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U.S. SEC's Top Ten Enforcement Developments Of 2010

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This Special Report highlights significant developments during 2010 in the enforcement program of the U.S. Securities and Exchange Commission ("SEC"). Developments were selected because they may signal future trends or establish new legal standards.

The Number One enforcement development of 2010 is the enactment of the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act. In the wake of the most serious financial crisis since the Great Depression, Dodd-Frank created a new way to respond to failing financial firms, and created a new consumer protection agency, housed at the Federal Reserve, with authority to regulate financial products. Dodd-Frank also requires numerous studies and rulemaking proceedings relating to hedge funds, derivatives, credit-rating agencies and other participants and products within the financial services industry. In broad and significant areas, Dodd-Frank empowers the SEC and other regulators, as Congress largely delegated substantive details of reforms and their implementation, while also specifically expanding and clarifying aspects of the SEC's enforcement authority. How the SEC implements its expanded powers under Dodd-Frank may have implications for the SEC enforcement program for years to come.

The Number Two enforcement development of 2010 is the SEC's continued pursuit of insider trading cases. Two notable court opinions addressed the scope of the duty owed by individuals who come into possession of non-public information.

The remaining Top Ten developments illustrate other significant issues and trends in the SEC enforcement program:

- The Number Three enforcement development of 2010 is the Supreme Court decision in the so-called "foreign-cubed" case limiting the extraterritorial application of the federal securities laws.
- Number Four is a decision by the SEC's Chief Administrative Law Judge holding that a broker-dealer's general counsel is a "supervisor."
- Number Five is the SEC's continuing pursuit of violators of the Foreign Corrupt Practices Act of 1977, including the SEC's first case against a non-U.S. issuer.
- Number Six is the SEC's announcement of its enforcement cooperation initiative for individuals who assist in investigations.
- Number Seven is the first court decision sustaining a "pure" clawback of executive compensation.
- Number Eight is a decision setting a very high bar for aiding and abetting liability in SEC enforcement proceedings.
- Number Nine is the SEC's pursuit of numerous Ponzi schemes in response to criticism concerning Madoff and Stanford.

- Number Ten is the SEC's settlement with Goldman Sachs for a record $550 million.

Number One: Dodd-Frank's Expansion and Enhancements of the SEC's Enforcement Authority

The Dodd-Frank Wall Street Reform and Consumer Protection Act[1] (the "Act" or "Dodd-Frank") contains significant enhancements to the enforcement authority and jurisdiction of the SEC (*see analysis at WSLR, January 2011, page 31*), including the following:

- **Aiding and Abetting Liability.** The Act amends the Securities Act of 1933 (the "Securities Act") and the Investment Company Act of 1940 (the "Investment Company Act") to provide the SEC with authority to prosecute persons who aid and abet violations of those acts.[2] Previously, the SEC only had authority to prosecute aiders and abettors who "knowingly" substantially assisted violations of the Securities and Exchange Act of 1934 (the "Exchange Act") or who had aided and abetted violations of the Investment Advisers Act of 1940 (the "Advisers Act"). In addition, Dodd-Frank clarifies that "recklessness" constitutes "actual knowledge" for purposes of establishing aiding and abetting liability.[3] The Act also clarifies the SEC's ability to pursue enforcement actions against "control persons" under the securities laws.[4] Dodd-Frank does not extend aiding and abetting liability to private actions, but commissions the Government Accountability Office to study the potential impact of such an extension.[5]

- **Civil Penalties in Cease-and-Desist Proceedings.** The Act amends the Securities Act, Exchange Act, Advisers Act, and Investment Company Act to grant the SEC the authority to impose monetary penalties in all of its cease-and-desist proceedings.[6] Previously, the SEC only had the authority to impose monetary penalties in cease-and-desist proceedings against registered entities and persons associated with registered entities.

- **Collateral Bars.** Dodd-Frank grants the SEC the authority to impose securities industry-wide suspensions or bars.[7] In other words, the SEC may now, for example, suspend or bar a person who commits a securities violation while associated with a broker-dealer from associating not only with a broker-dealer, but also with an investment adviser, municipal securities dealer, or other such regulated entity. Previously, such suspensions or bars could only be imposed with regard to the capacity in which the person had committed the violation.

- **Antifraud Provisions.** Dodd-Frank amends Sections 9, 10 and 15 of the Exchange Act to expand its antifraud provisions.[8] Section 9, which relates to market manipulation, is amended to cover all securities except government securities, regardless of whether they are registered on a national securities exchange. The reach of Section 10(a), relating to short sale abuses, is similarly extended. Dodd-Frank also extends the reach of Section 9(b) to cover non-exchange transactions in options. Exchange Act Section 9(c) is amended to apply to all broker-dealers, not just members of a national securities exchange, and Section 15(c)(1), which prohibits broker-dealers from engaging in fraud or manipulation in connection with the purchase or sale of an over-the-counter security, is amended to cover exchange transactions as well.

- **Nationwide Service of Trial Subpoenas.** Dodd-Frank provides that in any federal district court proceeding instituted by the SEC under the Exchange Act, the Securities Act, the Advisers Act, or the Investment Company Act, both the SEC and defendants may serve subpoenas anywhere in the United States to compel the production of documents or attendance of a witness at a hearing or trial.[9] Federal Rule of Civil Procedure 45(c)(A)(ii) ordinarily would require a court to quash a subpoena that compelled a person to travel more than 100 miles in order to comply, but the 100-mile limit will not apply to subpoenas in SEC cases.

- **Proceedings Against Formerly Associated Persons.** The Act amends various provisions of the securities laws to make it clear that the SEC has the authority to bring an action against a person formerly associated with a registered entity, even if that such person is no longer currently associated with any registered entity.[10]

- **Extraterritorial Jurisdiction.** The Act limits the application of the recent Supreme Court decision in *Morrison v. National Australia Bank Ltd.*, discussed below, in which the Court held that the antifraud provisions in Section 10 of the Exchange Act were not applicable to private actions by foreign investors arising from purchases and sales of securities that occurred outside the United States. Dodd-Frank provides that federal district courts have jurisdiction over actions commenced by the SEC alleging violations of the securities laws' antifraud provisions "even if the securities transaction occurs outside the United States and involves only foreign investors," if the SEC alleges conduct in the United States that constitutes "significant steps in furtherance of the violation" or conduct outside the United States that has a "foreseeable substantial effect within the United States."[11] The Act also requires the SEC to conduct a study to determine whether the extraterritorial jurisdiction of the federal courts should also be extended to private rights of action under the antifraud provisions.[12]

- **Deadline for Completing Investigations, Inspections and Examinations**. In an apparent effort to accelerate the enforcement process, Dodd-Frank adds a new section to the Exchange Act regarding deadlines for completing enforcement investigations and compliance examinations and inspections.[13] In general, it provides that, not later than 180 days after the SEC staff provides a written Wells notification to any person, the staff must either file an action against the person or provide notice to the Director of the Divi-

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sion of Enforcement of its intent not to file an action. For certain "complex" actions, the staff may be granted one 180-day extension with approval by the Director of the Division of Enforcement and notification to the Chairman of the Commission. After one initial 180-day extension, the staff may be granted additional 180-day extensions in complex actions only with approval of the Commission. Similarly, the SEC's compliance, inspections and examinations staff has 180 days from the date it completes an on-site examination or inspection and obtains all requested records to request corrective action or provide notice that the matter is concluded, subject to 180-day extensions on notice to the Chairman of the Commission and subject to Commission approval for successive extensions.

