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## The Seventh Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law: The U.K FSA: Nobody Does It Better?

Dean William Michael Treanor Welcome\*

Ben A. Indek Opening Remarks†

Jill E. Fisch Opening Remarks‡

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## LECTURE

THE SEVENTH ANNUAL A.A. SOMMER, JR.  
LECTURE ON  
CORPORATE, SECURITIES AND FINANCIAL LAW<sup>†</sup>  
“THE U.K. FSA: NOBODY DOES IT BETTER?”

### WELCOME

William Michael Treanor<sup>1</sup>  
*Fordham University School of Law*

### OPENING REMARKS

Ben A. Indek<sup>2</sup>  
*Morgan, Lewis & Bockius LLP*

Jill E. Fisch<sup>3</sup>  
*Fordham University School of Law*

### FEATURED LECTURER

Margaret Cole<sup>4</sup>  
*United Kingdom Financial Services Authority*

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<sup>†</sup> Margaret Cole delivered this address at Fordham University School of Law on October 17, 2006. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory material in respect of certain statements by the speakers.

1. William M. Treanor is the Dean and Professor of Law at Fordham University School of Law.

2. Ben A. Indek is a partner in the securities litigation practice of Morgan, Lewis & Bockius LLP.

3. Jill E. Fisch is the T.J. Maloney Chair in Business Law at Fordham University School of Law and is the Director of the Fordham Center for Corporate, Securities and Financial Law.

4. Margaret Cole is the Director of Enforcement of the Financial Services Authority (FSA).

## WELCOME

DEAN TREANOR: I'm Bill Treanor. I'm the Dean of Fordham Law School. It's my pleasure to welcome you to tonight's event, which is the Seventh Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law.

Fordham is a school that has always taken incredible pride in its business law offerings. We're a school that is ranked in the top twenty nationally in terms of our business law program.<sup>5</sup>

We have really an extraordinary faculty. This year we welcome two new corporate law hires: Sean Griffith<sup>6</sup> and Richard Squire.<sup>7</sup> We have a remarkable adjunct faculty that brings leading practitioners in to offer courses on really the cutting edge of practice.

We have a journal, the *Fordham Journal of Corporate & Financial Law*,<sup>8</sup> which I am now holding up to you. It has been cited by the Supreme Court.<sup>9</sup> It is available outside.

And we also have—and are now, I think, in the fifth year of—our Corporate Center, which really brings it all together.<sup>10</sup> I'd like to thank the leadership of the Corporate Law Center. John Peloso,<sup>11</sup> who is with us here today, has really led the way and was really a visionary in this area, so I wanted to thank John.

We have a remarkable faculty who has always supported it. I see Gus Katsoris<sup>12</sup> here, who is a legend in the business law field. We have two brilliant faculty directors: Jill Fisch, who is one of the leaders in

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5. See Leiter's Law School Rankings, as measured by "Faculty Quality in Specialty Areas," available at [http://www.leiterrankings.com/faculty/2003faculty\\_businesslaw.shtml](http://www.leiterrankings.com/faculty/2003faculty_businesslaw.shtml).

6. Sean J. Griffith is an Associate Professor of Law at Fordham University School of Law.

7. Richard C. Squire is an Associate Professor of Law at Fordham University School of Law.

8. For more information, please visit the Fordham Journal of Corporate & Financial Law website, <http://law.fordham.edu/publications/index.ihtml?pubid=600> (last visited February, 22 2007).

9. See *Arthur Anderson LLP v. U.S.*, 544 U.S. 696, 704 (2005).

10. For more information, please visit the Fordham Center for Corporate, Securities & Financial Law website, <http://www.fordham.edu/law/faculty/fisch/source.html> (last visited Jan. 23, 2007).

11. John F.X. Peloso is senior counsel at Morgan, Lewis & Bockius and an Adjunct Professor of Law at Fordham University School of Law.

12. Constantine N. Katsoris is the Wilkinson Professor of Law at Fordham University School of Law.

corporate law in the country, has just been so superb; and Caroline Gentile,<sup>13</sup> who has really done an amazing job in her relatively brief period at Fordham, comes to us from Cravath. Ann Rakoff<sup>14</sup> has provided great leadership this year.

And again, the Corporate Center is really our jewel, and of its jewels the A.A. Sommer, Jr. Lecture is really something that we have taken such great pride in since its origins.

We are joined here tonight by Starr Sommer. Thank you very much for coming up from Washington to be here tonight.

It should be a fabulous lecture. Our lecturer tonight is really an extraordinary one, Margaret Cole, who is, as I assume you all know, one of London's most experienced and respected financial services litigators. She became the Director of Enforcement of the Financial Services Authority (FSA) in July of 2005.<sup>15</sup> The FSA regulates all financial services in the United Kingdom (U.K.), including the banking, insurance, mortgage, and securities industries. We're just so delighted that she is here tonight delivering this great lecture, continuing really such a fabulous series.

Now, to do the formal introduction, it's my pleasure to introduce Ben Indek, a Partner at Morgan, Lewis & Bockius, who will present tonight's opening remarks.

#### OPENING REMARKS

MR. INDEK: Good evening, everybody. On behalf of Morgan, Lewis & Bockius, welcome to the Seventh Annual A.A. Sommer, Jr. Lecture.

This lecture was established by Morgan Lewis to honor our partner most identified with the securities industry. Al Sommer was a Partner at Morgan Lewis from 1979 until 1994, when he became counsel to the firm and its clients. He was a terrific lawyer and a prolific author and commentator on a wide range of securities law issues. Al is best known for his service as an SEC Commissioner from 1973–1976, and as Chairman of the Public Oversight Board of the American Institute of

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13. Caroline Gentile is an Associate Professor of Law at Fordham University School of Law.

14. Ann Rakoff is the Executive Director of the Fordham Center for Corporate, Securities and Financial Law.

15. For more information, please visit the Financial Services Authority website, <http://www.fsa.gov.uk> (last visited Jan. 23, 2007).

