

# Cooperation or Capitulation?: Forecasting DOJ and SEC Enforcement Efforts in 2009

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As a new Democratic president sounds a populist call, and the U.S. market continues to deteriorate amidst revelations of gross corporate mismanagement, the hue and cry for cracking down on corporate wrongdoing has reached a fever pitch. In light of public statements by President Obama, new Attorney General Eric Holder and new SEC Commissioner Mary Shapiro, there is reason to believe that the government will exert unprecedented pressure on corporations to cooperate with government enforcement efforts in 2009.

Based on recent enforcement trends we can predict some features of enforcement efforts in the Obama administration. With marginally increased resources and potentially greatly increased activity the enforcement agencies will likely be forced to seek greater investigative assistance from targeted companies. The government will likely pressure corporations to provide more extensive voluntary waivers of privilege, internal investigations, and more active self reporting, in exchange for leniency. But the price of cooperation, especially in terms of ever-greater settlement amounts, may undermine the value of cooperation to companies. Targeted entities might argue that the price is antithetical to economic recovery in certain market sectors. The future of cooperation as an attractive option and effective government tool is thus far from certain.

## *A Brief History of DOJ Corporate Enforcement*

Crisis begetting regulation is a well known phenomenon in American financial markets. Since the 1930s, the DOJ has enforced both civil and criminal laws governing corporations even as these laws have evolved over time. Today, the DOJ's 94 U.S. Attorneys enjoy wide prosecutorial discretion.<sup>1</sup> In 1999, then-Deputy Attorney General Eric Holder promulgated a memo titled "Bringing Criminal Charges Against Corporations."<sup>2</sup> This document attempted to standardize criminal prosecutions of corporations throughout the nation. Holder described eight factors DOJ lawyers should consider when deciding whether and how to pursue charges against a corporate entity.

One of the most controversial aspects of the memo was the notion of 'cooperation' and its implications. The memo stated that "[i]n determining whether to charge a corporation, the corporation's timely and voluntary disclosure of wrongdoing and its willingness to *cooperate* with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation the prosecutor may consider the corporation's willingness to . . . disclose complete results of its internal investigation, and to waive the attorney-client and work-product privileges." Essentially, a company was given the option of surrendering its rights to protected information, in exchange for potential leniency.

In 2001, following scandals and criminal prosecutions involving such corporations as Adelphia, Arthur Andersen, Enron, and WorldCom, the DOJ faced accusations of inadequate regulatory enforcement. In response, then-Deputy Attorney General Larry Thompson issued the "Thompson Memo" in January 2003.<sup>3</sup> The Thompson Memo, primarily a restatement of the Holder Memo, intended to place "increased emphasis and scrutiny on the authenticity of a corporation's cooperation."<sup>4</sup>

The Thompson Memo included important alterations with reference to corporate cooperation. It changed the factors in the Holder Memo from voluntary to mandatory considerations, requiring prosecutors to use the level of cooperation of a corporation as central consideration when deciding whether or not to pursue an enforcement action. The Thompson Memo directed prosecutors to consider whether or not, "while purporting to cooperate, [the corporation] has

engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction).<sup>5</sup> Cooperation would be predicated on factors such as whether the company voluntarily relinquished privileged information gained through internal investigations and whether it advanced attorneys' fees on behalf of its employees.

In the wake of the Thompson Memo, cooperation became a cornerstone of DOJ enforcement actions against companies. Companies become more active in instituting compliance programs and performing internal investigations.<sup>6</sup> The DOJ also became far more aggressive in seeking waivers.<sup>7</sup> One study from 2006 showed that 75 percent of survey respondents agreed with the statement there was "culture of waiver"<sup>8</sup> surrounding corporate investigations where "governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." A survey of 422 U.S. and international companies found that 63 percent of them had used external counsel to perform internal investigations within the past year because these investigations "have become essential tools for companies faced with . . . government inquiries."<sup>9</sup> Yet another study examining the period from 2001-2006 covering 250 DOJ, SEC, and eight states' attorneys' general investigations showed a correlation between internal investigations and less severe penalties.<sup>10</sup>

In 2006, a federal district judge in Manhattan repudiated the DOJ's aggressive posture by finding unconstitutional some tactics practiced by the government in the name of the Thompson Memo. In *United States v. Stein*, the USAO used the threat of indictment—particularly potent in the immediate post Enron world—to force KPMG, the accounting firm, to condition the payment of employee legal fees on cooperating with the USAO investigation. The court ruled that this tactic—advocated by the Thompson memo and carried out by the USAO—violated the 5th and 6th Amendment rights of the KPMG employees. Accompanying the judicial denunciation of DOJ tactics, Senator Arlen Specter introduced a potential legislative response: the Attorney Client Protection Act of 2006.<sup>11</sup> The proposed Act barred federal prosecutors from using waiver of privilege as a form of cooperation on which to condition prosecution.