- **Whistleblower Provisions.** Dodd-Frank includes significant monetary incentives for individuals with knowledge of securities violations to contact the SEC and provide assistance to the investigation and prosecution of the violations, providing that the SEC "must" pay a bounty of between 10 percent and 30 percent of any monetary sanction of more than $1 million when information furnished by a whistleblower leads to the enforcement action.[14] The bounty provisions also apply if the information leads to enforcement action by the Justice Department, another federal agency, a self-regulatory organization or a state attorney general. To qualify for a bounty, the whistleblower must have voluntarily provided information "derived from the independent knowledge or analysis" of the whistleblower that was not known to the SEC from any other source. The Act also provides substantial protections to such whistleblowers.

Number Two: The SEC's Continued Pursuit of Insider Trading Cases, Including Two Notable Court Opinions

The SEC continued its aggressive pursuit against insider trading, bringing numerous actions against company insiders,[15] auditors,[16] investment bankers,[17] hedge funds and their executives,[18] and others with access to material non-public information. Two of the most significant developments with respect to insider trading occurred in two litigated cases, both of which were discussed in our "Top Ten" list for 2009 (*see Special Report co-written by the authors at WSLR, April 2010, page 32*). In 2010, the SEC succeeded in obtaining a reversal of the district court's adverse decision in its action against Mark Cuban, but lost a bench trial in its first insider trading case involving credit default swaps.

SEC v. Cuban

On September 21, 2010, in *SEC v. Cuban*,[19] the U.S. Court of Appeals for the Fifth Circuit vacated the district court decision dismissing the SEC's well-publicized insider trading action against Mark Cuban. The court held that it was at least "plausible," based on the SEC's allegations, that Cuban had violated a duty not to trade on material, non-public information.

The SEC's complaint alleged that Cuban sold his entire position, 600,000 shares, or a 6.3 percent stake in Mamma.com, after learning of an impending PIPE offering, avoiding losses in excess of $750,000.[20] Cuban had learned of the impending transaction from the CEO of Mamma.com, who invited Cuban, then Mamma.com's largest known shareholder, to participate.[21] The SEC alleged that the CEO prefaced his call to Cuban by telling Cuban that the information was confidential and securing Cuban's agreement to keep the information confidential before telling him of the PIPE offering.[22] According to the SEC, Cuban reacted angrily to the news and, at the end of the call, stated, "Well, now I'm screwed. I can't sell."[23]

The U.S. District Court for the Northern District of Texas dismissed the SEC's complaint, holding the SEC had failed to adequately allege that Cuban had entered into an agreement sufficient to create a duty of nondisclosure and non-use. The court acknowledged that the SEC had adequately alleged that Cuban entered into a confidentiality agreement by virtue of his discussion with Mamma.com's CEO, but found that the SEC had not alleged that Cuban agreed to refrain from trading or otherwise use the information for his own benefit.[24] The court concluded that Cuban's alleged statement that he was "screwed" and could not sell his shares "cannot reasonably be understood as an agreement not to sell," and the fact that Mamma.com believed that Cuban would not sell was insufficient to create a duty to refrain from selling.[25]

The Fifth Circuit reversed, finding that "[t]he allegations, taken in their entirety, provide more than a plausible basis to find that the understanding between the CEO and Cuban was that he was not to trade, that it was more than a simple confidentiality agreement."[26] The Fifth Circuit stressed that, following the "Well, now I'm screwed. I can't sell" comment, the CEO sent Cuban an email providing him with contact information in the event he wanted to learn more about the deal and Cuban subsequently contacted that person and was provided more information.[27] The court concluded that "[i]t is at least plausible that each of the parties understood, if only implicitly, that Mamma.com would only provide the terms and conditions of the offering to Cuban for the purpose of evaluating whether he would participate in the offering, and that Cuban would not use the information for his personal benefit."[28] The Fifth Circuit concluded that it was premature to dismiss the action based on one plausible interpretation that there was no agreement not to trade in the face of an equally plausible interpretation that there was such an agreement.[29] In remanding the case, the Fifth Circuit acknowledged the "paucity of jurisprudence on the question of what constitutes a relationship of 'trust and confidence' and the inherently fact-bound nature of determining whether" Cuban's relationship with the company had created a duty to abstain from trading.

SEC v. Rorech

In *SEC v. Rorech*, the U.S. District Court for the Southern District of New York entered judgment against the SEC

following a bench trial in a case involving the SEC's first charge of insider trading on credit default swaps ("CDSs") (*see WSLR, July 2010, page 11*).[30] The June 25, 2010, decision stemmed from a civil action filed by the Commission in May 2009, claiming violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5.[31]

The SEC alleged that Jon-Paul Rorech, a sales representative for Deutsche Bank, passed insider information learned through Deutsche Bank investment bankers on to Renato Negrin, a portfolio manager at the hedge fund Millennium Partners.[32] In July 2006, Deutsche Bank was serving as lead underwriter for bond offerings of subsidiaries of VNU N.V., a Dutch media holding company, and was advising VNU about a potential restructuring of the company's offering.[33] Millennium Partners, through Negrin, purchased VNU CDSs after Rorech allegedly tipped Negrin about the changes to the bond offering.[34] Based on the information that Rorech allegedly passed on to Negrin, Millennium Partners realized over $1 million on its VNU trades.[35]

The district court found that the CDSs constituted security-based swap agreements subject to Section 10(b)'s antifraud provisions.[36] The court, however, concluded that neither Rorech nor Negrin could be liable under Section 10(b) or Rule 10b-5 because Rorech did not in fact possess material, non-public information at the time he spoke to Negrin. The court stressed that Deutsche Bank had not actually made any recommendation as to restructuring the VNU offering at the time of the phone calls between Negrin and Rorech, and therefore Rorech could not have told Negrin of the recommendation. And, any information Rorech did share with Negrin was not material because the fact that Deutsche Bank was advising on the deal was widely known in the marketplace and any opinion offered by Rorech as to what the advice would be "was speculative information that does not rise to the level of materiality."[37]