CPAs.<sup>16</sup>

I am particularly pleased that Margaret Cole, the U.K. FSA's Director of Enforcement, will deliver tonight's lecture for two reasons. First, over the last ten months in which I've gotten to know Margaret, I came to see that, because of her years spent in the defense bar, Margaret would take a practical approach to issues, but, at the same time, be a passionate regulator, with a no-nonsense attitude towards securities law violators. As a private lawyer and government regulator, I think Al would have appreciated both qualities.

Second, Margaret's remarks on U.K. enforcement issues would have been of keen interest to Al. In addition to being a preeminent expert in U.S. securities law, Al had an interest and expertise in international law issues. For example, Al was an active member of the International Bar Association,<sup>17</sup> where, among other things, he was Deputy Chairman of the Capital Markets Forum.<sup>18</sup> He also acted as a consultant to several foreign countries on the development of their securities laws and regulations, including being an advisor to the U.K.'s Office of Fair Trading in 1983.<sup>19</sup> It is clear that Al would have enjoyed hearing what our keynote speaker has to say about U.K. regulation.

Al was with us for the first two lectures to introduce our speaker, but passed away in 2002 after a long illness. He is represented here tonight, as Dean Treanor has indicated, by his wife, Starr, who came up from Washington, and his son-in-law Jeff. We are honored that they could attend tonight's lecture.

When Al joined our firm twenty-seven years ago, he came to start a securities law practice. Today, we have more than 100 lawyers in about a half-a-dozen cities in that practice. Those cities now include London, where we have a new and vibrant securities practice, a fact that would have tickled Al. All of these lawyers are dedicated to serving the securities industry on broker-dealer, investment advisor, investment company, enforcement defense, securities litigation and white-collar

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16. American Institute of Certified Public Accountants. For more information, please visit the AICPA website, <http://www.aicpa.org> (last visited Jan. 23, 2007).

17. For more information, please visit the International Bar Association website, <http://www.ibanet.org> (last visited Jan. 23, 2007).

18. For more information, please visit the Capital Markets Forum website, [http://www.ibanet.org/legalpractice/Capital\\_Markets\\_Forum.cfm](http://www.ibanet.org/legalpractice/Capital_Markets_Forum.cfm) (last visited Jan. 23, 2007).

19. For more information, please visit the Office of Fair Trading website, <http://www.ofc.gov.uk/default.htm> (last visited Jan. 23, 2007).

issues. We are also active in the public company accounting and corporate governance areas.

We are proud of Al's affiliation with Morgan Lewis and delighted to sponsor this annual lecture in his honor.

I'm pleased to turn tonight's proceedings over to Jill Fisch, the Director of Fordham's Center for Corporate, Securities & Financial Law and our host this evening.

PROF. FISCH: Good evening. I'm Jill Fisch. I'm the Director of The Fordham Center for Corporate, Securities & Financial Law. I'm delighted to welcome you on behalf of the Fordham Law community to the Seventh Annual A.A. Sommer, Jr. Lecture.

I would like to express the School's deep gratitude to the firm of Morgan, Lewis & Bockius for their generosity in establishing the lecture. I'm delighted that Al Sommer's family could join us tonight. I also want to express our pleasure that the SEC Historical Society<sup>20</sup> is joining us tonight. I'd also like to thank Margaret Cole for agreeing to deliver the lecture.

In the few short years since its inception—and you might think, well, okay, what was the reaction to corporate governance scandals? Congress passed Sarbanes-Oxley.<sup>21</sup> Fordham established the Corporate Center. Everybody deals with things in their own way.

In the few short years since its inception, the Fordham Corporate Center has developed a reputation for bringing the finest legal and business talent to the Law School. Recent public lectures have included Congressman Oxley's speech last month, "Securing the U.S. Economy: Protecting Investors in Our Capital Markets," and New York Attorney General Eliot Spitzer's lecture last spring.<sup>22</sup> Last year's Sommer Lecture was delivered by Citigroup General Counsel Edward Greene,<sup>23</sup> and I'm delighted that he is here tonight as well. An additional public program last spring, called "Bigger Carrots and Bigger Sticks," featured a panel discussion of issues and developments in corporate sentencing, a topic of particular importance in light of the recent and ongoing series—it seems like a never-ending series—of corporate governance scandals.

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20. For more information, please visit the SEC Historical Society website, <http://www.sechistorical.org> (last visited Jan. 31, 2007).

21. Sarbanes-Oxley Act of 2002, 107 P.L. 204, 116 Stat. 745 (2002).

22. *The Fifth Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law*, 11 Fordham J. Corp. & Fin. L. 1 (2005).

23. *The Sixth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law*, 11 Fordham J. Corp. & Fin. L. 697 (2006).

After options back-dating and pretexting, you wonder what's next on the horizon.

The Corporate Center hosts a variety of other programs. We have a Business Law Practitioners Series, which is geared to introducing our students to developments and career options in business law. We have policy-oriented roundtables, and more. We are partnering with ALI-ABA<sup>24</sup> to bring several of their programs in business law to Fordham later this fall. And, of course, we at Fordham are very proud of both the Securities Arbitration Clinic and the *Fordham Journal of Corporate & Financial Law*. I know that many students from both of those programs are in the audience tonight.

As you know, we at Fordham are delighted to host the Sommer Lecture. The Dean used the word "jewel," so I won't. With the assistance of Morgan Lewis and the Corporate Center's Board of Advisers, we have been fortunate in being able to attract the very cream of the country's—and now the world's—leadership in business law to speak here at the School. We have been privileged to hear the insights of our speakers on significant legal developments and cutting-edge regulatory issues.

If there has been a shortcoming in our programming, it has perhaps been the failure to pay sufficient attention to global issues. Fordham Law School, as you know, has a substantial number of foreign students, an international LLM program, and a strong reputation in international law. So I'm delighted that we're addressing our ethnocentrism tonight and broadening our focus with tonight's speaker.