In late 2006, then-Deputy Attorney General Paul McNulty issued the "McNulty Memo" to address legislative and judicial concerns about federal prosecutorial expectations of corporate cooperation in respect to waiver of privilege. The memo made several alterations to the Thompson memo. It divided information sought by prosecutors into Category I and II information: Category I information encompassed "purely factual" information related to the alleged wrongdoing, but could include privileged materials in its sweep. To obtain Category I privileged information, prosecutors would be required to "establish a legitimate need" for that information and demonstrate that there was no other way of acquiring it. Category II information included core privileged attorney-client communications, which prosecutors could seek to obtain only in extraordinary situations. Prosecutors were required to get written authorization from Main Justice before seeking any privilege waiver. The memo clarified that the advancement of attorneys' fees could not be a basis for considering cooperation except in extremely rare cases.

Many in the defense bar denounced the McNulty Memo revisions as falling "far short"<sup>12</sup> of safeguarding attorney-client and work-product privilege. Critics argued that the Category I and II distinctions were pointless, inasmuch as much privileged information, including witness interview statements, fell into Category I.<sup>13</sup> Also, critics argued that the memo failed to address a key pressure tactic addressed in *Stein*, in which USAO prosecutors defended themselves in part by testifying that they had not explicitly asked for waivers, but merely inquired into who was paying for the employee attorney fees. And in fact, in 2007 there was no apparent decline in waiver requests from prosecutors seeking cooperation from corporate subjects of inquiry.<sup>14</sup>

The "Filip Memo,"<sup>15</sup> promulgated in August 2008, constitutes the DOJ's current set of guidelines. The Filip Memo clarifies some aspects of the McNulty Memo. It explicitly states that prosecutors cannot consider the waiver of privilege in assessing cooperation. Prosecutors are now prohibited from inquiring about the source of employee attorney fees. However, the memo provides new

ways for companies to cooperate that could compromise privileged materials. For example, the Filip Memo appears to encourage companies to conduct internal investigations in such a way as to avoid creating privileged documents, suggesting that surrendering the results of such an internal investigation would be viewed favorably. Unlike the McNulty Memo, the Filip Memo does not require prosecutors to get written permission before seeking privileged 'factual' information. Thus the Filip memo, while ostensibly reinforcing certain protections afforded in the McNulty Memo, appears actually to institute a more flexible regime under which DOJ prosecutors may demand cooperative behavior from companies.<sup>16</sup>

#### *Where the DOJ May be Headed*

The result of the Siemens investigation may presage the expectations of the DOJ in the Obama administration. Siemens actively cooperated with the DOJ and SEC in an enforcement action involving the Foreign Corrupt Practices Act (FCPA), and DOJ publicly praised Siemens for assisting in the investigation. But the DOJ still levied an \$800 million fine, arguing it had credited Siemens for good behavior by reducing the fine from a potential maximum of \$2.7 billion. Siemens took many costly and aggressive steps to be cooperative, including supplying documentation of employee interviews and of its own internal investigation. The DOJ deemed Siemens's efforts as not completely forestalling a penalty for several reasons, including Siemens's failure to institute a mandatory FCPA training before 2007. The Siemens fine was followed by two more massive settlements: in early 2009, Halliburton and KBR (a former subsidiary of Halliburton) both agreed to pay fines of approximately \$500 million to settle FCPA charges.

Will the trend of large fines continue? The Obama government has been vocal about its desire to actively pursue corporate wrongdoing. Senators Leahy and Grassley have introduced the Fraud Enforcement and Recovery Act<sup>17</sup> to provide more DOJ and other federal agency funding for investigation of companies suspected of fraud and misuse of government funds. The appointment of Eric Holder and other top DOJ officials such as new antitrust chief Christine Varney, formerly of the FTC, sends a clear message: More coordinated interagency investigations are likely on the horizon. Because of the expansion of fraud laws, the increase in agency funding, the political will behind prosecuting perceived wrongdoing, and the increasing size of potential fines, corporations will face ever greater pressure to investigate potentially problematic business behavior.