Perhaps of more significance, the court further held that Rorech did not violate any duty of confidentiality. To the contrary, "Deutsche Bank had no expectation that Mr. Rorech's personal opinions or general information concerning the restructuring of the VNU bond offering would be kept confidential. Indeed, it was consistent with the custom and practice in the high yield bond market for Mr. Rorech, a salesperson, to share his ideas and opinions with Mr. Negrin, a prospective purchaser of the bonds."[38] As for Negrin, the court found that his purchases of VNU CDs were consistent with past investment practices and trading history, a fact that negated any inference of insider trading arising from the trades following Negrin and Rorech's communications.[39]

Finally, the court also concluded that the SEC had failed to prove scienter on the part of Negrin or Rorech, noting that the two spoke openly on recorded lines, they had a purely professional relationship, Rorech obtained no "quantifiable or direct financial benefit" as a result of Negrin's trades, there was no evidence that Negrin knew any of the information was material non-public information, and Negrin made no effort to hide the transactions from Deutsche Bank but openly traded with Deutsche Bank.[40]

Having found that the SEC failed to establish necessary elements under Section 10(b) and Rule 10b-5, the court entered judgment in favor of Rorech and Negrin.

Number Three: The Supreme Court Decision in the So-Called 'Foreign-Cubed' Case Limiting the Extraterritorial Application of the Securities Laws

On June 24, 2010, the U.S. Supreme Court decided *Morrison v. National Australia Bank Ltd.*, a case involving foreign plaintiffs suing foreign defendants in U.S. courts for misconduct in connection with securities traded on a foreign exchange, or what is often referred to as a "foreign-cubed case."[41] The Supreme Court held that Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 apply only in connection with the purchase or sale of a security listed on a U.S. stock exchange or the purchase or sale of any other security in the United States, and therefore do not permit a foreign investor to sue foreign and American defendants in connection with securities traded on foreign exchanges (*see WSLR, July 2010, page 9*).

National Australia Bank Ltd. ("NAB") was Australia's largest bank and its shares trade on the Australian Stock Exchange Limited and other foreign securities exchanges.[42] Although its American Depositary Receipts trade on the New York Stock Exchange, its shares never traded on any U.S. exchange. In 1998, NAB bought HomeSide Lending, a mortgage-servicing company headquartered in Florida and, from 1998 to 2001, both NAB and HomeSide, through its executive who resided in Florida, touted the success of HomeSide's business.[43] In 2001, however, NAB took a sizable writedown on the value of HomeSide's assets, and the price of NAB's shares declined.[44]

A group of Australian shareholders filed a putative class action in federal court in New York against NAB, HomeSide, and several of their executives.[45] The plaintiffs alleged that HomeSide and its executives manipulated HomeSide's financial models to make the business look more valuable than it really was. The district court dismissed the action for lack of jurisdiction and the Second Circuit affirmed, finding that the U.S.-based conduct was not sufficient to support jurisdiction under the Second Circuit's two-part test measuring whether there were sufficient domestic actions or effect to support jurisdiction.[46] Here, the Second Circuit concluded, the acts performed in the United States did not "compris[e] the heart of the alleged fraud."[47]

The Supreme Court affirmed, but on different grounds. In an opinion written by Justice Antonin Scalia, the Court overturned decades of jurisprudence on the question of the extraterritorial reach of the U.S. securities laws, and held that the U.S. securities laws do not apply extraterritorially.

The Supreme Court held that the Second Circuit erred in looking at the issue as one of subject matter jurisdiction. The appropriate question, according to the Supreme Court, is what conduct Section 10(b) reaches.[48] In deciding that question, the Court began with the

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strong presumption that federal laws apply only within the United States, unless Congress clearly says otherwise.[49] The Court noted that despite this presumption, the Second Circuit had developed an extensive body of case law to "discern whether Congress would have wanted the statute to apply."[50] The Court rejected this entire body of case law and the two-part test relied upon by the Second Circuit, calling it "judicial-speculation-made-law-divining what Congress would have wanted" and stated that "[r]ather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."[51]

The Court acknowledged that the case did have some connection to the United States, as HomeSide was based in Florida and its executives allegedly made fraudulent statements there.[52] The Court, however, held that the focus of the Exchange Act is not where the alleged deceptive conduct occurred but where the securities were purchased.[53] As the Court noted, "Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.' "[54]

The Court concluded that because this case "involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States," the Petitioners "failed to state a claim on which relief can be granted," and the Court affirmed the dismissal of their claims.[55]

Justice Stevens, in an opinion joined by Justice Ginsburg, concurred with the Court's conclusion, but not its reasoning. Justice Stevens stated that he "would adhere to the general approach that has been the law in the Second Circuit, and most of the rest of the country, for nearly four decades."[56] He described the Second Circuit's two-part test as the "north star" of Section 10(b) jurisprudence and objected to the Court's critique of "judge-made rules," noting that "[t]his entire area of law is replete with judge-made rules, which give concrete meaning to Congress' general commands."[57]

In a footnote, Justice Stevens asserted that "[t]he Court's opinion does not, however, foreclose the Commission from bringing enforcement actions in additional circumstances, as no issue concerning the Commission's authority is presented by this case. The Commission's enforcement proceedings not only differ from private § 10(b) actions in numerous potentially relevant respects, . . . but they also pose less threat to international comity. . . ."[58]

While private actions do differ significantly from enforcement actions, it is unclear why the *Morrison* decision would not apply equally to enforcement actions based on Section 10(b). Indeed, the majority opinion cited two SEC enforcement actions in the course of rejecting the Second Circuit's approach.[59]

Congress was apparently also concerned by the impact of the *Morrison* decision on the SEC because, as discussed above, Dodd-Frank includes a provision limiting the application of *Morrison*. Dodd-Frank provides that federal district courts have jurisdiction over actions commenced by the SEC alleging violations of the securities laws' antifraud provisions "even if the securities transaction occurs outside the United States and involves only foreign investors," so long as the SEC alleges conduct in the United States that constitutes "significant steps in furtherance of the violation" or conduct outside the United States that has a "foreseeable substantial effect within the United States."[60]

Number Four: A Decision That a Broker-Dealer's General Counsel Is a Supervisor

On September 8, 2010, Chief Administrative Law Judge Brenda P. Murray issued an Initial Decision dismissing the enforcement proceeding against Ferris, Baker Watts, Inc.'s ("FBW") former general counsel, Theodore W. Urban.[61] She did so, however, only after finding that Urban was a "supervisor" — a finding that, if upheld, could greatly expand the scope of individuals charged with a duty of reasonable supervision.