Traditionally, the United Kingdom and the United States have been leaders in the capital markets. But there have been substantial differences in their approach to regulation and enforcement. As you all know, in the United States the Securities and Exchange Commission has primary regulatory authority over the securities markets, and we have had a number of SEC officials deliver prior Sommer Lectures.<sup>25</sup>

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24. American Law Institute-American Bar Association. For more information, please visit the ALI-ABA website, <http://www.ali-aba.org> (last visited Jan. 23, 2007).

25. See, e.g., *The Sixth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law*, 11 *Fordham J. Corp. & Fin. L.* 697 (2006) (Edward F. Greene, former SEC general counsel); *The Third Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law*, 8 *Fordham J. Corp. & Fin. L.* 335 (2003) (Harvey Goldschmid, SEC Commissioner) and *The Inaugural A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law*, 6 *Fordham J. Corp. & Fin. L.* 259 (2001) (Hon. Arthur Leavitt, Jr., former SEC Chairman).

The SEC's counterpart in the United Kingdom is the FSA. The U.K. Financial Services Authority is an independent, nongovernmental body, given statutory powers by the Financial Services and Markets Act 2000.<sup>26</sup> It's the single U.K. statutory regulator, with direct responsibility for regulating deposit-taking, insurance, and investments.<sup>27</sup> It is also the listing authority for the admission of securities to the Official List.<sup>28</sup> The FSA assumed the powers and responsibilities of ten separate predecessor bodies. The statute sets out the FSA's objectives as follows: "market confidence, public awareness, consumer protection, and the reduction of financial crime."<sup>29</sup>

Margaret Cole was appointed to her present position, Director of Enforcement at the FSA, in 2005. Ms. Cole, a solicitor with over twenty years of experience in private practice, was previously a Partner in the London office of White & Case, where she founded and headed the firm's Dispute Resolution Department. Her clients included the European Bank for Reconstruction and Development, the Royal Bank of Canada, and Crédit Agricole. In the 1990s, Ms. Cole led the actions to recover the Maxwell Company pension funds on behalf of the fund trustee and she succeeded in obtaining a global settlement restoring the missing funds.

Ms. Cole is accredited by the Center for Effective Dispute Resolution<sup>30</sup> and the Alternative Dispute Resolution Group.<sup>31</sup> She was educated at Newhall Cambridge and graduated from the College of Law, Lancaster Gate, with honors.

At the FSA, Ms. Cole leads a team of 270 and reports directly to the FSA Chief Executive. Her work at the Enforcement Division includes conducting investigations, administrative, civil and criminal proceedings, obtaining redress for consumers, and working cooperatively with the FSA's domestic and international counterparts on investigations and enforcement actions.

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26. Financial Services and Markets Act, 2000, c. 8, § 1 (U.K.).

27. See *Introduction to the Financial Services Authority* at 3, available at [http://www.fsa.gov.uk/pubs/other/fsa\\_intro.pdf](http://www.fsa.gov.uk/pubs/other/fsa_intro.pdf) (last visited February 22, 2007) [hereinafter FSA Introduction].

28. *Id.* at 15.

29. Financial Services and Markets Act, 2000, c. 8, § 1 (U.K.).

30. For more information, please visit the Center for Effective Dispute Resolution website, <http://www.cedr.co.uk> (last visited Jan. 23, 2007).

31. For more information, please visit the Alternative Dispute Resolution Group website, <http://www.adrgroup.co.uk> (last visited Jan. 23, 2007).

Here to ask—and perhaps answer—the question of whether the FSA does it better is Margaret Cole.

## FEATURED LECTURER

MS. COLE: Mrs. Sommer and ladies and gentlemen, I am really delighted and honored to be with you tonight and to have been asked to deliver this Seventh Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law, with the title, as you know, “The U.K. FSA: Nobody Does It Better?” I was asked to suggest a catchy title for my talk this evening. As you can see, I have followed the philosophy of the Enforcement Division and been very bold and resolute in my choice of a theme.

Standing in front of this distinguished audience here tonight, I am wondering whether another title, perhaps another song title, comes to mind, perhaps “Fools Rush In.”

But I note with interest that I am your first overseas speaker. As such, I hope you are going to give me a bit of license to depart from what is the usual British norm of understatement so that I can engage in a bit of shameless “PR” for the U.K. Financial Services Authority and how we go about our business.

My title does at least end with an interrogation mark. If this was a debate, as the title suggests, I would be standing up here for the FSA and there would be a long line of U.S. regulators ranged against me, including the SEC, Federal Reserve Bank,<sup>32</sup> CFTC,<sup>33</sup> NASD,<sup>34</sup> numerous regulators of insurance, numerous regulators of exchanges, and others. They would all be on the other side of this very long table opposing my motion.

Outnumbered I would be, yes. But, very solid in my convictions, I would be arguing many of the points that I am going to raise today, such as the benefits of having a unitary authority; how London’s philosophy of “light-touch”<sup>35</sup> regulation has helped it in becoming the world’s

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32. For more information, please visit the Federal Reserve Board website, <http://www.federalreserve.gov> (last visited Nov. 5, 2006).

33. Commodity Futures Trading Commission. For more information, please visit the CFTC website, <http://www.cftc.gov> (last visited Nov. 5, 2006).

34. National Association of Securities Dealers. For more information, please visit the NASD website, <http://www.nasd.com/index.htm> (last visited Nov. 5, 2006).

35. See John Tiner, FSA Chief Executive, *U.K.’s Leading Role in the Adoption of International Initiatives*, Keynote Address at the BBA 10th Annual Supervision

leading center for mobile capital; how the FSA is not an enforcement-led regulator at all, but one that uses supervision and ongoing relationships with the firms as its front-line means of regulation; and how the FSA is recognized in the international community of regulators as a thought leader, always seeking new approaches to better regulation, demonstrated, for example, by our deliberate shift to more principles-based regulation. We continue to have our aspiration of being the most admired and respected regulator globally.

