

2009

# Terrorism, Containment and International Law

Ian Shapiro

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# **An Overview of the Financial Crisis and its Effect on Corporate America**

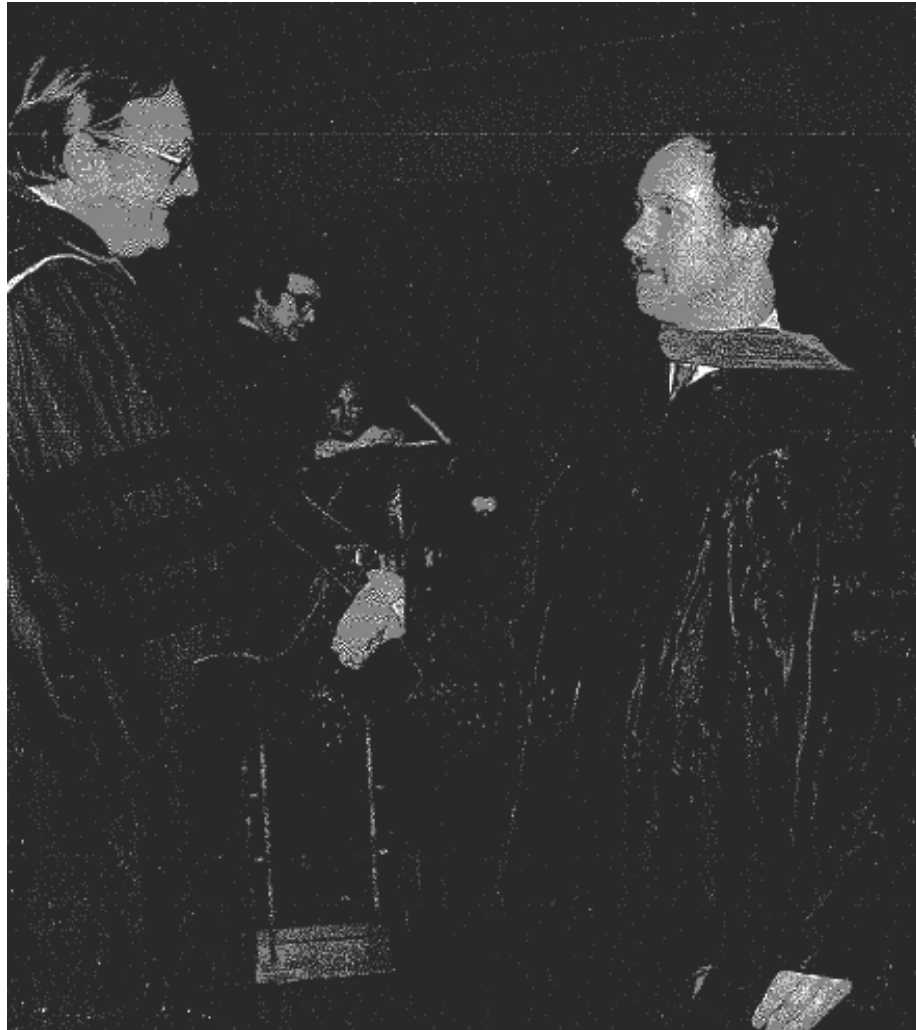
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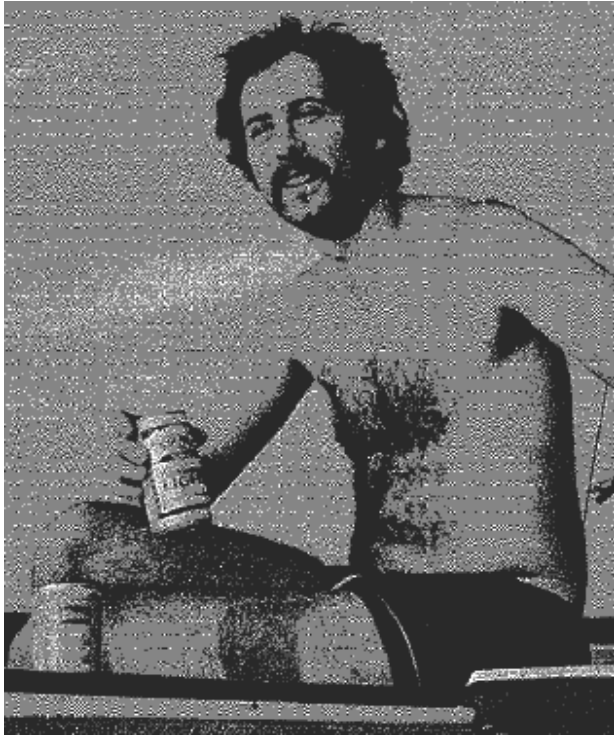
**University of Tulsa College of Law**

**March 23, 2009**

**Spencer C. Barasch**

**Andrews Kurth LLP**





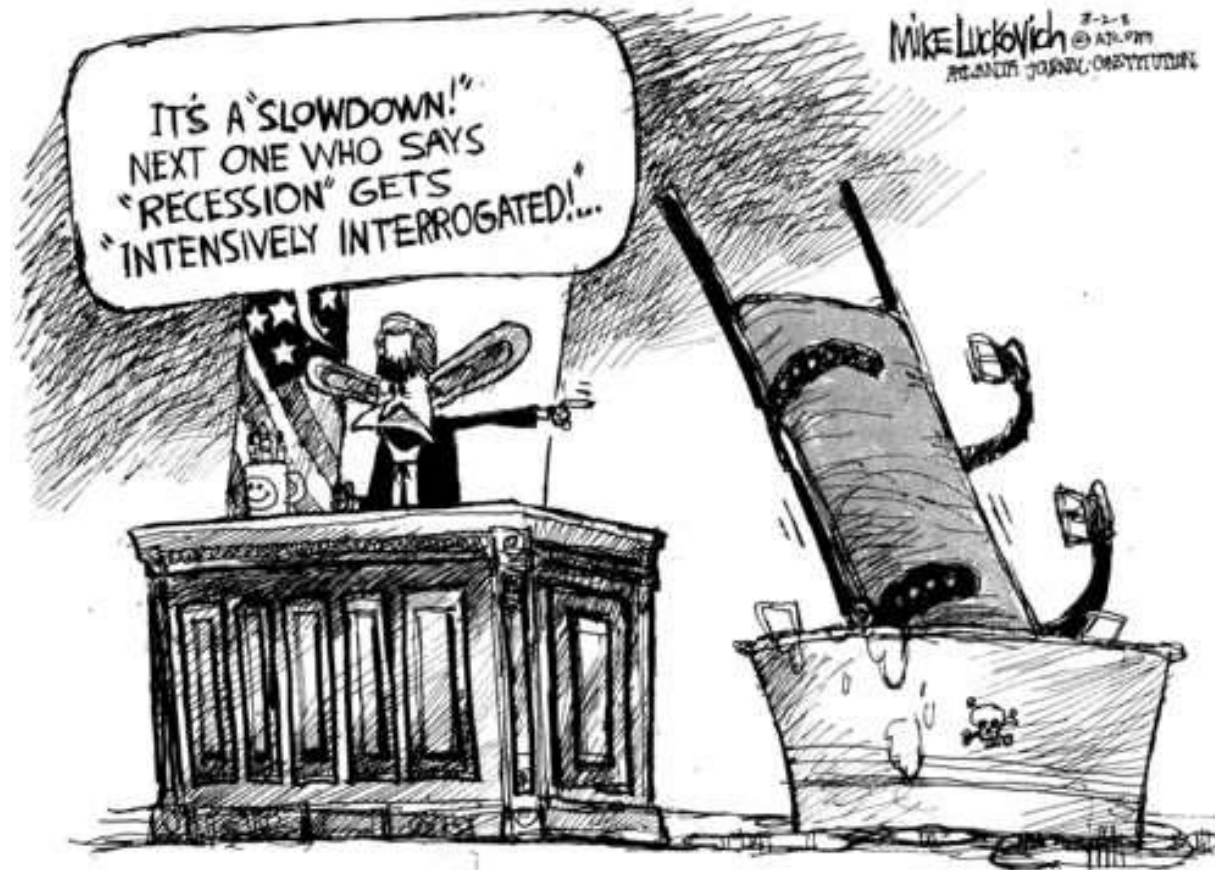


# Today's Presentation

- How did we get here?
- Overview of federal legislation and programs to stimulate economy
- Analysis of legislation's impact on corporate governance and disclosure policy
- What to expect in the enforcement arena
- Observations and advice for corporate executives and their counsel
- Questions and answers