According to the Initial Decision, the "most powerful person" at FBW was Louis J. Akers, who was head of Retail Sales and a member of the board of directors during the relevant time period.[62] Akers was described in the opinion as "domineering," a "bully," and someone whose "disparaging, unsupportive views of Compliance were well known among his subordinates."[63] Akers recruited Stephen Glantz, a broker, to FBW and Glantz became a "top revenue producer."[64]

Glantz had two direct supervisors. A branch manager was his supervisor for his retail accounts and the Director of Institutional Sales supervised his institutional accounts. Glantz, however, considered Akers not just to be his supervisor, but his "protector and that he could do pretty much what he wanted to do."[65]

Glantz ultimately admitted committing federal securities fraud while at FBW and was sentenced to 33 months in prison. Among other things, Glantz admitted to artificially inflating and maintaining the price of stock of Innotrac, a stock in which his accounts were heavily invested (many of those accounts he improperly characterized as institutional, rather than retail, to reduce the level of scrutiny from Compliance).

The Division argued that Urban was Glantz's supervisor because, although Urban was not his direct supervisor, Urban "had the requisite degree of responsibility, ability, or authority to affect [Glantz's] conduct when senior management informed him of the misconduct to obtain his advice and guidance and to involve him as part of management's collective response to the problem."[66] The Division further argued that Urban failed to reasonably supervise Glantz in that he acted recklessly in ignoring repeated red flags over the course of almost three years.[67]

Judge Murray concluded that Urban was in fact Glantz's supervisor despite finding that "[t]he overwhelming evidence is that Urban was not responsible and had no authority for hiring, assessing performance, assigning activities, promoting, or terminating employment of any-

one, outside of the people in the departments he directly supervised."[68] The Initial Decision states that, "[e]ven though Urban did not have any of the traditional powers associated with a person supervising brokers . . ., the case law dictates that Urban be found to be Glantz's supervisor."[69] Judge Murray explained her finding as follows:

> As General Counsel, Urban's opinions on legal and compliance issues were viewed as authoritative and his recommendations were generally followed by people in FBW's business units, but not by Retail Sales. Urban did not direct FBW's response to dealing with Glantz, however, he was a member of the Credit Committee, and dealt with Glantz on behalf of the committee. I agree with the opposing experts. . . that the language in Gutfreund [51 SEC 93 (1992)], taken literally, would result in Glantz having many supervisors because many people at FBW acted to affect Glantz's conduct in a variety of different ways.[70]

Judge Murray ultimately concluded that Urban acted reasonably, finding that Urban had taken all the action against Glantz that he could and that going to higher-ups at RBW would have been futile. That fact, however, is of little solace to compliance officers and lawyers at other financial services firms, given that the Initial Decision appears to stand for the proposition that anyone who is an a position merely to *affect* the conduct of others becomes a supervisor.

The SEC granted the Division's petition for review and Urban's cross-petition for review of the Initial Decision. On November 22, 2010, the Securities Industry and Financial Markets Association ("SIFMA") and the Association of Corporate Counsel ("ACC") filed an *amicus* brief in support of Urban.[71] The brief warns that "the standard applied in finding that the general counsel was a supervisor in this case, unless rejected, would set a precedent that would make it more difficult for in-house counsel to provide candid legal advice to their clients and to ensure corporate compliance with the law."[72] Indeed, the Initial Decision "puts all legal and compliance professionals at risk for liability as 'supervisors' merely as a result of performing their normal day-to-day functions properly."[73] The *amici* instead urge the SEC to clarify the standard for supervisory liability, a standard which "should recognize that an individual will be viewed as a supervisor only when the individual knew or should have known that he or she has been granted supervisory 'control' over another person."[74] The *amici* further urge that the authority to "hire or fire, to reward or punish" should typically be among the powers a supervisor must have, and "in their absence only very compelling evidence of actual authority to control an individual's conduct should suffice."[75]

The SEC's decision is expected in 2011 and will undoubtedly be the subject of much discussion and debate.

Number Five: The SEC's Continued Pursuit of Violators of the Foreign Corrupt Practices Act, Including the SEC's First Case Against a Non-U.S. Issuer

On January 13, 2010, the SEC announced that Cheryl J. Scarboro would head its new specialized Foreign Corrupt Practices unit.[76] In a speech on that same day, Chief Scarboro announced, among other things, that her unit would "conduct more targeted sweeps and sector-wide investigations, alone and with other regulatory counterparts both here and abroad."[77]

In keeping with that promise, on November 4, 2010, the SEC announced settlements involving the Swiss freight forwarder and customs clearance provider, Panalpina World Transport, and six oil and gas service companies and subsidiaries.[78] The U.S. Department of Justice (the "DOJ") also announced settlements with Panalpina and five of the six oil and gas companies that same day.[79] The settlements, which totaled approximately $236,565,000 in criminal fines and disgorgement, demonstrate the SEC and the DOJ's continued focus on the oil and gas industry and the companies that support it. According the SEC, however, this was only the "first sweep of a particular industrial sector in order to crack down on public companies and third parties who are paying bribes abroad."[80] Chief Scarboro emphasized that her unit "would continue to focus on industry-wide sweeps, and no industry is immune from investigation."[81]

Five of the six companies that settled with the DOJ entered into three-year deferred prosecution agreements with the DOJ and agreed to "fully cooperate with U.S. and foreign authorities in any ongoing investigations of the companies' corrupt payments."[82] The sixth company, Noble Corporation, entered into a non-prosecution agreement which, according to the DOJ, "recognizes Noble's early voluntary disclosures, thorough self-investigation of the underlying conduct, full cooperation with the department and extensive remedial measures undertaken by the company." While Noble also was required to pay a criminal penalty of $2.59 million, that penalty was significantly lower than the penalties imposed on the other six companies of between $7.35 million and $70.56 million. Notably, none of the companies was required to retain independent monitors; instead, they are required to provide periodic written compliance and remediation reports to the government.

The settlement with Panalpina represents the first time the SEC has charged a company that is not a U.S. issuer with FCPA violations. While the DOJ has previously charged non-U.S. issuers with FCPA violations, the SEC asserted jurisdiction over Panalpina by alleging that it was aiding and abetting violations by U.S. entities. While this is a way for the SEC to pursue non-U.S. companies, it is an extraordinarily expansive approach to jurisdiction for the SEC to take.

