

## Symposium Securities Regulation and Corporate Responsibility

### *Panel I: Recent SEC and Criminal Enforcement Trends and Developments*

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Abstract by Caroline Katz

Speakers included Tom Newkirk, Associate Director of Division of Enforcement at the Securities Exchange Commission; Jim Comey, U.S. Attorney for the Southern District of New York; Ted Wells, partner at Paul, Weiss, Rifkind, Wharton & Garrison; Roger Sherman, Vice President in the Enforcement Department at the NASD; Mary Jo White, chair of the litigation group of Debevoise & Plimpton; and George Terwilliger, senior partner at White & Case.

Mr. Newkirk discussed the increasing number of financial fraud and reporting cases brought by the Enforcement Division of the SEC. They have also encountered some new kinds of cases including cases of misuse of special purpose entities, related party transactions, and undisclosed compensation to officers and directors. Additionally, the Enforcement Division has been using new enforcement initiatives and tools in an attempt to move things along, has been seeking much tougher civil remedies in the cases they bring, and has issued the Seaboard Report in order to let the world know the standards it uses to evaluate cooperation.

Mr. Comey discussed the importance of the criminal justice response in the wake of Enron. As part of the effort, the president created the Corporate Fraud Task Force, headed by the Deputy Attorney General. It consists of U.S. Attorneys from major financial centers and is intended to determine what works and what does not when fighting white-collar crime. Mr. Comey also discussed the different challenges faced by prosecutors and private attorneys dealing with white-collar crime.

Mr. Wells discussed the Holder memo which says that the decision whether to charge companies with criminal conduct will depend on the prosecutor's evaluation of cooperation. Cooperation factors include: waiver of attorney-client privilege, whether the company had conducted an internal investigation and disclosed it, company punishment of employees who do not cooperate with the investigation by asserting 5th amendment rights, joint defense agreements between corporations and employees (this list is not exhaustive).

Mr. Sherman discussed the NASD, a self-regulatory organization with members consisting of U.S. brokerage firms and brokers. He suggested that in order to achieve a deterrent effect in a civil or administrative environment, it is necessary to achieve "real time enforcement." This includes having enough people to enable you to deal with matters quickly, narrowing down issues, requiring strict adherence to internal subpoenas, and making greater use of technology.

Ms. White discussed how lawyers can best represent a corporation in this post-Enron, SEC guidelines era. Encouraging compliance with cooperation factors is perhaps the most important thing that can be done in these situations. She also spoke about the role of the prosecutor in

these cases, including their discretion when deciding whether to indict and the need for fairness on their behalf. Ms. White suggested that a moderate course would likely bring optimal results.

Mr. Terwilliger discussed the purpose of all the investigative and prosecutorial activity. He suggested that the underlying drive/focus is on upholding the Constitutional principle that the “blessings of commerce are critical to individual freedom” and the intention is to protect commerce and the government and ensure the integrity of capital formation and increasing public confidence in both commercial and capital markets.