**HOW DID WE GET HERE?**

# Did Someone Say – “Financial Crisis”???





# THE WALL STREET JOURNAL.

SATURDAY/SUNDAY, FEBRUARY 28 - MARCH 1, 2009

OL. CCLIII NO. 48

OWJONES  
A NEWS CORPORATION COMPANY

WEEKEND EDITION

\*\*\*\* \$2.00

WSJ.com

## Economy in Worst Fall Since '82

*Output Sank 6.2% Last Quarter; Plunging Trade, Investment Signal Trouble Ahead*

By CONOR DOUGHERTY  
AND KELLY EVANS

The U.S. economy deteriorated far more than previously thought in the fourth quarter, according to new revisions of government data, casting fresh doubt about the chances of a recovery this year.

With falloffs in consumer spending and exports, gross domestic product declined at a 6.2% annual rate in the fourth quarter of 2008, according to a Commerce Department report Friday. The agency's first estimate for GDP, reported in January, was for a 3.8% decline.

The more recent figure—

which represents the steepest dropoff since the depths of the 1982 recession—raises pessimism among economists. Until recently, many had been hoping for a rebound in 2009 and now sound downbeat about the remainder of this year.

Besides the revised GDP, economic indicators for the first two months of the year point to a deepening recession—and the prospect of a dismal first quarter, too. Every week in February, more than 600,000 people filed new claims for unemployment insurance, and the unemployment rate rose to 7.6% in January, from 7.2% in December.

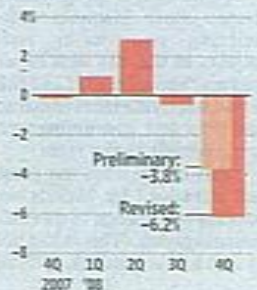
"The first quarter is going to

be bad," said Christina Romer, chairwoman of the Council of Economic Advisers, at an economics gathering Friday sponsored by the University of Chicago and Brandeis University. She told the audience that Obama administration officials have been watching with deepening concern what's been going on around the world.

The U.S. has been hurt by the synchronized nature of the current global downturn. Exports declined at a 24% annual rate, compared with the 20% rate previously reported. Meanwhile, it appears the world's other economies truly fell apart in the fourth

*Please turn to the next page*

**Sharper Contraction**  
GDP, quarterly change at a seasonally adjusted annual rate



Source: Commerce Department

# THE WALL STREET JOURNAL.

DOW JONES  
A NEWS CORPORATION COMPANY

TUESDAY, MARCH 3, 2009 - VOL. CCLIII NO. 50

★★★★ \$2.00

DJIA 6763.29 ▼ 299.64 -4.2% NASDAQ 1322.85 ▼ 4.0% NIKKEI 7280.15 ▼ 3.8% DJ STOCKS 50 1670.84 ▼ 5.6% 10-YR TREAS 1 2/32, yield 2.919% OIL 540.15 ▼ \$4.61 GOLD 989.00 ▼ \$2.50 EURO \$1.2576 YEN 97.48

## Stocks Hit '97 Level, Signaling Long Slump

Dow's Plunge Below 6800 Comes as Investors Bet on a Sustained Earnings Downturn; Markets Shudder Across the Globe

BY TOM LAURICELLA  
AND ANNELENA LOBB

The Dow Jones Industrial Average tumbled below 7000 for the first time in 12 years as investors around the globe appeared to be giving up hope and girding for a prolonged recession.

U.S. investors joined a worldwide selloff that began in Asia and rippled through industries from financials to consumer durables to technology. The Dow dropped 4.2% to 6763.29, its lowest close since April 1997. It has lost almost one-quarter of its value this year and more than half since its high in October 2007.

Hardest hit were shares of already-battered banks. Shares in HSBC Holdings PLC, Europe's largest bank, dropped nearly 19% after it announced plans to raise capital and pull out of a disastrous foray into U.S. consumer lending. Citigroup Inc. declined 20% and General Electric Co. slid 11%. In Asia Tuesday, Tokyo's Nikkei stock index was down 1% in midday trading, and Hong Kong stocks fell 2.5%. (Please see related articles on C2 and C10.)

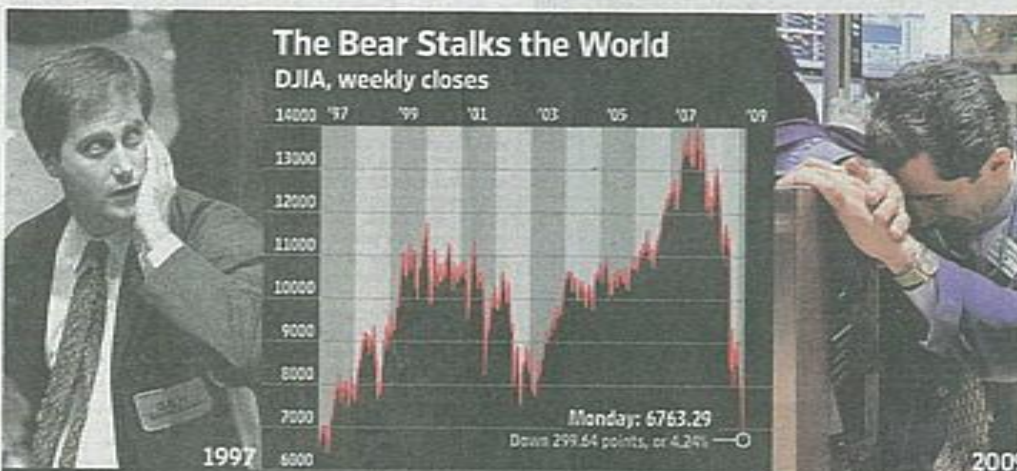
While there was plenty of fresh bad news to go round, trad-

ers said the latest downdraft broadly reflected a deepening sense of gloom among investors. Gone are the days where the mantra among investors was to "buy the dips," on the belief that when stock prices fall, they're likely to rebound. Instead, the opposite sentiment has taken hold.

"It's like an unending nightmare," says Kent Engelke, managing director at Capital Securities Management in Glen Allen, Va.

The latest readings on the U.S. economy offered little reason for hope. On Monday, the government said the personal savings rate jumped to 5% in January—its highest level in nearly 14 years, and a shift from recent years when households were spending more than they earned. In the past, many have called upon Americans to save more, but right now, weakness in consumer spending is depressing manufacturing and construction. The Institute for Supply Management said Monday that its measure of manufacturers' employment plans fell to its lowest level since monthly records began in 1948.

In a separate report Monday, please turn to page A4



### Monday's stock-market performance

Hong Kong Hang Seng	India Bombay Sensex	Japan Nikkei	France CAC 40	Germany DAX	U.K. FTSE 100	Brazil Bovespa	Canada S&P/TSX
-3.9%	-3.2%	-3.8%	-4.5%	-3.5%	-5.3%	-5.1%	-5.4%

Source: WSI Market Data Group

ANDREWS  
ATTORNEYS KURTH LLP

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SATURDAY/SUNDAY, MARCH 7 - 8, 2009

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WSJ.com

## Jobless Rate Tops 8%, Highest in 26 Years

Some Economists See Index Reaching 10% This Year as Layoffs Sweep Construction, Services; 'Companies Just Didn't Hire'

By KELLY EVANS

The U.S. unemployment rate surged last month to its highest level since 1983, and the toll seems set to go higher as employers batten down for a sustained drop in consumer demand.

