

# SEC ENFORCEMENT: KEY DEVELOPMENTS FROM FY 2009 AND WHAT MAY BE AHEAD IN FY 2010

NOVEMBER 4, 2009



# Agenda

- Introduction
- Presentation
  - William R. McLucas, WilmerHale
  - Martin S. Wilczynski, FTI Consulting
- Questions and Answers — (*anonymous*)
- Slides — now available on front page of Securities Docket
  - > [www.securitiesdocket.com](http://www.securitiesdocket.com)
- Wrap-up



# Webcast Series

- Next: November 9, 2009, 12:00 pm Eastern:
  - **OTC Derivatives and Structured Products in the New Economy**
- [www.securitiesdocket.com/webcasts](http://www.securitiesdocket.com/webcasts)



# Panel



William R. McLucas



Bruce Carton



Martin S. Wilczynski



# SEC Enforcement Key Developments from FY 2009 and What May Be Ahead in FY 2010

November 4, 2009

# New Leadership



Mary Schapiro  
Chairman

COURTESY: U.S. SECURITIES & EXCHANGE COMMISSION



Robert Khuzami  
Director of  
Enforcement



Lorin Reisner  
Deputy Director of  
Enforcement



David Becker  
General Counsel



George Canellos  
Director NYRO

# New Enforcement Division Initiatives

- **Termination of pilot program for pre-approval of corporate penalty negotiations**
- **Aim for Enforcement Division to be:**
  - Strategic, Swift, Smart and Successful
- **Incentives for individuals to cooperate**
  - New cooperation policy for individuals – akin to “Seaboard Report”
  - Oral assurances to witnesses regarding intention to file charges
  - Delegation of Authority to Director for immunity requests to DOJ
  - Deferred prosecution agreements

# Enforcement Division Reorganization

## Specialized Units

- Asset Management
- Market Abuse
- Structured and New Products
- FCPA
- Municipal Securities and Public Pensions



# Enforcement Division Reorganization

## Other Initiatives

- Branch Chief Position eliminated
- Decision-making process streamlined
- Authority to issue formal orders delegated
- Fewer tolling agreements

# New Initiatives

- **New COO of Enforcement Division – Adam Storch**
  - Responsible for project management and workflow
  - Responsible for processes surrounding Fair Funds
  - Along with Lorin Reisner, Deputy Enforcement Director, Storch will supervise SEC Office of Market Intelligence, intended to monitor incoming tips and complaints

# New Initiatives

- **Division of Risk, Strategy and Financial Innovation**

- Led by Professor Henry T.C. Hu
- Combines Offices of Economic Analysis and Risk Assessment
- Will also pursue:
  - Strategic and long-term analysis
  - Identification of new developments, trends and risks in markets
  - Make recommendations on how trends affect SEC regulatory activities
  - Conduct research and analysis
  - Provide training on new developments and trends

# SEC Enforcement Activity in 2009

(January – September)

	2008	2009	% Change
Formal Orders Issued	181	448	148%
Emergency Actions Filed	30	62	107%
Investigations Opened	663	713	8%
Orders for Disgorgements and penalties (in billions)	\$ 0.865	\$ 1.800	108%

Source: “The Road to Investor Confidence” speech given by SEC Chairman Mary Schapiro, Oct. 27, 2009

# Accounting Matters

- Pipeline Accounting Matters
  - Being scrutinized, brought, closed
  - Being evaluated for continuing viability of “message”
- Subprime, Hedge Fund and Financial Institutions
  - Loan Loss Issues
  - Rate of Return
- Ponzi Scheme Matters

# Accounting Matters - FCPA Focus

- One of the specialized enforcement units
- DOJ has hired 20 new prosecutors, renewed interest
- SEC and DOJ coordinating investigations
- New area interests – technology, pharma, med device
- Cooperation issues
- SEC and DOJ taking an expansive view of jurisdiction
- SEC foresees increase in stand-alone books and records cases
- Control person liability will be used in settlements but not likely in litigation
- SEC will consider whether and what sanctions were imposed in the country in which the offenses occurred

# Post-Madoff Reforms

- **New Rules to Safeguard Investors' Assets**
  - Annual surprise exams by independent public accountants
  - IA's that hold assets subject to third party reviews
- **Complaints and Tips**
- **Whistleblower Program**
- **Recruiting**
  - Seeking to hire staff with more specialized experience
- **Increased Training for "Back-Office" Personnel**

# Scrutiny of Hi-Tech Trading

- **Flash trading**
- **High-frequency trading**
- **Dark pools**
- **Co-location**



# Judicial Backlash

- **Pauley Decision re: Fair Fund**
- **Bank of America**

# Insider Trading Issues

## •Galleon Group Matter

- SEC instructed by Judge Rakoff to be ready to begin civil case in 5 months, potentially showing evidence in advance of criminal trial



## •Cross Market Misconduct

- Deutsche Bank / Millenium Partners

# Other Enforcement Developments

## • Auction Rate Securities

- Schwab matter – NYAG fraud charges, Schwab intent not to settle

## • “Pay to Play” Investigations

- NY pension fund investment / Hank Morris matter
- To date, four guilty pleas and over \$70 million in penalties

## • SOX 304 “Clawback” Provision

- Maynard Jenkins / CSK Auto matter

## • Control Person Cases

- Nature’s Sunshine Products matter

# Joint Representation Issues

- **Laura Pendergest-Holt**

- Stanford matter involving Proskauer Rose

- **Irell & Manella**

- Broadcom matter

# Questions

# Questions?

# Thank You

Thank you for attending this webcast.

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