I also want to mention some things that some of my opponents in this hypothetical debate would almost certainly raise. They might well say, for example, that there is a conspicuous absence of criminal prosecutions of securities law violations in the United Kingdom; or that the FSA's resources are very widely spread across its huge jurisdiction; or that the strategic approach to enforcement sends out selective messages and allows some illicit activity to go unpunished.

Now, in this debate some such criticisms might be fairly argued. But I would still argue that our model in the United Kingdom is an innovative and highly effective one. It may not be the perfect model of regulation, but I do genuinely believe that it is one that gets a lot of the very important things right. I am also, however, the first to recognize that there are many things that we can learn from you.

Now to some background about the FSA to give some context to my proposition.

The FSA is a body, as Jill mentioned, that is operationally independent of the U.K. government.<sup>36</sup> We were set up in 1997 by the then-incoming Labour administration. That was the second thing that they did, after making the Bank of England<sup>37</sup> independent in respect of monetary policy. We are the result of a merger of ten predecessor regulators. We are now a one-stop regulatory shop for virtually all aspects of financial services regulation in the United Kingdom.

We are financed by fees levied on the firms, large and small, that fall within our remit.

We have supervisory responsibility for wholesale and retail markets, equities and derivatives trading, banking and insurance. The FSA also acts as the competent authority for listing in the United

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Conference (Oct. 11, 2006), *available at* [http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/1011\\_jt.shtml](http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/1011_jt.shtml) (last visited Jan. 20, 2007).

36. See FSA Introduction, *supra* note 27, at 18.

37. For more information, please visit the Bank of England website, <http://www.bankofengland.co.uk> (last visited Nov. 6, 2006).

Kingdom. The scope of the activities we regulate was more recently expanded to include mortgage and general insurance.<sup>38</sup>

One fact you may find of topical interest: we do not authorize or regulate hedge funds, which is not to say that we're not concerned about the risks they pose. I'll come back and say some more about that in a moment.

We regulate an industry that employs one million people—the population of the United Kingdom is just about 60 million people—and accounts for 7% of GDP.<sup>39</sup> We have 2,800 staff and a current budget of £266 million.<sup>40</sup>

As Jill mentioned, so I won't take too long on it, the cornerstone of our powers is the Financial Services and Markets Act 2000.<sup>41</sup> We rather inelegantly shortened that to FSMA. FSMA gave us a wide range of rulemaking, investigatory, and enforcement powers and certain important responsibilities, including the ability to take action to prevent market abuse and to prosecute offenders for insider dealing.<sup>42</sup>

FSMA also gave us those four statutory objectives that were mentioned previously: firstly, market confidence, maintaining confidence in the financial system; second, public awareness, promoting public understanding of the financial system; third, consumer protection, securing the appropriate degree of protection for consumers; and fourth, the reduction of financial crime, reducing the extent to which it is possible for a business to be used for a purpose connected with financial crime.<sup>43</sup>

Those objectives govern the way we carry out our general functions and help ensure that the FSA is accountable in political, public, and legal terms. We have to report annually to Parliament on how successful we

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38. See *FSA Opens the Doors to Mortgage and General Insurance Firms* (Nov. 3, 2003) <http://www.fsa.gov.uk/Pages/Library/Communication/PR/2003/117.shtml> (last visited Feb. 22, 2007).

39. Gross Domestic Product. See Vernon Everitt, Director of Retail Themes, FSA, *The FSA's Regulatory Approach and Raising Financial Capability Through the Workplace*, Speech at CBI, Executive Lunch, Birmingham (Sept. 14, 2006), available at [http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/0914\\_ve.shtml](http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2006/0914_ve.shtml) (last visited Nov. 5, 2006); see also National Statistics, available at <http://www.statistics.gov.uk/CCI/nugget.asp?ID=6> (last visited Nov. 5, 2006).

40. See *Facts and Figures*, <http://www.fsa.gov.uk/Pages/About/Media/Facts/index.shtml> (last visited Feb. 22, 2007) [hereinafter *Facts*].

41. Financial Services and Markets Act, 2000, c. 8, § 1 (U.K.).

42. *Id.*

43. *Id.*

have been in meeting our objectives, and when we interpret those objectives wrongly or fail to consider them we can be challenged in the courts.<sup>44</sup>

So we are a single regulator with a single aim: to promote the statutory objectives, and we have, at last count, 30,000 firms and 165,000 individuals to regulate.<sup>45</sup>

Let me say something about our approach to regulation to deliver our objectives.

Our clear preference is to encourage efficient markets. Our philosophy is that only after market solutions have been exhausted should regulatory initiatives be contemplated.

A very good example of this was the work done alongside the U.S. Federal Reserve Bank, as well as the Swiss and German authorities, to address concerns about growing operational risk associated with confirmations for credit risk derivatives.<sup>46</sup> This problem couldn't be solved by any one regulator or any one firm and required collaboration between regulators in different countries, something which will, of course, become increasingly essential in the global landscape of financial services.

Together, we met with the industry and set out the problem, and the industry came back with proposals which the regulators discussed. There was an agreement on approaches and tracking of improvements, and I am pleased to say the results have been good.

There are numerous risks in the financial markets, so we adopt a disciplined approach to identify the big-ticket risks to our objectives. This risk-based approach is designed to align our finite resources with addressing the big risks that matter the most. This means that we—and others—need to accept that some things can and will go wrong, what we refer to as a “non-zero-failure regime.” Our view is that, although the idea that regulation should seek to eliminate all failures may be appealing in theory, in practice it imposes prohibitive costs on the industry and on consumers.

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44. See Facts, *supra* note 40.

45. See John Tiner & John Fingleton, Office of Fair Trading and FSA, *Delivering Better Regulatory Outcomes, A Joint FSA and OFT Action Plan* (April 2006), available at [http://www.fsa.gov.uk/pubs/other/OFT\\_FSA\\_Actionplan.pdf](http://www.fsa.gov.uk/pubs/other/OFT_FSA_Actionplan.pdf) (last visited Nov. 6, 2006).