The number of jobless Americans rose to 12.5 million in February, pushing the unemployment rate to 8.1%, up from 7.6% in January, said the Labor Department.

"We'll be at 10% unemployment by year end," said Joseph LaVorgna, chief U.S. economist at Deutsche Bank. "What's going to stop it?"

The U.S. has lost 4.4 million jobs since the recession began in December 2007—more than half the losses coming in the last four months as the worst financial crisis in decades has intensified the economy's steep decline.

The number of employed non-farm workers fell 651,000 in February. That followed declines of 655,000 in January and 681,000 in December. Some economists said the pace of job losses may be stabilizing, albeit at a high level.

Still, manufacturing and overtime hours slid, apparently pre-

saging more job cuts to come. A quarter-million construction and manufacturing jobs vanished; the service sector shed 375,000. Only health services and government eked out job growth.

The broadest gauge of unemployment, which includes part-timers seeking full-time jobs, hit 14.8% last month.

The labor market has historically been a lagging indicator of activity, which means that even if the economy were to recover soon, the jobless level is likely to climb for many more months. With no immediate end in sight to the downturn—output in the current quarter seems on track to fall by 5% or more after a 6.2% decline in the fourth quarter of 2008—the jobs picture is likely to get bleaker.

President Barack Obama's \$787 billion stimulus package includes spending he says will create or save 3.5 million jobs. In Ohio Friday for a police academy graduation, he billed the 25 cadets as among the beneficiaries. But he admitted the outlook is somber. "We've got big challenges ahead of us," he said.



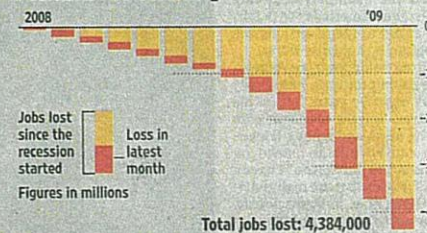
General Photographic Agency

The U.S. has lost 4.4 million jobs since the recession began in December 2007. Job seekers wait to enter a career fair in New York on Thursday.

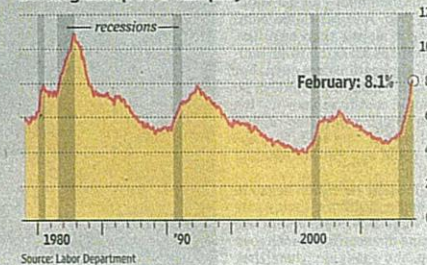
### The Jobs Report: A2

- Working Americans save out of fear
- A town endures 13% unemployment

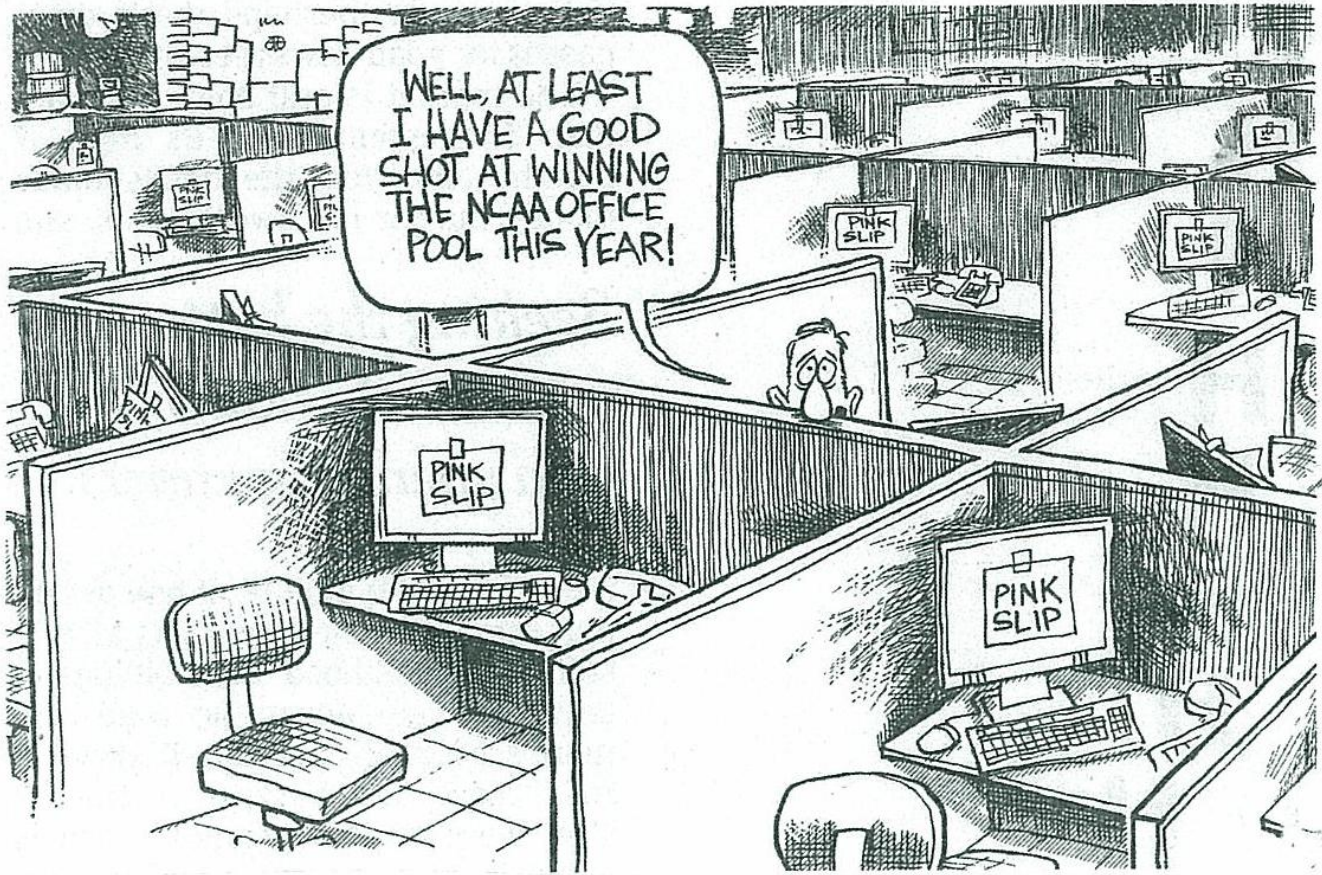
### Positions Are Vanishing Fast ...