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Number Six: The SEC's Announcement of Its Enforcement Cooperation Initiative for Individuals Who Assist in Investigations

Nearly a decade after the Commission's *Seaboard* 21(a) Report in 2001 and the promulgation of cooperation guidelines for corporations, the SEC announced its new initiative to incentivize cooperation by individuals (*see analysis at WSLR, February 2010, page 26*).[83] The implementation of cooperation guidelines for individuals fulfilled one of Enforcement Director Robert Khuzami's promised initiatives outlined in his August 5, 2009, speech after his first 100 days as Director.[84] The new cooperation guidelines are designed to provide the SEC with a greater spectrum of tools to elicit information from witnesses in order to aid in detecting fraud and violations of securities laws.[85]

The January 2010 cooperation initiative for individuals authorizes the SEC staff to:

- provide formal, written cooperation agreements in which Enforcement agrees to recommend that the cooperator receive credit for assisting in the investigation, if the information is truthful;
- provide formal, written deferred prosecution agreements in which the SEC agrees to delay enforcement against a cooperator if the cooperator provides truthful information and complies with SEC required prohibitions;
- provide formal, written non-prosecution agreements in which the SEC agrees not to pursue enforcement action against the individual cooperating; and
- streamline the process of submitting witness immunity requests to the DOJ for witnesses who can assist in the DOJ's investigations.[86]

In deciding whether the SEC will provide such incentives, the SEC may take into account: 1) the assistance provided by the individual cooperating; 2) the importance of the underlying matter; 3) any societal interest in holding the individual accountable for misconduct; and 4) the appropriateness of awarding credit based upon the risk profile of the individual cooperating.[87]

Number Seven: The First Decision Upholding a Pure Clawback Case

In 2009, the SEC invoked the "clawback" provisions of Section 304 of the Sarbanes-Oxley Act ("SOX") against Maynard Jenkins, the former CEO of CSK Auto Inc.[88] The SEC's case against Jenkins marked the first time the SEC had used Section 304 to reclaim compensation from an executive who was not himself accused of wrongdoing.[89] In its complaint, the SEC requested that the U.S. District Court for the District of Arizona compel Jenkins to reimburse CSK for bonuses paid to Jenkins during a period in which CSK was materially noncompliant with financial reporting standards.[90] Section 304 of SOX requires CEOs and CFOs to reimburse performance-based compensation to corporations that restate financials due to material non-compliance with reporting standards.[91] While CSK was required to restate its financials for accounting fraud and several officers at the company were charged with fraud by the SEC and the DOJ, Jenkins was never accused of wrongdoing.[92]

Jenkins moved to dismiss the SEC's complaint, arguing that Section 304 of SOX "does not impose liability, but instead is merely a remedy to be applied to 'wrongdoers.' "[93] The district court rejected this argument as contrary to the plain language of Section 304.[94] The court explained as follows:

> As the title of the subsection makes plain, it was Congress's purpose to recapture the additional compensation paid to a CEO during any period in which the corporate issuer was not in compliance with financial reporting requirements. A CEO need not be personally aware of financial misconduct to have received additional compensation during the period of that misconduct, and to have unfairly benefitted therefrom. When a CEO either sells stock or receives a bonus in the period of financial noncompliance, the CEO may unfairly benefit from a misperception of the financial position of the issuer that results from those misstated financials, even if the CEO was unaware of the misconduct leading to misstated financials. It is not irrational for Congress to require that such additional compensation amounts be repaid to the issuer.[95]

The district court also rejected Jenkins' arguments that the SEC must specify the amount of reimbursement sought and that the amount sought must be attributable to the alleged misconduct, finding that such arguments have no bearing on whether the SEC has stated a claim for purposes of deciding a motion to dismiss.[96]

Jenkins also argued that, to the extent Section 304 allows the SEC to recover compensation not attributable to the alleged misconduct, the statute is punitive rather than remedial and violates Jenkins' right to due process.[97] The district court acknowledged that "to the extent that the statute or the remedy sought under it results in a severe or unjustified deprivation to the Defendant, constitutional issues may arise in particular cases."[98] The court, however, held that the facts were not yet sufficiently established to determine if, in this case, the application of the statute would be punitive.[99] Moreover, the court questioned whether any punitive aspect of the statute would in fact give rise to due process concerns, given that the purpose of the larger statutory scheme — to incentivize CEOs and CFOs "to be rigorous in their creation and certification of internal controls" — appears to have both remedial and punitive aspects.[100]

Number Eight: A District Court Decision Setting a High Bar For Aiding and Abetting Liability

The U.S. District Court for the District of Connecticut set a very high standard for the SEC in pursuing aiding and abetting claims.[101] In *SEC v. Apuzzo*, the district court dismissed the SEC's complaint against former Terex Corporation ("Terex") chief financial officer Joseph Apuzzo, despite allegations that Apuzzo aided and

abetted a fraudulent accounting scheme involving two sale and leaseback transactions carried out by United Rentals, Inc. ("URI") and certain of its former officers.[102]

URI, a large equipment-rental company, purchased equipment from Terex and rented it to other companies.[103] According to the SEC, URI sought to inflate its profits by selling used equipment to General Electric Capital Corporation ("GECC") at prices in excess of the equipment's fair market value, prematurely recognizing the revenue from those sales, and leasing the equipment back.[104] To induce GECC to buy the equipment at inflated prices, URI paid a fee and arranged for Apuzzo to have Terex enter into a remarketing agreement with GECC, pursuant to which Terex agreed to resell the equipment at the end of the lease period and that GECC would receive no less than 96 percent of the price it had paid for the equipment.[105] Terex in turn entered into "backup remarketing agreements" with URI pursuant to which URI assumed Terex's obligations and guarantees to GECC, agreed to indemnify GECC for any losses, and agreed to make additional, increased purchases of equipment from Terex.[106] The indemnification payments paid by URI to QTI were concealed through use of inflated invoices disguising the indemnification payments as premiums on purchases of new equipment.[107]

The district court dismissed the SEC's claims that Apuzzo aided and abetted URI's fraudulent accounting scheme, finding that, while the SEC had adequately alleged that Apuzzo had actual knowledge of the violation by URI, Apuzzo's actions did not constitute "substantial assistance."[108]

Despite finding that Apuzzo participated in the two transactions about which URI's auditors were misled, the court held that allegations of "awareness and approval of the primary violation" and allegations of a "but for causal relationship" are insufficient.[109] Instead, " '[a] defendant provides substantial assistance only if [he] affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed.' "[110] The court concluded that Apuzzo's participation — which included entering into multiple agreements which he allegedly knew were part of a fraudulent scheme — did not constitute substantial assistance because the SEC alleged that URI, not Apuzzo, created the structure for the two sale-leaseback transactions; that URI, not Apuzzo, was responsible for bringing the parties together; that URI, not Apuzzo, modified the transaction documents to conceal the true nature of the agreements (Apuzzo's initial draft explicitly described Terex's guarantee and URI's indemnification agreement); that URI, not Apuzzo, was responsible for accounting decisions at URI; and that URI, not Apuzzo, prepared and forwarded the inflated invoices.[111] The court further noted that Apuzzo did not enter into any arrangement on behalf of URI and did not give anyone at URI authorization necessary in order to carry out the fraud.[112]

It may be noteworthy that the SEC did not allege that Apuzzo made affirmative misrepresentations to URI's auditors. Rather, while the SEC alleged that Apuzzo offered to provide a misleading appraisal letter to URI's auditors, the SEC did not allege that he actually provided the letter.[113] The decision sets a high standard for the SEC to allege aiding and abetting against individuals not employed by or associated with the primary violator. It seems unlikely that individuals who are not an officer or employee of the primary violator would be in a position to enter into arrangements on behalf of the primary violator or authorize the primary violator to take steps necessary to carry out the fraud.