46. See John Tiner, Chief Executive, FSA, Chief Executive's Report, Annual Report 2005/06, available at [http://www.fsa.gov.uk/pubs/annual/ar05\\_06/ar05\\_06.pdf](http://www.fsa.gov.uk/pubs/annual/ar05_06/ar05_06.pdf) (last visited Nov. 6, 2006).

Now, the FSA's decision to be a risk-based regulator is a conscious and deliberate decision, and we regularly review the amount of risk that we are prepared to accept and focus our resources on the risks that we consider matter the most. We are keen to ensure that our regulatory interventions always add to, rather than detract from, the positive impact of market forces and really are justified in terms of the level of risk to our statutory objectives and the consequences of harm that would otherwise arise.

Consequently, even where empirical analysis shows that there has been a market failure, we are not always convinced that regulatory intervention is the most efficient and cost-effective form of correction. Market failures can also be addressed using other mechanisms, such as competition policy, or the FSA using its considerable influence with market participants and their trade representatives to change firms' policies, processes, and behaviors, without reaching for the heavy-handed tool of the regulator's rule book. The FSA is very firmly of the view that regulators must be very wary of the damaging effects that they can have on creativity, innovation and competition.

In support of this risk-based approach, the FSA is an advocate for principles-based regulation. That's why the focus is on the outcomes rather than on the prescription of detailed rules. Targeting outcomes—such as, for example, customers of financial firms treated fairly, or firms holding financial resources sufficient for the risks they run—enables companies to focus on the substance of what is good for their business, their customers, and for society around them.

Now, the FSA's eleven high-level principles for businesses have been around since 2001 and set overarching requirements for all financial services firms.<sup>47</sup> They are the regulatory equivalent of first principles that articulate what actions and behaviors we expect of firms. We see real benefits for firms, markets, and consumers, as well as for our own people, in tipping the balance materially towards principles and away from prescription. We believe that providing firms with the flexibility to decide more often for themselves what businesses processes and controls should operate will better align good regulation with good business practice.

We also believe that firms that seriously commit to a set of outcome-based principles are in the best position to judge the detail of

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47. See FSA's Principles for Businesses, *available at* <http://fsahandbook.info/FSA/html/handbook/PRIN/2/1> (last visited Nov. 6, 2006).

how best to deliver those outcomes in the marketplace. By taking this approach, we create incentives for firms to focus on compliance in return for a regulatory dividend, and that's less regulatory intervention.

We also think that a "tick-box" mentality towards rule compliance, at the expense of judgment and real understanding of the business, de-skills the industry, because good people who like to exercise judgment will leave that kind of environment, and we want to make sure that we have good people in all sectors of the U.K. financial services industry.

However, an approach along these lines is not always easy—in fact, it is never easy. Both regulators and the regulated find a sense of safety and security in detailed rules, as they define the scope of their legal exposure. But while rules-based standards are authoritative and enforceable, they do not prevent dishonest practice.

We think that the regulator and the regulated must be bold enough to accept some uncertainty and ambiguity and to manage any consequent legal risks for the benefit of society and the markets as a whole. So, for our part, when we ask questions of firms, we have to accept that the answers might not always be precise and that there may be a range of judgment-based outcomes which are acceptable.

In short, it's a question of striking the right balance between simplicity and detail. Einstein said, "Everything should be made as simple as possible, but not simpler."<sup>48</sup>

Now, the benefits of this light-touch approach to regulation are borne out by the figures. I wouldn't be a regulator without throwing in a few figures.

By the end of September this year, companies had raised more capital on the main market of the London Stock Exchange, \$26.7 billion,<sup>49</sup> than the New York Stock Exchange and NASDAQ combined, \$26.4 billion<sup>50</sup>— and this didn't even include the \$6.7 billion raised on the London Stock Exchange's alternative investment market.<sup>51</sup>

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48. THE NEW INTERNATIONAL DICTIONARY OF QUOTATIONS 281 (1st ed. 1986).

49. See London Stock Exchange, Investment News, *With-Profit Insurers Show Strong Capital Strength* (July 4, 2005), available at <http://www.londonstockexchange.com/en-gb/pricesnews/investnews/article.htm?ArticleID=16087757> (last visited Nov. 6 2006).

50. For the most recent information supporting these figures, see *LSE Success Prompts New York Fight Back*, AFX INTERNATIONAL FOCUS, Sept. 24, 2006, available at <http://www.finanznachrichten.de/nachrichten-2006-09/artikel-7035593.asp> (last visited Jan. 12, 2007).

51. See Ian Bailey, *Beginning Life as a UK-Listed Company*,

The figures are even more stark when you look at international IPOs. So far this year, the LSE has attracted fifty-nine deals worth \$15.9 billion, whilst the New York Stock Exchange and NASDAQ together have only attracted seventeen deals worth \$5.9 billion.<sup>52</sup>

Now, I'll say straight away, I better had say it in front of this audience, that I am not gloating about any of this—of course not, absolutely not. And I do know that New York's performance of late in comparison to London has caused a great deal of concern in your corridors of power. I understand that Mayor Bloomberg has recently appointed a consultant to look at just this issue<sup>53</sup> and that Treasury Secretary Paulson has mobilized a team of experts to look at the effects of the Sarbanes-Oxley legislation.<sup>54</sup>

However, I do believe, to use the words of a leading U.K. financial journalist in *The Daily Telegraph*, that “there is a regulatory dividend that London enjoys under the auspices of the Financial Services Authority: and that that dividend has bolstered London's status to establish itself as the world's leading center for mobile capital.”<sup>55</sup>

Now, this whole issue of our different regulatory approaches was thrown into stark relief recently, when Ed Balls, Economic Secretary to the Treasury—that's a kind of Deputy Chancellor of the Exchequer—announced a month ago that “the FSA will be given new powers to veto rule changes to exchanges that it considers to be too draconian and disproportionate in their impact.”<sup>56</sup> The government was at pains to emphasize that this unprecedented move was not protectionist and was not aimed at deterring foreign buyers from buying on our exchanges.