A recent study noted that in 2008, deferred and non prosecution agreements (DPAs and NPAs) declined by 60 percent, compared to 2007.<sup>18</sup> And there was a significant decline within these agreements of waiver provisions: from more than half of the agreements in 2003-2006, to only three in 2007 and two in 2008. The authors of the study postulate that the decline in waivers is a measure of self-policing by the DOJ. However, since explicit requests for waivers may be unnecessary depending on the way companies gather and produce their information, companies may be avoiding the creation of privileged material around internal issues for which they are being investigated.

In today's political climate, prosecutors may be loath to offer DPAs and NPAs. And because of the massive penalties sought by regulators in early 2009,<sup>19</sup> companies may find less incentive to enter into early settlements. Self-initiated cooperation is an alternate route that might increase in importance in 2009. In 2008, 18 of 29 new FCPA investigations began with companies making voluntary disclosures to the government.<sup>20</sup> If its caseload increases faster than funds to prosecute,<sup>21</sup> the DOJ could be at the mercy of voluntary cooperation, and companies may be in a better position to resist prosecutorial pressure.

#### *A Brief History of SEC Corporate Enforcement*

Since its creation in 1934, the SEC has been an important player in the policing of corporate wrongdoing. While the SEC has remained relatively unchanged in structure since its inception, Congress has increased its enforcement powers.<sup>22</sup> Some in the Obama administration have

proposed augmenting the powers of the SEC to include some criminal enforcement. Such an expansion of SEC powers would raise constitutional and logistical problems, including the potential overlap with DOJ jurisdiction. In any event, the SEC is already actively involved in the legal landscape: a recent report from the Commission noted that in 2008, it filed the second highest number of enforcement actions in its history.<sup>23</sup> As with the DOJ, the SEC has created an investigative regime in which voluntary waiver has become a central part of corporate cooperation.

As with the DOJ, critics have expressed concerns about the consistency of SEC regulatory enforcement. To address such concerns, in October 2001, the SEC issued the 21(a) Report entitled the "Statement on the Relationship of Cooperation to Agency Enforcement Decisions,"<sup>24</sup> which became known as the "Seaboard Report." Like the Filip Memo, the Seaboard Report prescribes a litany of factors by which regulators will assess the cooperation of a company. The factors include (1) measures of self policing done by the corporation before the misconduct is discovered; (2) self reporting of the misconduct once discovered; (3) any acts of remediation; and (4) cooperation with government agencies. The criteria are considered in tandem with whether the scrutinized company has asserted either attorney client or work product privilege, implying that the SEC equates cooperation with a voluntary relinquishment of these privileges.

The 2002 passage of the Sarbanes-Oxley Act was widely viewed as freeing the SEC to fine public companies as severely as private ones.<sup>25</sup> With both public and private companies now vulnerable to substantial SEC fines, some observers voiced concerns about uniformity of evaluation of cooperation and fine assessment. In 2006, the SEC issued a statement about its procedures for assessing fines as penalties for regulatory violations, citing cooperation as a mitigating factor for corporations facing investigations, with self reporting of offenses and active participation in the investigation as key aspects of cooperation.

In 2007, then-Enforcement Chief Linda Thomsen discussed what actions the SEC considered cooperative,<sup>26</sup> noting Putnam Fiduciary Trust Co., which managed to avoid SEC enforcement action by surrendering results of internal investigations, including privileged information.<sup>27</sup> The SEC has also penalized companies specifically because they were "uncooperative."<sup>28</sup> And while the 2008 SEC Enforcement Manual<sup>29</sup> proscribes enforcement staff from requesting waivers of attorney-client or work-product privilege, it also makes clear that targets of investigation may freely make voluntary disclosure of privileged materials. And timely disclosure of all relevant factual information is a necessary consideration in determining whether or not an entity may be deemed "cooperative."

#### *Future SEC Enforcement*

The SEC can bring considerable pressure to elicit voluntary waivers from entities. One major consideration is that SEC publicly announces only enforcement actions, not investigations.<sup>30</sup> Settling quickly can short-circuit a formal investigation. Though the number of SEC settlements decreased in 2008,<sup>31</sup> the median dollar amounts of the settlements increased.<sup>32</sup> Like the Filip Memo, the SEC Enforcement Manual puts only superficial restraints in place, leaving SEC staff with the ability to incentivize voluntary waivers in exchange for leniency.