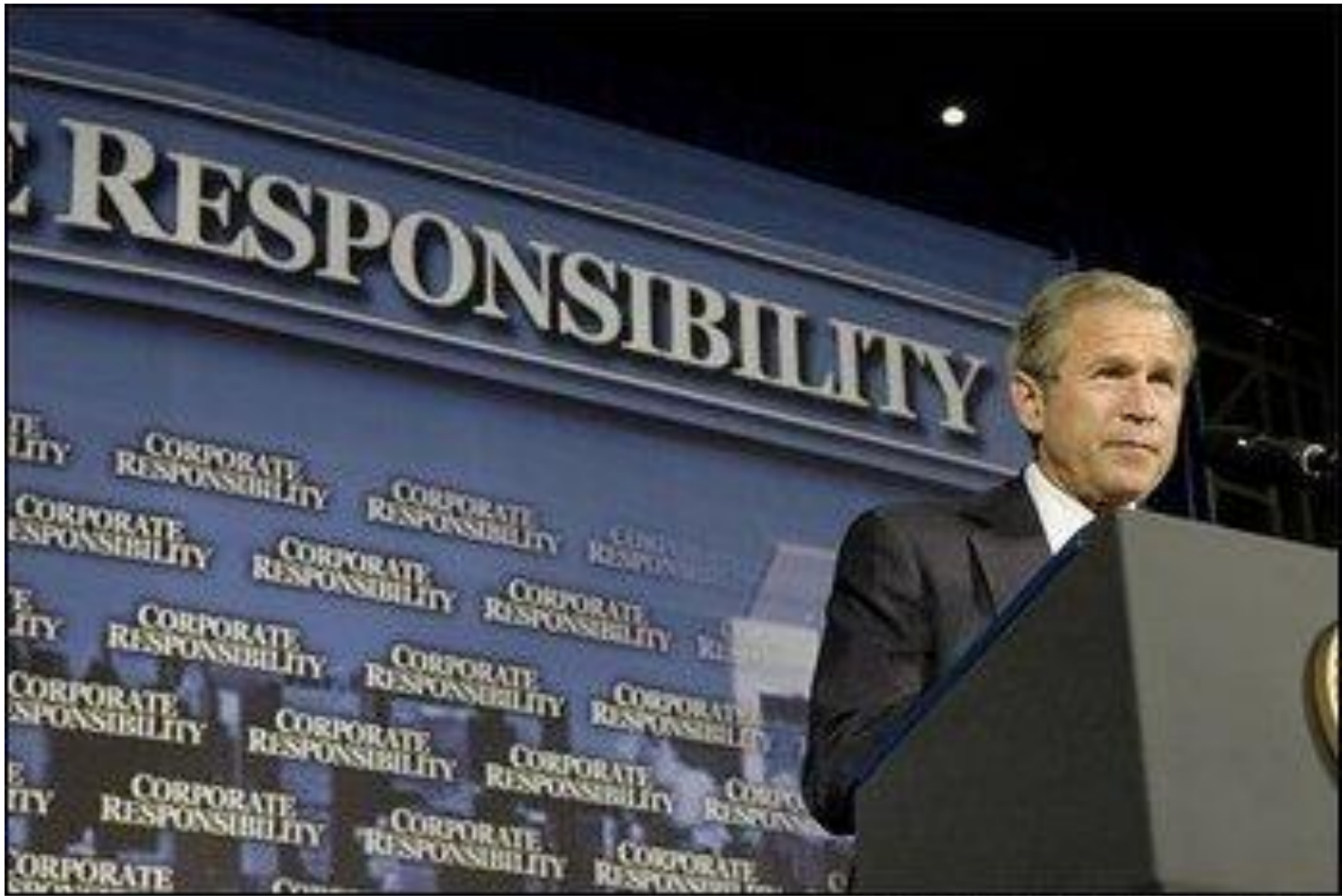
### Driving Jump in Unemployment Rate



## Laugh Lines



# Presidential Task Force on Corporate Fraud

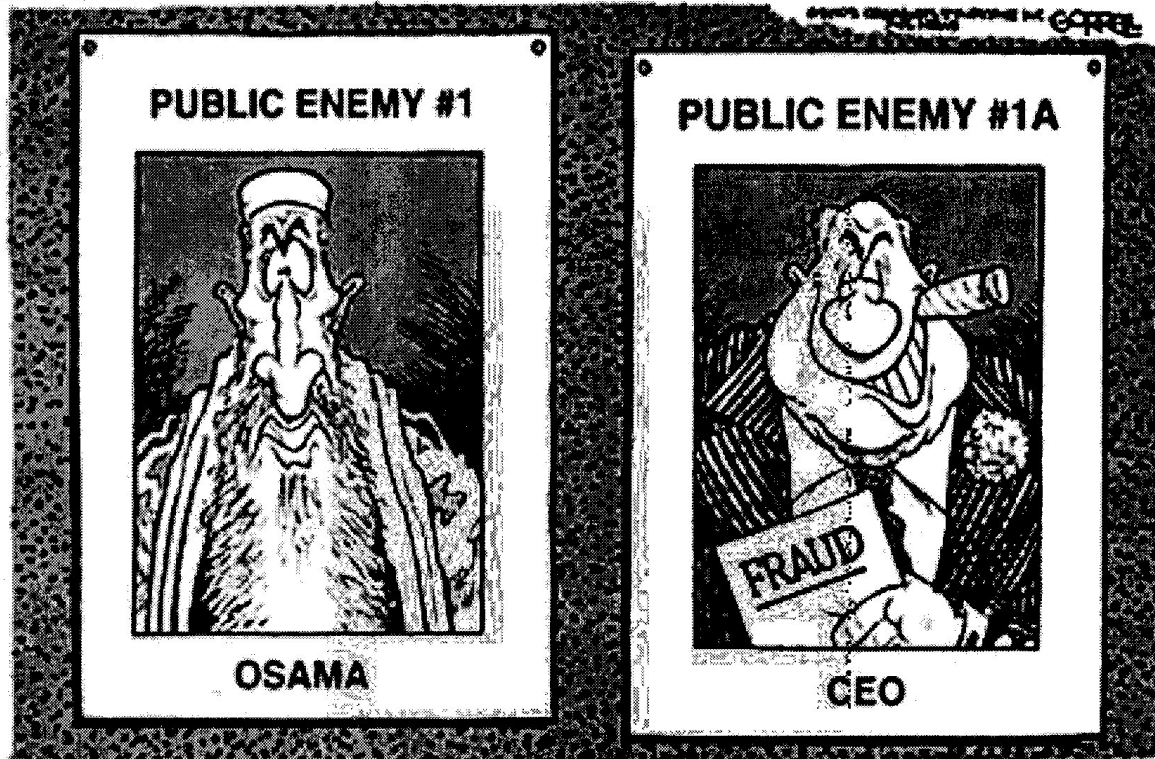


White House photo by Eric Draper

Editorial  
cartoons

Bob Gorrell

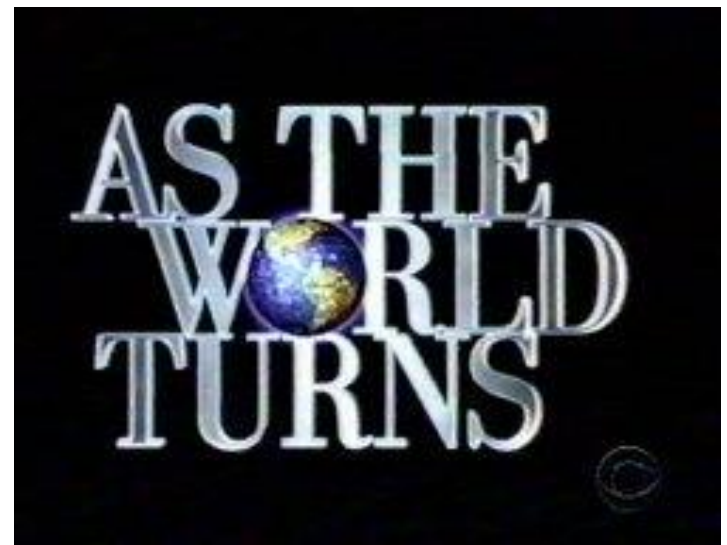
July 12, 2002





"SO ALL THIS IS BECAUSE WE TOOK OUT A HOME EQUITY LOAN TO REDO THE BATHROOM?"