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<http://www.webershandwick.com/newsroom/thoughtleadership.cfm/contentid,13968.html> (last visited Feb. 2, 2007) (note amount listed in pounds).

52. David Seifman, *IPO Turf Wars – City Hires McKinsey to Study Biz Drain to London*, NEW YORK POST, Sept. 27, 2006, at 33.

53. See *LSE Success Prompts New York Fight Back*, AFX INTERNATIONAL FOCUS, Sept. 24, 2006, available at <http://www.finanznachrichten.de/nachrichten-2006-09/artikel-7035593.asp> (last visited Jan. 12, 2007).

54. See Paul Tharp, *Paulson Posse Targets Sarbanes*, N.Y. POST, Oct. 11, 2006, at 37.

55. Damian Reece, *London Confirms its Reputation as the Capital City*, DAILY TELEGRAPH, Sept. 27, 2006, at 2.

56. Ed Balls, Economic Secretary to the Treasury, *Financial Services: a U.K. Perspective*, Address at the Hong Kong Chamber of Commerce and the British Chamber of Commerce (Sept. 13, 2006), available at [http://www.hm-treasury.gov.uk/newsroom\\_and\\_speeches/speeches/econsecspeeches/speech\\_est\\_130906.cfm](http://www.hm-treasury.gov.uk/newsroom_and_speeches/speeches/econsecspeeches/speech_est_130906.cfm) (last visited Jan. 23, 2007).

However, it is clear that the possibility of a takeover of the London Stock Exchange by NASDAQ, which already owns twenty-five percent and is no longer barred from increasing that stake, and anxiety at the prospect of rules driven by Sarbanes-Oxley regulating the London Stock Exchange played a major part in this.<sup>57</sup> The FSA welcomed this move by government to create a legal ring fence and ensure that London continues to enjoy the competitive advantage it derives from domestic regulation.

Equally, we welcome and are hugely encouraged by the SEC's pledge at the end of last month not to apply U.S. rules to European exchanges that are taken over by American exchanges.<sup>58</sup> This is a testament to the open and constructive dialogue between the SEC and the FSA on matters of mutual interest.

Now, at this stage you might be forgiven for wondering when or whether I'll get around to talking about enforcement. After all, I am the FSA's Director of Enforcement.

So where does enforcement fit into this picture? Well, a clue lies in the fact that my team of approximately 288 people represents just eight percent of the total staff of the FSA. Contrast this with the SEC, whose Enforcement Division makes up just over half of the SEC's total personnel nationwide.<sup>59</sup>

The FSA is not an enforcement-led regulator. Enforcement is one of a range of tools available to deal with noncompliant behavior, but it is not the most widely used. It is used selectively and strategically as part of our overall risk-based supervisory strategy and in support of the FSA's objectives.

Consistent with this, the Enforcement Division does not have its own freestanding priorities. Our priorities are the same as those of the FSA as a whole, and our work is driven by the needs of the rest of the organization. Two big priority areas for the FSA, and therefore for the Enforcement Division, are market abuse on the wholesale side and treating customers fairly on the retail side.

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57. See *Exchange Chief Warns of Merger Manipulation*, CANBERRA TIMES, Oct. 14, 2006 and Chris Noon, *Greifeld's NASDAQ Ups LSE Stake Again*, FORBES, May 19, 2006.

58. Norma Cohen, *U.S. and E.C. Reassure on Local Rules Stock Exchanges*, FINANCIAL TIMES, Sept. 28, 2006, at 27.

59. See *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml> (last visited Feb. 22, 2007) (noting the staff of the SEC is 3,100).

A key focus in the FSA's efforts to ensure the integrity of the markets in the United Kingdom is to deter market abuse. An appropriate enforcement action that sends out strong messages is a very important part of achieving deterrence, but we generally regard non-enforcement options—such as proactive surveillance of likely hot spots, up-to-date transaction analysis systems, and industry cooperation to ensure a steady flow of information—as more desirable. We take the view that prevention is better than cure.

An interesting dimension to this priority is the role played by hedge funds, a subject I flagged earlier, which is of much topical interest, of course. Indeed, it is not possible to open a newspaper, either in London or in New York, without reading about the latest issue concerning hedge funds, be it in connection with the regulation of hedge funds or the absence of it, the risk of the misuse of insider information by hedge funds (witness the SEC's investigation into the *Movie Gallery* case, which was featured on the front page of yesterday's *New York Times*<sup>60</sup>), the well-publicized difficulties of Enron or the risks posed by an industry that has become so dominant that it accounts for roughly half the trading on the London and New York stock exchanges.<sup>61</sup>

It is important to emphasize that the FSA does not, and is not seeking to, authorize and regulate the funds themselves, which are outside our jurisdiction. Rather, we continue to believe that we can mitigate the risks through our existing authority over hedge fund managers and broker-dealers who provide prime brokerage services to the funds.

Of particular interest to us in the Enforcement Division is the FSA's belief that some hedge funds may be testing the boundaries of acceptable practice with respect to insider trading and market manipulation. In addition, given the payment of significant commissions and close relations with counterparties, they may be creating incentives for others to commit market abuse.

Characteristically, our main response has been on the surveillance side, and we have recently devised metrics to measure the incidence of unusual price movements in order to see if this belief is correct. However, we have also used our enforcement powers against hedge funds acting improperly on our markets, most notably in the *GLG*

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60. Jenny Anderson, *As Lenders Hedge Funds Draw Insider Scrutiny*, N.Y. TIMES, Oct. 16, 2006, at A1.

61. *Id.*

case.<sup>62</sup>

The FSA's initiative aimed at treating customers fairly is a prime example of the FSA's strategic shift to more principles-based regulation. The initiative is of great importance for retail financial markets in the United Kingdom and is directed at improving the outcomes for consumers in these markets. Through this work, we hope that the industry will move to a position where consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture.