Policy changes for the SEC are afoot. New SEC chief Mary Schapiro recently repealed the requirement that SEC field offices seek approval of penalty amounts before beginning settlement negotiations with public companies<sup>33</sup>—a policy that had been thought to hamstring the negotiating abilities of SEC enforcement staff. The Supplemental Anti-Fraud Enforcement Markets Act, introduced by Senators Chuck Schumer and Richard Shelby, would fund additional SEC enforcement employees. A proposal by Congressman Gary Ackerman would reinstate the uptick rule. Other suggestions include extending SEC authority to hedge funds and derivatives markets.

It is unknown which of these many proposed reforms will become law. It seems certain, however, that the SEC will initiate a greater number of investigations.<sup>34</sup> President Obama has requested

\$37 million in additional funds in 2009 for the SEC. His proposal for a fiscal year 2010 budgetary increase would bring the SEC's funding up to more than \$1 billion. The rationale for the funding increase is to "build [the SEC's] staff and technology resources" to "better detect fraud and strengthen markets." The appointment of Robert Khuzami, a former criminal prosecutor, as director of enforcement at the SEC underscores the SEC's seriousness of purpose in policing corporate malfeasance.<sup>35</sup>

Along with more enforcement actions, the SEC is likely to seek increasingly significant fines. The dollar amount of fines has grown substantially in the recent past.<sup>36</sup> Cooperation, including maintenance of an effective internal compliance program, will likely still be the best hope for companies to moderate fines. But because SEC and DOJ enforcement actions increasingly occur simultaneously,<sup>37</sup> a company could, even with cooperation, find itself in the unenviable position of paying multiple fines.<sup>38</sup> If the cost of the fines outstrips the cost of defending against accusations of wrongdoing, companies might find little incentive for swift cooperation with SEC investigations particularly in as much as voluntary disclosure to one agency is tantamount to voluntary disclosure to all agencies.

### *Conclusion*

The political environment is particularly unfriendly to corporate malfeasance: the DOJ and the SEC are under increasing pressure to hold business entities accountable for bad acts. To the extent business entities do the investigative heavy lifting through self reporting, internal investigation, and voluntary privilege disclosure, DOJ and SEC staff will be spared both time and expense and will receive completed investigations on a silver platter. In a climate of only marginally increased resources and a quantum leap in political pressure, collective will to place blame for the current economic woes, and increased targets for investigation, DOJ and SEC will have little choice but to rely on internal investigations to augment their own limited investigative resources.

Although Senator Specter reintroduced his Attorney Client Privilege Protection Act on February 13, the current political climate makes it unlikely that legislation protecting companies will be a top priority for Congress. Companies will continue to face strong pressure to cooperate. And as the high dollar amounts of recent enforcement settlements suggest, the upward movement of fines will be a "one way ratchet: for companies as enforcement lawyers seek to "top" the most recent settlement. This "ratchet" effect is of understandable concern to companies. Inevitably, as companies weigh the actual discounted risks and costs of litigation in the near term against the escalating levels of settlements, they may begin to reconsider the benefits of "cooperation" on their well-being. The Obama administration would do well to ensure that cooperation does not come at too high a price.

In light of current political and agency postures, companies should be increasingly vigilant in conducting internal investigations and reporting potential wrongdoing: they should also remain aware that attorney-client privilege could constitute an increasingly illusory protection. They should carefully weigh the trade-offs in light of the political pressures on enforcement attorneys to collect ever-greater settlements—and make realistic assessments of litigation costs and risks—rather than automatically assume the safest course of action in dealing with a government investigation is cooperation.

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<sup>1</sup> This discretion is guided both by codified and customary policies. For example, it is the general policy of the Antitrust division to grant amnesty to the first, and only the first, company of a group of companies engaged in anti-competitive practices that cooperated with prosecutors.

<sup>2</sup> Memorandum from Eric H. Holder Jr., Deputy Attorney General, on Bringing Criminal Charges Against Corporations, to All Component Heads and United States Attorneys (June 16, 1999) *available at* <http://www.usdoj.criminal/fraud/docs/reports/1999/chargingcorps.html>.