# The SEC Under Cox





# Cox's Initial Statement to SEC Staff



## Speech by SEC Chairman: Statement to SEC Staff

*by*

**Chairman Christopher Cox**

*U.S. Securities and Exchange Commission*

Washington, D.C.  
August 4, 2005

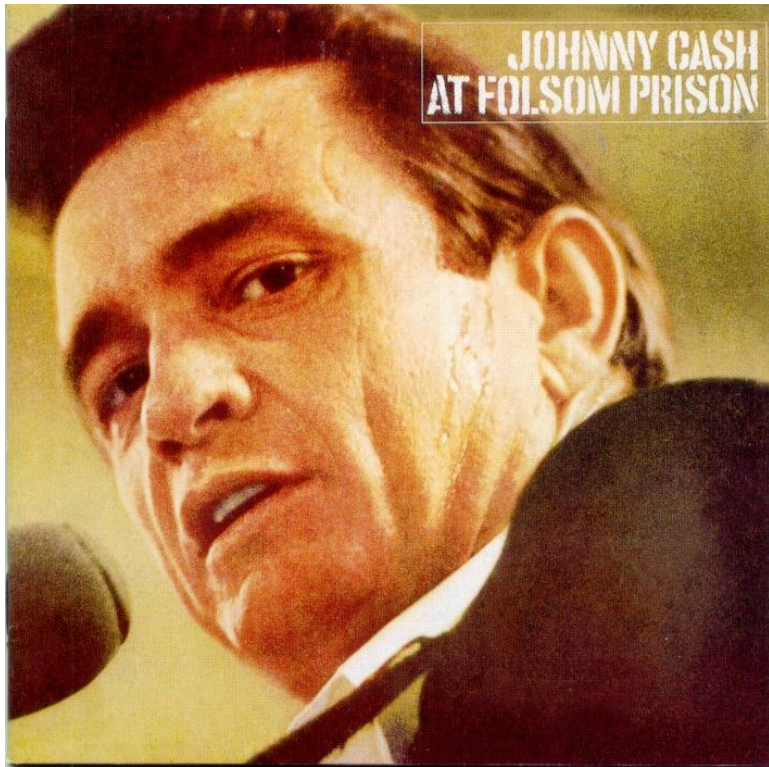
Good morning,

I'm happy to be here this morning to join you in our vital work - and how enlivening it is to join an agency with such a successful history and such a critical mission. First, however, I would like to congratulate Commissioner Ruel Cammons on his reappointment, and to

And that's what we are all about here -- ensuring that those who exercise power and control over Other People's Money respect the trust that has been placed in them ... and treat investors right. That's why my first meeting with Commission Staff was with Linda Thomsen, our head of Enforcement. She and her entire Division will have my unstinting support.

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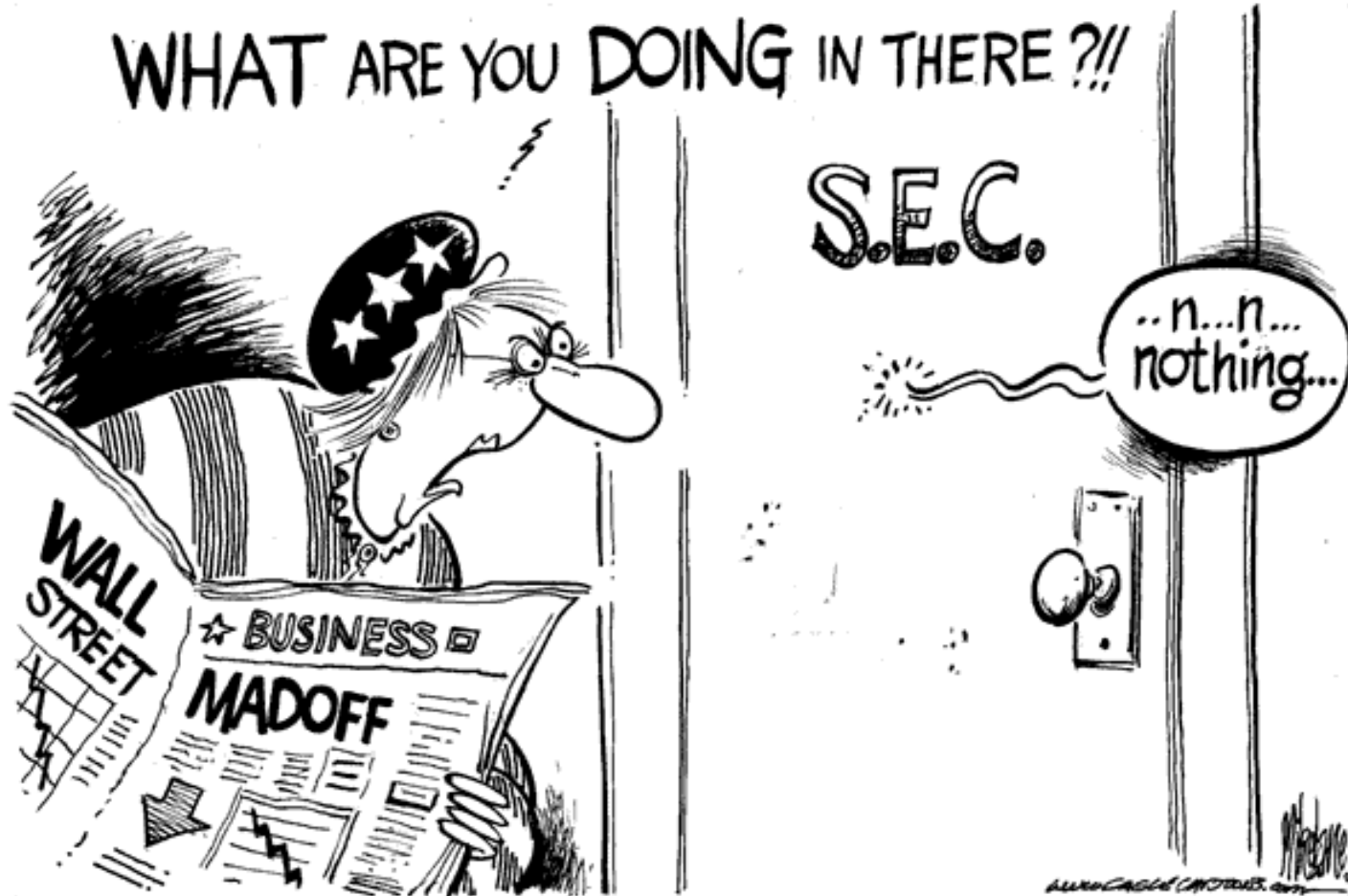


**“Walk the Line”**  
**or**  
**“Walk the Walk?”**

# The Verdict on Cox

- Interfered with the enforcement process
  - new penalty policy (twice)
  - more difficult to obtain formal orders
  - intervene in investigations
  - manipulation of enforcement numbers?
- Out of touch with Wall Street
  - Bear Sterns fiasco
- Criticism by former SEC Chairpersons
- Even conservative Senator John McCain ultimately called for Cox's ouster

