

## Increased White-Collar and Securities Enforcement Likely under Obama Administration; Similar Increase in Enforcement Seen in the United Kingdom

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A more aggressive approach to white-collar crime and securities enforcement looks certain under the Obama administration, as evidenced by President Obama's budget proposal in February, which called for funding increases for the Department of Justice and the Securities and Exchange Commission. Under President Obama's budget proposal, the SEC will receive over \$1 billion for FY2010, an increase of 13 percent, which will go to "build [SEC] staff and technology resources and pursue a risk-based, efficient regulatory structure that will better detect fraud and strengthen markets." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, PROPOSED BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010, p. 38 (2009). In the meantime, on March 11, 2009, the president signed the 2009 Omnibus spending bill that grants the SEC an additional \$37 million dollars for FY2009. Pub. L. No. 111-8. Similarly, under President Obama's budget proposal, the DOJ is to receive \$26.5 billion, a 3.5 percent increase from FY2009, in addition to the \$4 billion received under the American Recovery and Reinvestment Act of 2009, and increased spending on mortgage fraud and white-collar crimes will likely be a major component of the FY2010 DOJ budget. See Press Release, U.S. Department of Justice, DOJ FY 2010 Budget Request (Feb. 26, 2009), available at <http://www.usdoj.gov/opa/pr/2009/February/09-ag-169.html>.

The new SEC chair and attorney general have already indicated that there will be increased enforcement of white-collar crime and securities law violations. For her part, Mary Schapiro began her position as SEC chair by articulating the SEC's enforcement role in emphatic terms: "Those who break the law and take advantage of investors need to know that they will face an unrelenting law enforcement agency in the SEC — an agency that will pursue them until the full force of the law is the sure, certain and sole reward for their wrongdoing. No one should be heard credibly to question whether enforcement is a priority at the SEC. It is, and always will remain, a foundation of our mission." Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n, Address to the Practising Law Institute's "SEC Speaks in 2009" Program (Feb. 6, 2009). Indeed, SEC Chair Mary Schapiro has already instituted process changes at the SEC to enhance enforcement. Most prominently, she reversed former Chairman Christopher Cox's penalty-pilot program that required Enforcement Division staff to obtain approvals from the five-person Commission in Washington, DC before monetary

penalties could be imposed on public companies, a program perceived by some to have resulted in low corporate penalties and stalled investigations. *Id.* Ms. Schapiro has also streamlined the process of opening a formal investigation, which no longer requires full review by the SEC commissioners, a move that should make it easier for staff to compel documents and witness testimony in its investigations. *Id.* Similarly, Ms. Schapiro's selection of Robert Khuzami as Enforcement Director seems designed to signal a tough new enforcement stance. Mr. Khuzami made his reputation as a prosecutor at the U.S. Attorney's Office in the Southern District of New York, and is well-known for his three year tenure as Chief of the Securities and Commodities Fraud Task Force at the U.S. Attorney's Office.

Like Mr. Khuzami, the new Attorney General Eric Holder, is a well-respected prosecutor. Mr. Holder has signaled his intent to make white-collar crime a priority, especially with respect to the current subprime financial crisis: "We're not going to go on any witch hunts, but to the extent that what this nation is facing is the result of fraud and misconduct, we'll find it and we'll hold people accountable." See Evan Perez, "Holder Sworn In as Attorney General," *WALL STREET JOURNAL*, Feb. 3, 2009. Similarly, Mr. Holder's spokesman has commented: "It will be a top priority of the Justice Department to hold accountable executives who have engaged in fraudulent activities." David Segal, "Financial Fraud Is Focus of Attack by Prosecutors," *NEW YORK TIMES*, March 12, 2009, at A1. We are also likely to see increased healthcare enforcement, given President Obama's statements about curbing Medicare overpayments. See Maggie Fox, "Obama Health Care Budget Includes FDA Reform," *REUTERS*, Feb. 26, 2009.