Number Nine: The SEC's Pursuit of Numerous Ponzi Schemes In Response to Criticism Concerning Madoff and Stanford

Continuing a trend of 2009, the SEC brought numerous actions against alleged perpetrators of Ponzi schemes. These alleged schemes vary wildly in the amount of money involved, the complexity, the number of victims, and the relative sophistication of the victims. Many of the schemes targeted members of certain "affinity groups," including retired bus drivers in Los Angeles,[114] retired government employees and law enforcement agents nationwide,[115] members of the Caribbean and African-American communities of Brooklyn,[116] and Cuban-Americans in Miami.[117] The SEC also expanded its net with respect to the Madoff Ponzi scheme, charging two employees of Bernard L. Madoff Investment Securities LLC with fraud.[118] According to the SEC, Annette Bongiorno, an employee with BMIS since 1968, not only helped perpetuate the fraud by creating false books and records and misleading investors through fictional account statements and trade confirmations, but also created false trades in her account that enabled her to cash out millions of dollars more than she deposited. The other charged individual, JoAnn Crupi, is accused of helping facilitate the fraud and also, when the scheme was on the verge of collapse, helping to decide which accounts should be cashed out and preparing checks for those investors, many of whom were friends or family of Madoff.

The SEC's stepped up pursuit of these and numerous other alleged fraudsters is hardly surprising, given the intense criticism the SEC has faced in connection with the Madoff and Stanford Ponzi schemes.

On March 31, 2010, the SEC Office of Inspector General ("OIG") released its Report of Investigation in connection with its Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme.[119] In its Report, the OIG concluded that, since 1997, the SEC's Fort Worth Office was aware that Robert Allen Stanford was likely operating a Ponzi scheme.[120] Indeed, according to the Report, the Examination group of the Fort Worth Office conducted four examinations of Stanford in 1997, 1998, 2002, and 2004 and, on each occasion, concluded that Stanford's CDs would not be "legitimate" and were likely a Ponzi or other fraudulent scheme.[121] The Enforcement section of the Fort Worth office, however, rejected multiple requests by the Examination section to open investigations. On one occasion, Enforcement opened an inquiry, only to close it three months later after Stanford failed to produce

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documents in response to a voluntary document request. The OIG concluded that Enforcement made "no meaningful effort . . . to investigate or to bring an action to attempt to stop it until late 2005."[122] Even then, however, according to the OIG, Enforcement failed to take injunctive action in 2005 against Stanford's investment advisor for an admitted failure to conduct any due diligence regarding Sanford's investment portfolio, missing an opportunity to shut down the sales of Stanford's CDs.[123]

The OIG did not find that the reluctance of Enforcement to investigate Stanford was related to any improper relationship on the part of any SEC employee, although it did note that the former head of Enforcement in Fort Worth, who had participated in multiple decisions not to open investigations, sought to represent Stanford on three occasions after leaving the SEC and did in fact represent him before being informed by the SEC Ethics Office that such representation was not proper.[124] The OIG also found evidence that "SEC-wide institutional influence within Enforcement" was a factor. Specifically, the OIG found that "senior Fort Worth officials perceived that they were being judged on the number of cases they brought, so called 'stats,' and communicated to the Enforcement staff that novel or complex cases were disfavored. As a result, cases like Stanford, which were not considered 'quick-hit' or 'slam-dunk' cases, were not encouraged."[125]

The OIG's report included a recommendation that the SEC Chairman and the Director of Enforcement consider promulgating and/or clarifying procedures with respect to seven areas: 1) the consideration of potential harm to investors when deciding to bring an action that also may involve litigation risk; 2) the significance of bringing difficult, but important, cases in evaluating the performance of staff; 3) the significance of the presence or absence of U.S. investors in deciding whether or not to bring an enforcement action; 4) coordination between Enforcement and the Office of Compliance Inspections and Examinations; 5) the factors determining when referral to state securities regulators, in lieu of an SEC investigation, is appropriate; 6) training of Enforcement staff on the laws governing broker-dealers and investment advisers; and 7) the need to coordinate with the Office of International Affairs and the Division of Risk, Strategy, and Financial Innovation when appropriate.[126]

On the same day the OIG released its report, the SEC issued a press release entitled "Fact Sheet: Addressing Issues Raised in the Inspector General's Stanford Report." The Fact Sheet details each of the OIG's recommendations and what efforts the SEC has made toward addressing those recommendations.[127] The SEC provided a more detailed description of its efforts in the form of written testimony by the Director of the Division of Enforcement and the Director of the Office of Compliance Inspections and Examinations to the Senate Committee on Banking, Housing, and Urban Affairs on September 22, 2010.[128] According to this testimony, the Enforcement Division has taken action on all seven recommendations. For example, as evidence that Enforcement was carefully considering potential harm to investors in the face of litigation risk, the Directors pointed out that Enforcement had obtained 45 emergency temporary restraining orders to halt ongoing misconduct and 56 asset freezes to preserve investor funds.[129] In terms of staff evaluations, the Directors stated that "[r]ather than emphasizing the number of actions filed, we focus on the programmatic priority of the case, which reflects a consideration of multiple factors," including whether the matter involves particularly egregious conduct, widespread and extensive harm to investors, reflects a priority area, and several other factors.[130] The Directors indicated that "[w]e further consider in our evaluations the difficulty, complexity and investigative challenges of the case, as well as the efficiency of the resources used, the swiftness of the action, and the success of the outcome."[131] There can be no question, however, that Enforcement staff will still have an incentive to bring "quick hit" and "slam dunk" cases, as the Directors testified that the success of the enforcement program will be gauged not just on the number of cases, but also on "(i) the percentage of enforcement cases successfully resolved, (ii) the percentage of enforcement cases filed within two years, and (iii) our success in collecting and returning money to investors in a timely fashion."[132]

