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PANEL DISCUSSION

## Coordinating National Regulatory Standards and Enforcement Mechanisms in the Global Marketplace

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## Coordinating National Regulatory Standards and Enforcement Mechanisms in the Global Marketplace

The panel discussed the following questions:

- How will investors be protected in a global marketplace? What are the consequences of different systems of liability? What are the consequences of different enforcement mechanisms?
- In light of these questions, what considerations should be given to pursuing foreign violators at home, and to pursuing U.S. violators abroad?
- Are bilateral agreements and informal cooperation among regulators sufficient to protect against fraud and market manipulation in the global marketplace? Are there alternative or complementary mechanisms that would be more effective?
- Do growing concerns about privacy, particularly in light of the evolution of Internet use, affect regulators' ability to enforce securities laws?

The panel agreed that securities regulations are meaningless without coordinated, robust enforcement across and within nations. The panel also recognized the demand for coordinated global enforcement, as transnational financial services firms cannot operate efficiently under multiple, uncooperative regimes.

### Enforcement

Mr. Cutler discussed the legal and practical background behind several recent cross border enforcement actions, and focused on some of the practical problems which have arisen. He pointed out that courts are often reluctant to enforce foreign judgments, especially criminal penalties and results of administrative proceedings. Additionally, regulators in one

### PANEL CHAIR

David M. Becker, General Counsel,  
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### PANELISTS

Stephen M. Cutler, Acting Director,  
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Felice Friedman, Acting Director,  
Office of International Affairs, U.S.  
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Anthony Neoh, Chief Adviser,  
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Commission

George Schieren, Senior Vice  
President and Associate General  
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Georg Wittich, President and Chair,  
German Securities Commission,  
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nation are often unable to access information vital to an enforcement action that is held by their foreign counterparts. The panel discussed the tensions that arise when overseas conduct is permitted by the laws of the jurisdiction in which the conduct takes place, but prohibited by the U.S. securities laws and subject to a U.S. enforcement action.

Ms. Friedman noted that securities laws cannot be enforced solely with bilateral Memoranda of Understanding (“MOUs”). Effective enforcement across borders will require more formal relationships between regulators and criminal authorities from participating countries. These relationships should be founded on uniform procedures, rather than on the immediacy of a particular case. Additionally, interested nations should create an international clearinghouse for out-of-court settlements. MOUs are incapable of providing these advantages.

Mr. Wittich detailed steps being taken in the EU and suggested more broadly that international enforcement could borrow from the “European passport concept” for investment service firms in the EU. In this system, firms may advise across borders and establish branches in foreign countries without undertaking host country approval. This model could be applied to address enforcement concerns with foreign issuers. Mr. Wittich also discussed a newly established European network, called FINET, which will facilitate consumers’ access to out of court settlements to cross border disputes when consumers and financial service providers come from different states in Europe.

All panelists stressed the importance of information sharing across jurisdictions and for coordinated approaches to enforcement action. Some panelists suggested that perhaps agreements for single proceedings in a single jurisdiction could be developed. The question was raised whether this approach would best benefit investors or simply ease matters for large international institutions which faced enforcement actions in numerous jurisdictions. Panelists also suggested that mechanisms to allow an action in one jurisdiction to be enforced in other jurisdictions could be developed. In particular, panelists asked whether it would make sense at least to hold financial intermediaries responsible in various jurisdictions for violations committed in one jurisdiction but with an impact in a number of jurisdictions.

"There are different views as to how well these monitoring mechanisms function, and I don't presume to address them here, but the important point is that the first part of an enforcement infrastructure is monitoring at the point at which business is done. Second, what is the role of self-regulation? In the United States, for some professions, we rely heavily on self-regulation as the first line of enforcement. Again, there are differing views as to how well self-regulation has succeeded in the markets and in the various professions. But I think there is a growing consensus that this is an important first line of defense, one that reflects and teaches commercial values beyond compliance with the letter of the law. Third, there are the enforcement agencies themselves. At the SEC, we think we do the bulk of the heavy lifting, and I think many regulatory agencies feel the same way. Enforcement agencies must have the resources necessary for them to do their job."

– DAVID BECKER

"I think the Chairman, like his predecessors, believes firmly in vigorous enforcement of the federal securities laws. His innovation is the introduction of a concept of real time enforcement. And this is the goal of really achieving quick, effective, and efficient response to wrongdoing, taking swift and decisive actions to stop fraud or other investor harm expeditiously in an ideal world as it occurs. One significant, and I emphasize one, significant component of real time enforcement is our effort to encourage meaningful cooperation by issuers in the form of self-policing and then self-reporting if and when wrongdoing is discovered. And the Commissioner articulated his views in this regard in the recent 21(a) report on cooperation.

– STEPHEN CUTLER

"One way to address this may be harmonization of laws. If we all have the same laws, then it is no problem if we have dual criminality requirements. However, while harmonization of laws can mitigate the damaging effects of dual criminality requirements, I don't believe that they are a long-term answer to the dangers that are posed by old ways of thinking about sovereignty. Rather, as some differences are eliminated, new ones will emerge. Many countries now prohibit insider trading; however, interpretations of insider trading laws continue to differ, raising questions about compliance for industry and for regulators. The same is true of the EU's proposed scheme for addressing market abuse."

– FELICE FRIEDMAN

"When we started our cooperation in Europe, we had 17 European regulators. So as a group, we took a new approach to that and we signed very early, already in '99, a multilateral memorandum of understanding on the exchange of information and surveillance of securities activities. This multilateral agreement establishes a general framework for cooperation and consultation between the authorities to facilitate performance of the supervisory functions and the effective enforcement of the laws and regulations governing the markets and the cross border contacts. Under this MOU, the authorities are obliged to provide each other the fullest mutual assistance in any matters following the sort of competence of the authorities, recognizing that the duties and competence of the authorities vary until now from country to country in Europe."

– GEORG WITTICH



## Standards

Panelists pointed out that as insider trading and market manipulation rules develop in jurisdictions, enforcement across jurisdictions becomes easier. The panelists discussed the possibility of the development of one set of laws that would be adopted in each jurisdiction. In that vein, one panelist suggested IOSCO could issue standard guidelines or model guidelines for laws for countries to enact. It was generally agreed, however, that even were universal laws developed, interpretation would diverge to such a degree as to make any attempt to have one set of laws ineffective. One proposal was that financial intermediaries that operate across markets could be subject to global standards.

"You might also have schemes whereby you can jointly inspect international conglomerates. That is something which the SEC and the Hong Kong authorities have done, in fact, in the past to create effect. In other words, through the platform of intermediary supervision, one gets to know how an international conglomerate works. And it also is in the interest of the international conglomerate to allow, in fact, a joint inspection so that they don't get bothered by different inspections all at a time."

– ANTHONY NEOH

"In a perfect world, if we were dealing with a clean page, I would like to see one regulator with one set of standards regardless of where the institution does business. That, of course, assumes due process and clear consistent standards across the board. Right now our regulatory bodies, for the most part, are regulating legal entities rather than businesses, rather than functions. We have got to look at the end users and bring these things together."

– GEORGE SCHIEREN