# Cox's Legacy



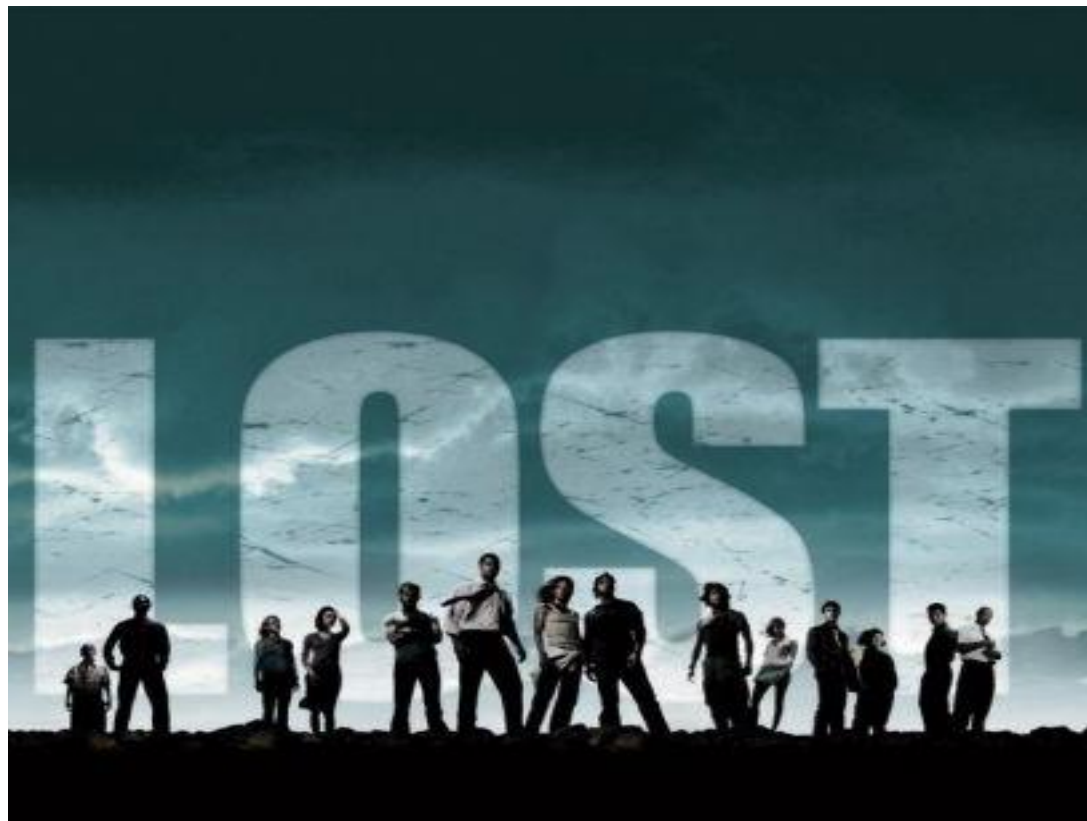
# SEC Staff

- Approximately 4,000 staff members
- Primarily attorneys, accountants, analysts, examiners, investigators, paralegals and support staff
- 2/3 in Washington, DC
- 1/3 in regions

# SEC Responsibilities

- 17,000 public companies
- 8,500 registered broker-dealers
  - 63,000 branch offices
  - 700,000 registered representatives
- 34,000 investment companies
- 7,500 investment advisers (with \$20 trillion in assets under management)
- Oversight responsibility for nine securities exchanges, the NASD, the National Futures Association, 13 clearing agencies and the Municipal Securities Rulemaking Board

# What Happened with DOJ?



# Decline in Corporate Prosecutions

## The Decline of Corporate Convictions

*Corporate Crime Reporter* has a long and interesting new report out about "The Rise of Deferred and Nonprosecution Agreements" with respect to corporate crime. The brief summary goes something like this:

Federal and state prosecutors are increasingly offering major corporations – including Adelphia, Computer Associates, KPMG, Merrill Lynch, Monsanto, Sears, Shell, WorldCom/MCI – special deals – known as deferred prosecution or non prosecution agreements.

Under these agreements, prosecutors agree not to criminally prosecute the corporation to conviction in exchange for cooperation against culpable executives, implementation of corporate monitors, and fines.

So, for instance: In August 2005, the accounting firm KPMG admitted to fraud that generated at least \$11 billion in phony tax losses. But there was no conviction, and the company was instead given a deferred prosecution deal, which came over the objections of N.Y. Attorney General David Kelley. KPMG appealed directly to Deputy Attorney General James Comey—the man who has received a few plaudits of late for refusing to sign off on the Bush administration's spying program—and the deputy AG ordered Kelley to cut a deal. Comey was reportedly worried that KPMG would go the way of Arthur Andersen, and figured it was a company that was too big to fail. (Arthur Andersen, by the way, received its *own* deferred prosecution deal in 1996, in a case involving real estate fraud.)

This practice has become *much* more common since 2002, after prosecutors became skittish about bringing more Enrons down, and the practice picked up legitimacy for major corporate crime cases after then-Deputy Attorney General Larry Thompson issued a memo in 2003 setting new "guidelines" for prosecuting corporations. (Previously, prosecutors defended these deals by saying they didn't want to clog up the courts with minor crimes—but now they're being used for major crimes as well.)

Now there's at least a plausible case for avoiding an indictment and possibly a conviction of a major corporation. Some prosecutors will say that corporations are too big to indict. If there's an indictment, the company's stock could tumble, innocent people could lose their jobs, the economy could suffer. And a conviction could put a company out of business altogether. (This isn't exactly true: Convicted criminals such as Chevron, Exxon, Tyson Foods, Pfizer, and Samsung are all still in business, last I checked.) So it makes much more sense, the prosecutors say, simply to put those individuals responsible (i.e. "bad apples") in jail and just let the corporation reform itself. No conviction necessary!



# **OVERVIEW OF FEDERAL LEGISLATION AND PROGRAMS TO STIMULATE ECONOMY**

# Key Bailout/Stimulus Legislation and Programs

- Stimulus Act of 2008 (February 13, 2008)
- Emergency Economic Stabilization Act (“EESA” or “Stabilization Act”) (October 3, 2008)
  - Troubled Asset Relief Program (“TARP”)
- American Recovery and Reinvestment Act (“ARRA” or “Recovery Act”) (February 17, 2009)
- End Government Reimbursement of Excessive Executive Disbursements (End Greed) Act (introduced March 17, 2009)

# Overview of Financial Crisis Legislation



# “Stimulus Act of 2008”

- Essentially, just a bill to give tax rebates to individuals to “jump-start” the economy
- No substantive provisions to effect governance or behavioral changes on Wall Street or Corporate America

# Stimulus Act of 2008 in a Picture?



# “EESA” or “Stabilization Act”

- Stabilization Act can be characterized as “bailout” statute or bill
- Intended to provide stimulus to economy in wake of economic downturn brought about by the subprime mortgage crisis and resulting credit crunch
- Goal to restore liquidity and stability to financial system

# “TARP”

- Fundamental component of Stabilization Act is TARP
- TARP provides broad authority to Secretary of Treasury to purchase troubled assets of distressed companies
  - authority must be exercised in a manner that promotes home values, college funds, retirement accounts and savings, preserves home ownership and promotes jobs and economic growth

# “Restore Stability to Financial System”: Piece of Cake, Right?



"SIX WEEKS ON THE JOB! HAS IT BEEN THAT LONG ALREADY?"



# Exercise of Authority Under TARP

- Treasury Secretary authorized to expend \$700,000 billion to purchase troubled assets and preferred stock of distressed companies
- As of March 6, 2008, 473 companies had received bailout funds
  - 323 of those companies are “public companies”
  - many of the other companies are privately-held investment banks
  - Full list of companies can be found at [http://online.wsj.com/public/resources/documents/st\\_BA\\_NKMONEY\\_20081027.html](http://online.wsj.com/public/resources/documents/st_BA_NKMONEY_20081027.html)

# Common View of TARP Expenditures



# “AARA” or “Recovery Act”

- Recovery Act is a revised, more comprehensive version of the Stabilization Act
- Added measures include:
  - federal tax cuts
  - expansion of unemployment benefits
  - domestic spending in education, health care and infrastructure, including the energy sector

# Recovery Act Measures with Potential Long-Term Impact on Corporate America

- Recovery Act provides new requirements regarding corporate governance and public disclosure
- Applicable to all recipients of financial assistance under TARP
  - retroactive: includes recipients of assistance prior to enactment of Recovery Act
- Treasury Secretary to promulgate rules implementing these provisions

# Limited Reach of Governance and Disclosure Measures?

- Technically limited to TARP recipients
- Commentators universally advise that these measures should be considered by boards of directors of all public companies
  - provide insight into concerns of the current Congress and administration
  - signal likely future rule-making by the SEC
  - best practices
- Non-public companies also are advised to take note of these provisions