<sup>3</sup> Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations, to Heads of Department Components and United States Attorneys (Jan. 20, 2003) *available at* [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> David B. Anders et al., *Nuts and Bolts of Internal Investigations*, in *Internal Investigations 2007: Legal Ethics & Strategic Issues* 105, 109 (PLI Corp. L. and Practice Course Handbook Series No. 11355 2007); Nancy Kestenbaum & Jacob P. Criss, *Credit Where Credit is Due? The Role of Internal Investigations in the Outcome of Government Investigations* 121, 125-126 (PLI Corp. L. and Practice Course Handbook Series No. 10630, 2006).

<sup>7</sup> *The Thompson Memorandum's Effect on the Right to Counsel: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 6 (2006) (statement of Karen Mathis, President, Am. Bar Ass'n) *available at* [http://www.abanet.org/poladu/letters/attyclient/060912testimony\\_mathis\\_acpriv.pdf](http://www.abanet.org/poladu/letters/attyclient/060912testimony_mathis_acpriv.pdf).

<sup>8</sup> "The Decline of the Attorney Client Privilege in the Corporate Context" *available at* <http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=16306>.

<sup>9</sup> See David B. Anders et al., *supra* note 6.

<sup>10</sup> See Nancy Kestenbaum & Jacob P. Criss, *supra* note 6.

<sup>11</sup> Press Release, U.S. Senate Judiciary Committee, "Specter Introduces Attorney-Client Privilege Protection Act of 2006" (Dec. 7, 2006).

<sup>12</sup> "Statement by ABA President Karen J. Mathis regarding revisions to the Justice Department's Thompson Memorandum," *available at* <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59>.

<sup>13</sup> The McNulty Memorandum: New DOJ Policies On Attorney-Client Privilege And Attorney Work Product Protections, William M. Sullivan Jr., *available at* <http://www.metrocorpocounsel.com/current.php?artType=view&artMonth=February&artYear=2007&EntryNo=6208>.

<sup>14</sup> The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the House Subcomm. On Crime, Terrorism, and Homeland Security, 110th Cong. (statement of Richard T. White, chairman of the Board of Directors, Association of Corporate Counsel), *available at* <http://judiciary.house.gov/media/pdfs/white070308.pdf>.

<sup>15</sup> Memorandum from Mark R. Filip, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations, to Heads of Department Components and United States Attorneys (Aug. 28, 2008), *available at* <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>.

<sup>16</sup> For a more extended discussion on the effect of the Filip memo, please see "Shakespeare and the DOJ's New Guidelines On Corporate Cooperation," Thomas O. Gordon, *available at* [www.abanet.org/crimjust/wcc/newsletter309.htm](http://www.abanet.org/crimjust/wcc/newsletter309.htm).

<sup>17</sup> A section by section summary of the proposed bill can be found at <http://leahy.senate.gov/press/200902/020509b.html#section>.

<sup>18</sup> Finder, Lawrence D., McConnell, Ryan D. and Mitchell, Scott L., *Betting the Corporation: Compliance or Defiance? Compliance Programs in the Context of Deferred and Non-Prosecution Agreements - Corporate Pre-Trial Agreement Update - 2008* (January 23, 2009). *Corporate Counsel Review*, Forthcoming, *available at* SSRN: <http://ssrn.com/abstract=1332033>.

<sup>19</sup> See, for example, the \$780 million fine included in the DPA reached with UBS, announced February 18, 2009, *United States v. Siemens*, 1:08-CR-00367 (D.D.C. Dec. 12, 2008) (Sentencing Memorandum).

<sup>20</sup> "U.S. targeting execs in bribe probes," Andrew Osterland, *available at* <http://www.financialweek.com/apps/pbcs.dll/article?AID=/20080303/REG/931152399>.

<sup>21</sup> "A spiraling caseload under the Foreign Corrupt Practices Act," Roger M. Witten and Jay Holtmeier, *available at* <http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=1202428476885>.

<sup>22</sup> For example, since the Securities Enforcement Remedies Act of 1990, the SEC has been allowed not only to fine, but to press suit in civil court for securities law violations; see Statement of the Securities and Exchange Commission Concerning Financial Penalties (January 4, 2006), *available at* [http://www.sec.gov/news/press/2006-4.htm#P18\\_1888](http://www.sec.gov/news/press/2006-4.htm#P18_1888).

<sup>23</sup> "SEC Announces Fiscal 2008 Enforcement Results: Agency Brings Second-Highest Number of Actions Ever; Significant Increase in Insider Trading and Market Manipulation Cases," *available at* <http://www.sec.gov/news/press/2008/2008-254.htm>.