Although much of this work is done through supervision and education, the treating-customers-fairly agenda is also keeping the Enforcement Division very busy. As I hope is evident, in the United Kingdom enforcement is a small part of the regulatory relationship. It is used strategically for the most egregious cases and where necessary to protect markets and consumers. We put great emphasis on the messages sent out to the markets through careful selection of cases and leverage off the publicity that they generate.

However, the potential impact of enforcement action is very significant. My division generates more publicity, both good and bad, for the organization than any other. Our enforcement outcomes play a very significant role in educating the industry and consumers about issues of concern and the FSA's approach to them. They can also be a very powerful way of changing behavior and achieving effective deterrence more generally, which of course is what enforcement activity is all about.

So what can the FSA do to enforce the provisions of FSMA, as well as the principles and rules we issue under that Act? Well, we are able to prosecute insider dealing and market abuse in the criminal courts, as well as breaches of the perimeter when people conduct regulated activities without authorization.<sup>63</sup> I should just say that when we bring those actions in the criminal courts, we are the prosecutor; we don't need to refer cases to any other prosecuting body.<sup>64</sup> We can also bring cases in the civil courts to freeze assets and restrain unauthorized

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62. *Jabre v. Financial Services Authority*, [2006] F.S.M.T. (U.K.).

63. Financial Services and Markets Act, 2000, c. 8, §§ 401-02 (U.K.).

64. *Contra* David R. Chase & Neal Wilson, *When the SEC Comes Knocking*, BUS. LAW TODAY, May/June 2000, available at <http://www.abanet.org/buslaw/blt/blt00may-sec.html> (last visited Nov. 6, 2006) (discussing how the SEC must refer prosecutions to the DOJ).

behavior,<sup>65</sup> but these kinds of cases are quite rare compared with the cases that we bring through our own regulatory proceedings. Our own procedures enable us to impose unlimited fines, to withdraw a person's or firm's ability to conduct regulated activities, or even to prohibit them from the industry altogether.<sup>66</sup>

There are a variety of reasons for regulatory cases making up such a large majority of our cases, but I see the main reasons as being: the greater scope they offer for establishing breaches; the lower evidentiary standards that apply and the consequent lower—but not low, I hasten to add—litigation risks they involve; and the greater prospects of settlement that they hold out.

The FSA actively looks for new ways to make sure its penalties bring about the deterrent effect that the FSA wants to achieve. This means considering not only the types and levels of penalties that the FSA imposes, but making sure that the penalties affect the right people. It also means acting with confidence and resolutely taking enforcement action where appropriate to convince wrongdoers that there is a real risk that they will be caught and proceeded against. Sometimes it means taking important cases, recognizing that they will be difficult to fight and that we may not win.

The Enforcement Division also supports the FSA's strategic shift to more principles-based regulation. Where appropriate, the FSA can and does take enforcement action on the basis of principles alone, and this trend will grow.

Now, I did promise at the beginning of this speech that I'd acknowledge that there are some things that we in the United Kingdom and we at the FSA might be considered to do less well and where we might learn from the way you do things here in the United States.

It is clear to me that the authorities in the United States, particularly in recent years, have been very successful in prosecuting major corporate scandals,<sup>67</sup> and in doing so recognizing that those at the heart

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65. See Financial Services Authority Enforcement in the Civil and Criminal Court, available at <http://www.fsa.gov.uk/Pages/doing/regulated/law/focus/courts.shtml> (last visited Nov. 13, 2006).

66. See Joint Committee on Financial Services and Markets, Second Report, 1999-9, at 8-17, available at <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtfinser/465/46502.htm> (last visited Jan. 15, 2007).

67. Christopher Wray, *Prosecuting Corporate Crimes*, eJournal USA: Economic Perspectives, Feb. 2005, available at <http://usinfo.state.gov/journals/ites/0205/ijee/wray.htm> (last visited Jan. 12, 2007).

of those scandals are criminals and deserve to be brought to justice.

Eliot Spitzer's efforts here in New York, of course, are particularly well-known. But they are only part of the picture. I know that the SEC and the Department of Justice have also obtained criminal convictions in a number of insider trading cases, some indeed involving hedge funds.<sup>68</sup> With the SEC's head of enforcement giving testimony before the Senate Committee on the Judiciary only a few weeks ago,<sup>69</sup> it is clearly a matter that is very much in the spotlight.

In the United Kingdom, we have the Serious Fraud Office, whose sole role it is to investigate and prosecute serious and complex fraud, and who conclude in the region of about ten such trials a year.<sup>70</sup>

As far as the FSA is concerned, we have successfully brought a number of prosecutions against people who have acted without appropriate authorization. But we have only used our prosecutorial powers against someone who has committed an offense in our markets once, and that was last year, when we successfully prosecuted directors of the AIT Group for criminal market abuse by making false and misleading statements to the market.<sup>71</sup>

While some notable victories have been achieved in the United Kingdom—for example, the *City Slickers*<sup>72</sup> prosecution by our Department of Trade and Industry, and convictions arising from the *Guinness* trials<sup>73</sup>—overall, successful prosecutions of so-called white-collar criminals are sparse.

Now, it seems to me there are clearly some cultural and environmental differences between our two countries, which perhaps, in part at least, explain our different appetite for prosecution of major corporate and financial scandals.

First, for the last ten years or so, after the scandals of the early 1990s—which I was intimately concerned with as a lawyer trying to sort

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68. See, e.g., *U.S. v. Pollet*, 05 Cr. 287 (E.D.N.Y. April 26, 2005).

69. Testimony Concerning Insider Trading before the Senate Comm. on the Judiciary, (Oct. 5, 2006) (statement of Linda Chatman Thomsen, Director, SEC Div. of Enforcement), available at <http://www.sec.gov/news/testimony/2006/ts120506lct.pdf> (last visited Jan. 10, 2007).