# Compliance Certification

- CEO and CFO of each TARP recipient will be required to provide written certification of compliance by the TARP recipient with the requirements of the Recovery Act
- Publicly-traded TARP recipients will provide the certification to the SEC, most likely in their annual filings SEC filings
- Non-publicly traded TARP recipients will provide the certification to the Secretary of the Treasury

THE SCREAM



# Executive Compensation Measures

- No incentives that encourage unnecessary and excessive risk
- Prohibition on golden parachutes
- Prohibition on bonuses, incentive awards and other incentive compensation to certain employees
- Prohibition on compensation plans that would encourage manipulation of earnings
- Expanded clawback provisions



# Compensation Committee Requirements

- Each TARP recipient is required to have a Compensation Committee, comprised entirely of independent directors, for the purpose of reviewing employee compensation plans
- The Committee is required to meet at least semiannually to discuss and evaluate employee compensation plans in light of an assessment of any risk posed to the TARP recipient from such plans
- For non-public companies that have received less than \$25 million of TARP assistance, the Committee's duties can be carried out by the board of directors (which presumably need not be independent) of such TARP recipient

# “Say on Pay”

- At each annual or other meeting of shareholders during the TARP period, TARP recipients must allow a separate nonbinding “say on pay” shareholder vote to approve executive compensation as disclosed under the SEC’s compensation rules
- The “say on pay” shareholder vote would be non-binding on the board of directors, and the Recovery Act states that the vote will not be construed “as overruling a decision by such board, nor to create or imply any additional fiduciary duty by such board.”
- The SEC is directed to issue rules implementing this subsection within one year of enactment

# Limitations on Luxury Expenditures

- The Board of each TARP recipient will be required to have in place a company-wide policy regarding “excessive or luxury expenditures.”
- The covered expenditures will be identified by the Secretary and may include excessive expenditures on:
  - Entertainment or events
  - Office and facility renovations
  - Aviation or other transportation services; or
  - Other activities or events that are not reasonable expenditures for staff development, reasonable performance incentives, or other similar measures conducted in the normal course of business operations of the TARP recipient

## End Government Reimbursement of Excessive Executive Disbursements (End Greed) Act

- It allows the Attorney General to (1) claw back bonuses, and (2) review contracts to prevent bonuses from being paid.
- The bill applies to companies that received more than \$10 billion in TARP funds after September 1, 2008 bill
- Playing off public outrage over AIG and Bank of America/Merrill Lynch bonus scandals
- Constitutional



## **What to Expect in the Enforcement Arena**

# Obama: 21st Century Regulation

“We have been asleep at the switch”

I intend “to make sure that regulatory agencies “are led by individuals who are ready and willing to enforce the law.”

*USA Today, 12/18/08*

Obama promises “21st century regulatory framework”

"We will crack down on this culture of greed and scheming that has led us to this day of reckoning"

*New York Times, 12/19/08*

# Shapiro: Enforcement Handcuffs Are Off

“With investor confidence shaken, it is imperative that the SEC be given the resources it needs to investigate and go after those who cut corners, cheat investors and break the law”

“One of the first things I’ll do would be to try to take the handcuffs off the enforcement division”

“The Commission will make war without quarter on any who sell securities by fraud or misrepresentation”

Mary Shapiro, Confirmation Hearings, 1/15/09

# Shapiro: Enforcement is the Foundation of the SEC's Mission

“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 Shapiro, “SEC Speaks,” 2/6/09

“The SEC is going to act like our hair is on fire!”

Mary Shapiro, *Compliance Week*, 2/24/09



# There's a "New Era on Wall Street"

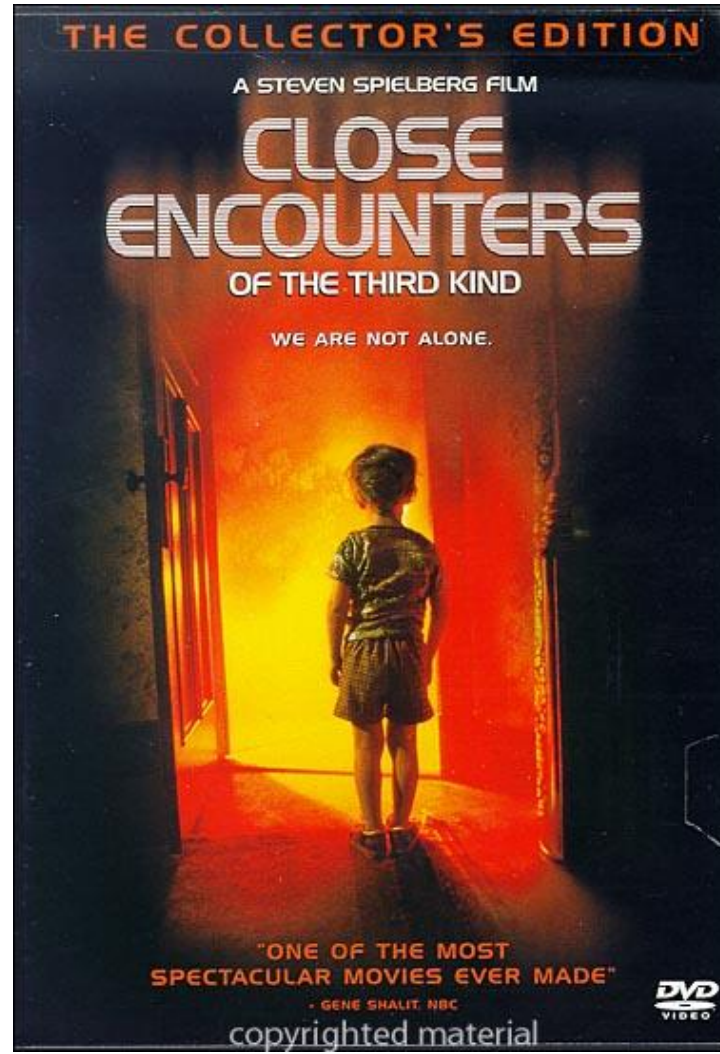
- SEC will take "no excuses" from securities firms.

OCIE Director Lori Richards, *SEC Speaks*, 2/6/09

- "As head of the SEC's Division of Enforcement, the staff and I will relentlessly pursue and bring to justice those whose misconduct infects our markets, corrodes investor confidence and has caused so much financial suffering."

**New Enforcement Director Robert Khuzami,**  
*Press Release*, 2/19/09

# Enforcement Environment in a Picture



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search ID: jhan211

**"I'll serve your businessman's lunch, sir, as soon as the SEC's done examining it."**

# More Seats at the Enforcement Table

- SEC
- U.S. Attorneys Offices
- Main Justice
- State Securities Commissions
- State Attorney Generals
- NASD/Stock Exchanges
- FTC/CFTC
- PCAOB

# U.S. Attorney Feeding Frenzy



# Private Securities Litigation on the Rise

- More than 210 securities class actions in 2008
  - 18% increase over 2007
  - 80% increase over 2006

MONEY & BUSINESS

# DAY OF RECKONING

A CEO's arrest sparks a market rally, and not a moment too soon

BY JODIE T. ALLEN, NOAM NEUSSER,  
AND JAMES M. PETHOKOUKIS

Sometimes a picture is worth a thousand points—or at least 500. The widely televised spectacle of Adelphia Communications founder John Rigas being led to a car in handcuffs last Wednesday morning seemed to produce what repeated presidential exhortations could not: a stock market rally, however fragile. As the day wore on, the market gathered steam, with the Dow ending up an impressive 489 points after a disastrous nine-week losing streak.

The arrests of Rigas and his two sons on charges of looting the nation's sixth-largest cable company came early in the morning at a tony apartment on Manhattan's Upper East Side. Here at last was tangible evidence for weary investors that deserved retribution would be visited upon those they blame for their losses.