Number Ten: The SEC's Settlement with Goldman Sachs for a Record $550 Million

On July 15, 2010, the SEC announced that Goldman Sachs had agreed to pay $550 million to settle the charges that the company misled investors in the purchase of subprime mortgage products (*see WSLR, August 2010, page 7*).[133] The settlement sets the record for the largest penalty ever assessed by the SEC against a financial services firm.[134] Although Goldman did not admit or deny wrongdoing, the company conceded it did not provide adequate marketing materials that contained disclosures related to the collateralized debt obligations ("CDOs") that were at the center of the SEC's case.[135] In addition to the monetary penalty, Goldman is required to review its offerings of mortgage securities and provide training for employees.[136]

The settlement stems from the April 16, 2010, complaint filed by the SEC against Goldman Sachs and its employee, Fabrice Tourre (*see WSLR, May 2010, page 4*).[137] The complaint alleged that the marketing materials for Goldman's subprime residential mortgage-backed CDO, ABACUS 2007-AC1 ("ABACUS"), did not disclose that a hedge fund, Paulson & Company ("Paulson"), had direct economic interests adverse to those of the investors in ABACUS, even though Paulson participated in the portfolio selection process.[138] Goldman marketing materials claimed that Paulson's interests aligned with those of ACA Management LLC ("ACA"), a corporation that analyzes credit risk in residential mortgage-backed securities; however, Paulson's interests ran counter to ACA's interests.[139]

The SEC alleges that Paulson had a synthetic short position in the ABACUS portfolio that was created through Tourre's selection of the reference securities.[140] This position gave Paulson the economic incentive to pick se-

curities that were likely to experience a negative credit event.[141] Goldman did not disclose Paulson's role in the selection of reference securities or the position Paulson had in the securities in the materials distributed to investors.[142] By October 24, 2007, six months after the deal closed, all the ABACUS securities had suffered either credit downgrades or were placed on negative watch.[143] By the following January, nearly every security in the ABACUS deal was downgraded.[144] The SEC alleged that investors in ABACUS lost over $1 billion, while Paulson profited nearly $1 billion.[145]

In the settlement papers submitted to the U.S. District Court for the Southern District of New York, Goldman Sachs claimed that it made a mistake in its marketing materials for the ABACUS deal by stating that the reference portfolio was selected by ACA and not disclosing Paulson's role in the selection process.[146] In addition, Goldman admitted to not disclosing Paulson's economic position in the ABACUS deal.[147] Goldman's $550 million settlement with the SEC will include a $250 million Fair Fund distribution to harmed investors and a $300 million payout to the U.S. Treasury.[148]

The litigation with Tourre is continuing.

NOTES

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1326.

[2] *Id.* at §§ 929M and 929N.

[3] *Id.* at § 929O.

[4] *Id.* at § 929P(c).

[5] *Id.* at § 929Z.

[6] *Id.* at § 929P(a).

[7] *Id.* at § 925.

[8] *Id.* at § 929L.

[9] *Id.* at § 929E.

[10] *Id.* at § 929F.

[11] *Id.* at § 929P(b).

[12] *Id.* at § 929Y.

[13] *Id.* at § 929U.

[14] *Id.* at § 922.

[15] *See, e.g.,* SEC Charges Perot Company Employee in $8.6 Million Insider Trading Scheme (SEC Press Release 2009-203) (September 23, 2009) (available at *http://www.sec.gov/news/press/2009/2009-203.htm*) (charged with trading on information regarding expected Dell, Inc. tender offer); SEC Charges Disney Employee and Boyfriend in Brazen Insider Trading Scheme (SEC Press Release 2010-84) (May 26, 2010) (available at *http://www.sec.gov/news/press/2010/2010-84.htm*) (charged with attempting to sell inside information about Disney to hedge funds).

[16] *See, e.g., SEC v. Flanagan*, Complaint, No. 10-cv-04885 (August 4, 2010) (available at *http://www.sec.gov/litigation/complaints/2010/comp21612.pdf*) and *SEC v. Flanagan*, Order Instituting Public Administrative and Cease-and-Desist Proceedings (August 4, 2010) (available at *http://www.sec.gov/litigation/admin/2010/34-62636.pdf*) (charging Deloitte partner and his son with trading on advanced earnings information concerning Deloitte clients).

[17] *See, e.g.,* SEC Charges Securities Professionals in Insider Trading Scheme Using Coded E-mail Messages (SEC Press Release 2010-44) (March 24, 2010) (available at *http://www.sec.gov/news/press/2010/2010-44.htm.*) (charging UBS investment banker and others with trading on information about transactions involving UBS's clients).

[18] *See, e.g.,* SEC Charges Pequot Capital Management and CEO Arthur Samberg with Insider Trading (SEC Press Release 2010-88) (May 27, 2010) (available at *http://www.sec.gov/news/press/2010/2010-88.htm*) (charges include hiring former Microsoft employee after receiving confidential information from him regarding Microsoft's earnings).

[19] 620 F.3d 551 (5th Cir. 2010).

[20] *SEC v. Cuban*, 634 F. Supp. 2d 713, 717 (N.D. Tex. 2009).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 728.

[25] *Id.*

[26] *SEC v. Cuban*, 620 F.3d 551, 557 (5th Cir. 2010).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *SEC v. Rorech*, 720 F. Supp. 2d 367 (S.D.N.Y. 2010).

[31] SEC Files First Credit Default Swap Insider Trading Case (SEC Litigation Release No. 21023) (May 5, 2009) (available at *http://www.sec.gov/litigation/litreleases/2009/lr21023.htm*).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Rorech*, 720 F. Supp. 2d at 408.

[37] *Id.* at 411-12.

[38] *Id.* at 414.

[39] *Id.*

[40] *Id.* at 415-16.

[41] 130 S. Ct. 2869 (2010).

[42] *Id.* at 2875.

[43] *Id.*

[44] *Id.* at 2875-76.

[45] Initially, the plaintiffs included a domestic purchaser of NAB's securities, but the domestic plaintiff's claims were dismissed for failure to allege damages. *Id.* at 2876, n.1.

[46] *Id.* at 2876.

[47] *Id.*

[48] *Id.* at 2877.

[49] *Id.*

[50] *Id.* at 2878.

[51] *Id.* at 2881.

[52] *Id.* at 2883-84.

[53] *Id.* at 2884.

[54] *Id.* (quoting 15 U.S.C. § 78j(b)).

[55] *Id.* at 2888.

[56] *Id.*

[57] *Id.* at 2889.

[58] *Id.* at 2895, n.12.

[59] *Id.* at 2879 (citing *SEC v. Berger*, 322 F.3d 187, 192-93 (2nd Cir. 2003) and 2880 (citing *SEC v. Kasser*, 548 F.2d 109, 116 (3rd Cir. 1977)).