<sup>24</sup> Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Rel. No. 34-44969 (Oct. 23, 2001), *available at* <http://www.sec.gov/litigation/investreport/34-44969.htm>.

<sup>25</sup> Among other things, the Sarbanes-Oxley Act of 2002 addressed the reluctance within the SEC to pursue public companies because of potential collateral damage to third parties; see Commissioner Annette L. Nazareth's Remarks Before the SEC Speaks Conference (March 3, 2006), *available at* <http://www.sec.gov/news/speech/spch030306aln.htm>. For example, Section 308 of the Act, known as the "Fair Fund" provision, allows the SEC to funnel proceeds garnered from fines into a fund to redistribute to the victims of the misconduct.

<sup>26</sup> *Remarks Before the Mutual Fund Directors Forum 7th Annual Policy Conference (April 12, 2007)*, *available at* <http://www.sec.gov/news/speech/2007/spch041207lct.htm>.

<sup>27</sup> *SEC v. Karnig H. Durgarian, Jr. et al*, Litigation Release No. 19517 (Jan. 3, 2006), *available at* <http://www.sec.gov/litigation/litreleases/lr19517.htm>.

<sup>28</sup> See, e.g., Lucent Settles SEC Enforcement Action Charging the Company with \$1.1 Billion Accounting Fraud, Exchange Act Release No. 2004-67 (May 17, 2004) ("As part of the settlement, Lucent agreed to pay a \$ 25 million penalty for its lack of cooperation.").

<sup>29</sup> *Available at* <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

<sup>30</sup> It does announce, in annual reports, the aggregate number of investigations initiated each fiscal year in its annual Performance and Accountability Reports.

<sup>31</sup> "SEC Settlements: A New Era Post-Sox," Jan Larsen with Dr. Elaine Buckberg and Dr. Baruch Lev (November 10, 2008), *available at* [http://www.securitieslitigationtrends.com/Settlements\\_Report.pdf](http://www.securitieslitigationtrends.com/Settlements_Report.pdf).

<sup>32</sup> See, for example, "SEC Settlements: A New Era Post-Sox," *available at* [http://www.securitieslitigationtrends.com/Settlements\\_Report.pdf](http://www.securitieslitigationtrends.com/Settlements_Report.pdf), and its Q4 update *available at* [http://www.securitieslitigationtrends.com/PUB\\_Settlements\\_Update\\_0209.pdf](http://www.securitieslitigationtrends.com/PUB_Settlements_Update_0209.pdf).

<sup>33</sup> Carrie Johnson, "SEC Shift May Lead To Lower Penalties; Policy Addresses Firms' Culpability," *Washington Post*, April 13, 2007. See also Judith Burns, "SEC's Cox Defends Pre-Approval of Corporate Fines," *Dow Jones Newswires*, April 13, 2007.

<sup>34</sup> "Hints of New SEC Priorities," Richard D. Marshall, *available at* <http://securities.law360.com/articles/87737>.

<sup>35</sup> "Enforcement under the new SEC Regime," Melissa Klein Aguilar, *available at* <http://www.complianceweek.com/article/5284/enforcement-under-the-new-sec-regime>.

<sup>36</sup> See, for example, the \$19.4 billion dollar fine paid by UBS in August 2008 in relation to auction-rate securities settlement. See also the testimony of SEC Chairman Cox in May 2008: "In the 17 years since the Congress gave the SEC authority to collect penalties against companies, this [2007 amount] is the fifth highest penalties and disgorgement total ever, and \$1 billion above the pre-Enron average of the 1990s." Fiscal 2009 Appropriations: Financial Services: Hearing Before the Comm. on S. Appropriations Subcomm. on Financial Services and General Government, 110th Cong. (May 7, 2008) (statement of Christopher Cox, Chairman, Sec. and Exch. Comm'n).

<sup>37</sup> "Securities Practice: Mayer Brown," Denise Oliveira, *available at* <http://www.law360.com/articles/75740>.

<sup>38</sup> See, for example, a \$380 million dollar fine levied against UBS as part of a February 19, 2009 settlement, *SEC v. Siemens*, 1:08-CV-02167 (D.D.C. Dec. 12, 2008) (Entry of Final Judgment), in addition to the \$780 million fine levied by the DOJ.