The reaction of Scott Cantway, a contractor in Leitchfield, Ky., to the Adelphia arrests summed up the feelings of many other investors: "Those guys are crooks. They should hang them." Cantway, 45, wants more of the same. "I don't care if it's for spitting on the sidewalk; they need to indict the Enron and WorldCom guys for

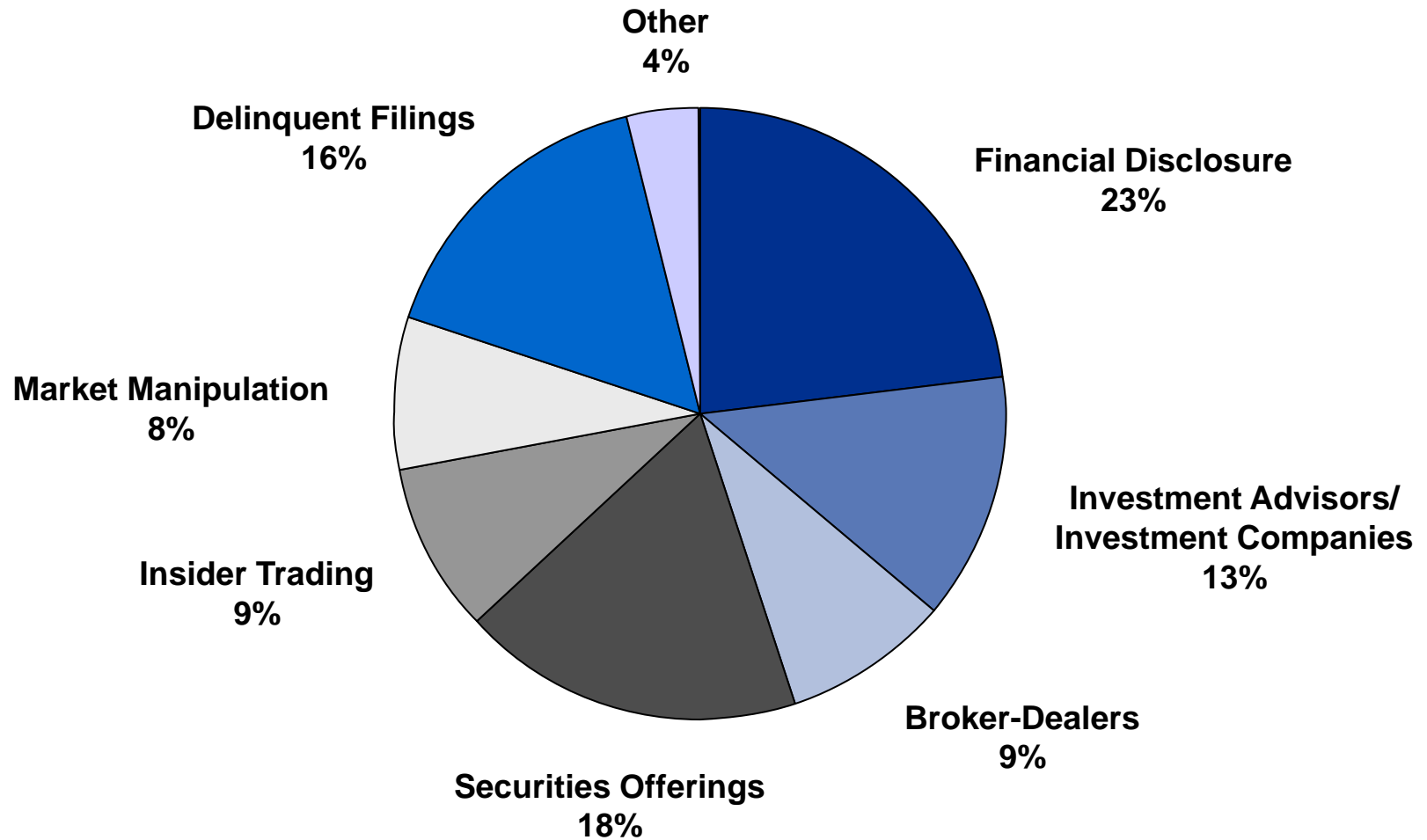


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# **OBSERVATIONS AND ADVICE FOR CORPORATE EXECUTIVES AND THEIR COUNSEL**



# SEC Cases and Enforcement in FY 2008



Source: U.S. Securities and Exchange Commission 2008 Performance and Accountability Report

# Post-SOX Emphasis on Gatekeepers Remains

- Autopsy of the corporate scandals of the early 2000s pointed at the gatekeepers of the securities industry
  - board members, audit committees, executive officers, in-house counsel, auditors, investment bankers
- Rabid focus on gatekeepers in securities investigations

# SEC View of Gatekeepers Pre-Sox



**“Pay Me Now, or Pay Me  
More Later”**

**or...**

**“Corporate Compliance  
Program: Don’t Wait Until  
Too Late”**



# General Characteristics of a Robust Compliance Program

- Adequately funded and staffed
- Clearly communicated to employees
- Apply to all employees and all situations (no special exceptions)
- Enforced
- Periodic assessment to ensure still effective

# Some Specific Elements of an Effective Compliance Program

- Memorialized in writing
- Clear assignments of responsibility
- Periodic training programs and ready access to legal advice
- Periodic written self-certification of compliance
- Maintenance of compliance records
- Periodic internal and external compliance audits
- Adjust to current risk assessment

# Senior Management Must “Buy-in” to Compliance

SEC’s Seaboard Report, DOJ’s guidelines and Sentencing Guidelines all emphasize:

- Proper “tone at the top”
- “Compliance culture”
- Imprimatur of board and senior management

# Compliance Must be Real



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 20, 2003

## MEMORANDUM

TO: Heads of Department Components  
United States Attorneys

FROM: Larry D. Thompson  
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

As the Corporate Fraud Task Force has advanced in its mission, we have confronted certain issues in the principles for the federal prosecution of business organizations that require revision in order to enhance our efforts against corporate fraud. While it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges, prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself.

Attached to this memorandum are a revised set of principles to guide Department prosecutors as they make the decision whether to seek charges against a business organization. These revisions draw heavily on the combined efforts of the Corporate Fraud Task Force and the Attorney General's Advisory Committee to put the results of more than three years of experience with the principles into practice.

The main focus of the revisions is to address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.

Further experience with these principles may lead to additional adjustments. I look forward to hearing comments about their operation in practice. Please forward any comments to Christopher Wray, the Principal Associate Deputy Attorney General.

**“The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.”**

## Federal Prosecution of Business Organizations

### I. Charging a Corporation: General

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.



# Not a Time for Cost-Cutting on Compliance

- “Mere compliance with the law . . . is not the highest goal to which we aspire, but the base from which we start.”

Former Enforcement Director Linda Thomsen, *Senate Testimony*, 1/27/09

- “In a profit and loss-driven world, there is always a risk that companies facing an uncertain economic future may choose to cut compliance expenses as a short-sighted way to save money .... Now more than ever, companies need to take a long-term view on compliance and realize that their fiduciary responsibility requires a constant commitment to investors.”
- “When a company cuts compliance, violations will occur. And if violations occur, punitive actions ... will be taken.”

Then-SEC Chairman Christopher Cox,  
CCOutreach Nat'l Seminar, 11/13/08

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Spence joined Andrews Kurth as a partner in its Dallas office in 2005 after 17 years with the Securities and Exchange Commission. He is the leader of Andrews Kurth's corporate governance and securities enforcement team.

His practice focuses on the representation of public companies, broker-dealers, investment advisers, investment companies, along with officers, directors, and others associated with these businesses. He also has extensive experience conducting internal investigations for public companies and regulated entities.

For the seven years prior to joining Andrews Kurth, Spence directed the SEC's enforcement program in the Southwest. He has extensive experience working with government agencies and self-regulatory organizations, including DOJ, state securities agencies and attorney general offices, the NASD, and the stock exchanges.