[60] Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1326 at § 929P(b).

[61] *In the Matter of Theodore W. Urban*, Initial Decision Release No. 402 (September 8, 2010).

[62] *Id.* at 3.

[63] *Id.* at 4.

[64] *Id.* at 4-5.

[65] *Id.* at 7.

[66] *Id.* at 46.

[67] *Id.* at 47.

[68] *Id.* at 35.

[69] *Id.* at 52.

[70] *Id.*

[71] Available at *http://www.sifma.org/issues/item.aspx?id=22405.*

[72] *Id.* at 1-2.

[73] *Id.* at 4.

[74] *Id.* at 5.

[75] *Id.*

[76] SEC Names New Specialized Unit Chiefs and Head of New Office

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of Market Intelligence (Press Release 2010-5) (January 13, 2010) (available at *http://www.sec.gov/news/press/2010/2010-5.htm*).

[77] Speech by SEC Staff: Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (January 13, 2010) (available at *http://www.sec.gov/news/speech/2010/spch011310newsconf.htm*).

[78] SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (SEC Press Release 2010-214) (November 4, 2010) (available at *http://www.sec.gov/news/press/2010/2010-214.htm*).

[79] Department of Justice Press Release: Oil Service Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $156 Million in Criminal Penalties (November 4, 2010) (available at *http://www.Justice.gov/printf/PrintOUt2.jsp*).

[80] SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (SEC Press Release 2010-214) (November 4, 2010) (available at *http://www.sec.gov/news/press/2010/2010-214.htm*).

[81] *Id.*

[82] Department of Justice Press Release: Oil Service Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $156 Million in Criminal Penalties (November 4, 2010) (available at *http://www.Justice.gov/printf/PrintOUt2.jsp*).

[83] SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (SEC Press Release 2010-6) (January 13, 2010) (available at *http://www.sec.gov/news/press/2010/2010-6.htm*).

[84] Robert Khuzami, Director of Enforcement, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (August 5, 2009) (available at *http://www.sec.gov/news/speech/2009/spch080509rk.htm*).

[85] Enforcement Cooperation Initiative (available at *http://www.sec.gov/spotlight/enfcoopinitiative.shtml*).

[86] SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (SEC Press Release 2010-6) (January 13, 2010) (available at *http://www.sec.gov/news/press/2010/2010-6.htm*).

[87] *Id.*

[88] SEC Seeks Return of $4 Million in Bonuses and Stock Sale Profits From Former CEO of CSK Auto Corp (SEC Litigation Release No. 21149A) (July 23, 2009) (available at *http://www.sec.gov/litigation/litreleases/2009/lr21149a.htm*).

[89] *Id.*

[90] *SEC v. Maynard L. Jenkins*, Case No. CV—09-1510-PHX-GMS, Complaint (July 22, 2009) (available at *http://www.sec.gov/litigation/complaints/2009/comp21149.pdf*).

[91] *Id.*

[92] Dennis K. Berman, *SEC's New Frontier: 'The Clawback,'* Wall St. J., June 22, 2010 (available at *http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704256304575321243743583052.html.*

[93] *SEC v. Jenkins*, 718 F. Supp. 2d 1020, 1075 (D. Ariz. 2010).

[94] *Id.* at 1074-75.

[95] *Id.* at 1075.

[96] *Id.* at 1075-76.

[97] *Id.* at 1075.

[98] *Id.* at 1076.

[99] *Id.*

[100] *Id.* at 1076-77.

[101] *SEC v. Apuzzo*, No. 3:07CV1910(AWT), 2010 WL 5359928 (D. Conn. December 20, 2010).

[102] *Id.*

[103] *Id.* at *1.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at *8.

[109] *Id.* at *12.

[110] *Id.* (quoting *SEC v. Espuelas*, 698 F. Supp. 2d 415, 433 (S.D.N.Y. 2010)).

[111] *Id.* at *14.

[112] *Id.* at *15.

[113] *Id.* at 15.

[114] SEC Halts Ponzi Scheme Targeting Retired L.A. Bus Drivers (SEC Press Release 2010-33) (March 4, 2010) (available at *http://www.sec.gov/news/press/2010/2010-33.htm*).

[115] SEC Charges Benefits Consultant to Government Agencies With Ponzi Scheme (SEC Press Release 2010-108) (June 25, 2010) (available at *http://www.sec.gov/news/press/2010/2010-108.htm*).

[116] SEC Charges Money Manager and Two Associates in New York City-Based Affinity Fraud (SEC Press Release 2010-87) (May 26, 2010) (available at *http://www/sec.gov/news/press/2010/2010-87.htm*).

[117] SEC Charges Miami Couple in $135 Million Ponzi Scheme Targeting Cuban-American Community (SEC Press Release 2010-31) (March 3, 2010) (available at *http://www.sec.gov/news/press/2010/2010-31.htm*).

[118] SEC Charges Two Longtime Madoff Employees With Fraud (SEC Press Release 2010-225) (November 18, 2010) (available at *http://www.sec/gov/new/press/2010/2010-225.htm*).

[119] Available at *http://www.sec.gov/news/studies/2010/oig-526.pdf.*

[120] *Id.* at 16.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* at 17.

[125] *Id.*

[126] *Id.* at 150-51.

[127] Available at *http://www.sec.gove/news/press/2010/2010-60-factsheet.htm.*

[128] Oversight of the SEC Inspector General's Report on the "Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme" and Improving SEC Performance, Before the S. Comm. on Banking, Housing, and Urban Affairs (September 22, 2010) (statement of Robert Khuzami, Director, SEC Division of Enforcement, and Carlo de Florio, Director, SEC Office of Compliance Inspections and Examinations).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (SEC Press Release 2010-123) (July 15, 2010) (available at *http://www.sec.gov/news/press/2010/2010-123.htm*).

[134] *Id.*

[135] *See* Peter J. Henning and Steven M. Davidoff, *Weighing the Trade-Offs in the Goldman Settlement, N.Y. Times*, July 16, 2010 (available at *http://dealbook.blogs.nytimes.com/2010/07/16/weighing-the-trade-offs-in-the-goldman-settlement/*).

[136] Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (SEC Press Release 2010-123) (July 15, 2010) (available at *http://www.sec.gov/news/press/2010/2010-123.htm*).

[137] The SEC Charges Goldman Sachs with Fraud in Connection with the Structuring and Marketing of a Synthetic CDO (SEC Litigation Release No. 21489) (April 16, 2010) (available at *http://www.sec.gov/litigation/litreleases/2010/lr21489.htm*).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] Id.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

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Foley & Lardner LLP represents parties who are the subject of SEC enforcement inquiries and actions, including in cases discussed in this Special Report.

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