Ms. Schapiro and Mr. Holder face significant pressure to increase enforcement efforts from Congressmen on Capitol Hill. Indeed, Representative Barney Frank held a Financial Services Committee hearing on March 20, 2009 where federal and state regulators were questioned about their enforcement plans. In light of this increased enforcement pressure, it is reported that many executives have already retained legal counsel, in both corporate and individual capacities, in anticipation of increased governmental enforcement. David Segal, "Financial Fraud Is Focus of Attack by Prosecutors," *NEW YORK TIMES*, March 12, 2009, at A1.

In addition, the passage of the stimulus bill will result in more scrutiny from another governmental body – the newly formed Recovery Accountability and Transparency Board, headed up by Earl E. Devaney. The Obama Administration continues to express a strong policy of preventing waste and fraud in the use of stimulus money. "A little hint: no swimming pools in this money," said Vice President Joe Biden at a conference with state

officials called to discuss the spending of the stimulus money. Stephen Dinan and Jon Ward, "Stimulus Overseer: Waste 'Inevitable'," *WASHINGTON POST*, March 13, 2009. While Mr. Devaney has admitted that waste and fraud will occur in the spending of the stimulus money, he has made it clear that he will zealously work to keep that waste to a minimum. "Obviously the challenge for all of us, especially those charged with oversight, will be to significantly minimize such loss," said Mr. Devaney at the conference. *Id.*

Relator suits under the False Claims Act are also likely to get a significant boost from Capitol Hill by way of the False Claims Act (FCA). On March 12, 2009, Senators Grassley and Leahy, by letter to Senate Leadership, referred the Fraud Enforcement and Recovery Act of 2009 (FERA), introduced on February 5, 2009, for consideration by the Senate. In addition to providing additional funds to the FBI to combat financial fraud, FERA would also seek to strengthen the FCA. Fraud Enforcement and Recovery Act of 2009. (Bill text, available at <http://www.opencongress.org/bill/111-s386/text> (last viewed March 25, 2009.)) Among other things, FERA would expand the reach of the FCA to mortgage lenders, options and futures trading, and TARP funds. (See Fraud Enforcement and Recovery Act of 2009 Bill Summary, available at <http://www.opencongress.org/bill/111-s386/show>.)

Additionally, Senator Durbin co-sponsored a bill with Senators Leahy, Specter, and Whitehouse called the False Claims Clarification Act of 2009, which seeks to overturn certain federal cases limiting the False Claims Act. Thus, for example, the bill would remove the requirement suggested by the Supreme Court in 2008 in *Allison Engine Co. v. Sanders*, 128 S.Ct. 2123 (2008), that false claims be directly presented to the government. Under the ruling in *Allison Engine*, if a subcontractor or defendant makes a false statement to a private entity funded by the government, there is no FCA liability because the subcontractor's statement is not made to induce payment by the government and the government does not rely on the false statement in paying the private entity. Under the proposed legislation, however, the FCA would no longer require that a false claim be presented to the government and would instead impose liability for any false or fraudulent claim linked to government money or property. Moreover, the proposed legislation seeks to codify a dissenting opinion in *US ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2003), which stated that government employees could serve as FCA plaintiff-relators provided there had been certain "up-the-ladder" disclosure.

Increased white-collar and securities enforcement in the United States mirrors the stronger enforcement trend being seen of late in the United Kingdom. In February, for example, in its 2009-10 business plan, the FSA announced that it would increase its enforcement budget to £43.4 million

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from £35.3 million, expand its budget to £5.1 million from £3.7 million for external counsel and forensic experts, and establish a £13.5 million contingency for criminal prosecutions. FINANCIAL SERVICES AUTHORITY, 2009/2010 BUSINESS PLAN, Feb. 12, 2009, p. 38 *available at* [http://www.fsa.gov.uk/pubs/plan/pb2009\\_10.pdf](http://www.fsa.gov.uk/pubs/plan/pb2009_10.pdf). In its business plan, the FSA stated that “[w]e have a range of disciplinary sanctions available – criminal, civil and administrative – and we will be bold and resolute in using our powers ...” *Id.* at 12. These statements appear to be no mere rhetoric, particularly given the £13.5 million contingency for criminal prosecutions.

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