investigating an alleged \$8 billion fraud, a federal judge in the United States "extended a freeze on millions of dollars held in Stanford Group Co. accounts."<sup>199</sup> One month later, a judge at the High Court in the U.K. froze more than \$100 million worth of assets belonging to Stanford International Bank by extending a freezing order covering cash, shares and investments held in bank accounts at Credit Suisse and HSBC branches in the U.K.<sup>200</sup>

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193. Worthen & Crawford, *supra* note 189; *see also* Transparency Int'l, *supra* note 33 (discussing German and Russian cooperation in the investigation).

194. Worthen & Crawford, *supra* note 189.

195. *Id.*

196. *Id.*

197. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 416–17 (2009–2010).

198. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010), <http://www.c-spanvideo.org/program/296805-1>.

199. SEC v. Stanford Int'l Bank, 3:2009-cv-00298 (N.D. Tex. Feb. 16, 2009) (order granting freeze of Stanford assets, also providing for extensions in the future); *see also* Laurel Brubaker Calkins, *Stanford Judge Extends Freeze on Investor Accounts*, BLOOMBERG (Mar. 2, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aE5ab4lw0Hvo> (discussing the asset freeze in connection with the Stanford fraud case).

200. Meghan Murphy, *High Court Judge Extends Freeze on Stanford Assets*, FIN. TIMES, Apr. 7, 2009, <http://www.ft.com/intl/cms/s/0/4f13ad00-230b-11de-9c99-00144feabdc0.html#axzz1URypu9vX>.

#### IV. CONCLUSION

Trends after the financial crisis show that regulators have almost universally announced that they intend to further focus their policies and procedures toward increased international cooperation in the area of enforcement. Time will tell whether these proclamations will materialize. One pressing question is to what extent the level of cooperation in FCPA investigations will take place outside of the FCPA arena. This type of cooperation has not been witnessed in the fields of insider trading and market manipulation. Strides have been made in international freeze orders (notably in the Stanford case) but there remain few examples of this level of cooperation.

In any event, multinational corporations should continue to stay attentive to anti-bribery and corruption investigations and inquiries. In the current climate, with much discussion regarding increased regulation and scrutiny of corporate business practices, a corporation's robust internal compliance policies and procedures are more vital than ever. With regulatory authorities speaking out for cooperation with each other in enforcement investigations, there is a greater likelihood that investigations will increasingly cross jurisdictional boundaries and result in hefty global joint settlements among regulators worldwide.