70. See FSA Introduction, *supra* note 27, at 22.

71. Press Release, Financial Services Authority, FSA Secures Convictions in First Criminal Market Abuse Case (Aug. 18, 2005), available at <http://www.fsa.gov.uk/pages/Library/Communication/PR/2005/091.shtml> (last visited Jan. 15, 2007).

72. *R v Hipwell*, [2006] E.W.C.A. (Crim.) 736 (Eng.); see also James Daley, *The 'Mirror' Shares Scandal: City Slickers Found Guilty*, THE INDEPENDENT, Dec. 8, 2005.

73. *R v Saunders*, [1996] 1 Crim. App. Rep. 463 (Eng.).

them out, I hasten to add, most notably the *BCCI*<sup>74</sup> and *Maxwell*<sup>75</sup> pension fund matters—we've been enjoying a relatively quiet time on this front, perhaps because our economy has generally been so buoyant.

Second, looking across from my side of the Atlantic, there appears to be greater public support in the United States than there is in the United Kingdom for seeing alleged corporate fraudsters and financial wrongdoings prosecuted in the criminal courts. And, indeed, there seems to be a greater willingness of juries to convict.

Third—and I hope this bit isn't too controversial—if my understanding of arrangements in the United States is correct, district attorneys are elected in most districts and attorneys general are elected in most states. These posts are used by many as a springboard for a career in mainstream politics. Well, although many lawyers in the United Kingdom do end up in politics—our Prime Minister, Mr. Blair, for example—the vast majority of them come from private practice rather than from the Crown Prosecution Service. The link between political office and prosecution is not a well-established one. A proven track record in prosecuting white-collar crime clearly has a much greater positive impact on a prosecutor's current and future career in the United States than it does in the United Kingdom.

Finally, plea bargaining and the giving of state's evidence by accomplices. In the United Kingdom, we call this giving Queen's evidence. This is a practice that is explicitly recognized in U.S. criminal practice, and as such is a very valuable tool for obtaining convictions of all manner of offenders. By contrast, it is not a practice that is formally recognized in our system and is not one of which our legal establishment has traditionally approved.

Over 350 years ago, Chief Justice Hale expressed his distaste for pleas of approvement. That was the term used at the time for granting immunity from prosecution to accomplices willing to give evidence to the Crown. He said: "The truth is that more mischief hath come to good men by these kinds of approvements, by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders."<sup>76</sup> How much sympathy would that view find, I wonder, in the United States?

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74. R v Inst. of Chartered Accountants, [1994] B.C.C. 736 (Eng.).

75. MGN Pension Trs. Ltd. v. Bank of Am. Nat'l Trust and Savings Ass'n, [1995] 2 A.I.I. E.R. 355 (Ch.) (Eng.).

76. 2 Sir Matthew Hale, *History of the Pleas of the Crown* 161 (1736).

But as I said earlier, the FSA has very wide responsibilities and limited resources and we take a risk-based approach to applying our resources in enforcement cases. From a risk-based perspective, we often feel it is a better use for our scarce enforcement resource to seek a quicker and less uncertain regulatory outcome.

It is not as if the consequences of our own administrative regulatory proceedings are not serious. As I said earlier, we ban people from the industry, for life if necessary, and we have unlimited fining powers. Nevertheless, we have stated publicly that, despite the well-documented difficulties of criminal prosecutions, some of which the SEC's Head of Enforcement outlined in her recent testimony on Capitol Hill, there are some cases where this route is the appropriate course, and we expect to bring more criminal prosecutions going forward.

So, to conclude, I propose to you, ladies and gentlemen, that nobody does it better than the FSA. I believe that our light-touch approach to regulation, with its growing emphasis on principles, backed up by bold and strategic enforcement action, is highly effective. I would point to London's current success on the global stage as irrefutable evidence of this. But we also know that we are not perfect. This is a very competitive world, and we don't intend to rest on our laurels.

Now, thankfully for me, because this isn't a debate, I am very relieved that my proposition will not be tested here tonight by a vote.

Thank you very much. Now for the difficult part, I'd be delighted to take some questions, especially easy ones.

QUESTION: As the United Kingdom becomes more integrated with the European Union, and when—perhaps I should say if—the United Kingdom were to ever accept the Euro, where do you see the FSA in terms of its evolution into a Brussels-type regulatory environment?

MS. COLE: When I talk about moving to more principles-based regulation, of course we can't ditch the rulebook. I mean it is very much a philosophy that we hope will move regulation and behavior in the right direction. One of the big reasons why we are clearly going to have trouble ditching the rulebook is because most of the new rules that we have to address come from Europe. So you are very right to make the point. It is a very significant issue for us.

Whenever we have to look at the implementation of a new Directive, as we do with some degree of regularity, we look very carefully at what we need to bring in, how far we can go to satisfy the Directive without going any further. It really is, as you point out, a very

significant issue, in terms of what we want for our philosophy going forward.

In terms of Europe more generally, I would say from time to time there is talk of a single European regulator for financial services. Clearly, if there were to be such, we would want to be it. Or would we? I don't know. Generally, I think we have lobbied behind the scenes to ensure that no such circumstance ever comes about.

I don't know other than that. I can't say where we'll be in terms of integrating further into Europe. I can't see any prospect of our losing our currency on the horizon, for example. But it is a very pertinent question.

QUESTION: What's your take on all of the corporate scandals that have been experienced over here? What is the reaction of people overseas to that?

MS. COLE: One of the points that I was seeking to make is that we try very often not to rush to a knee-jerk reaction of more regulation when something goes wrong. There is a powerful head of steam that gets up in that direction when you have, obviously, a scandal, or some "mis-selling," as we say, for example, as we have had in the United Kingdom. But we do try to focus on market solutions and such things like that.

I was talking before I came in this evening about, in terms of this issue of prosecution of corporate scandals, how we in the United Kingdom, I think, seem to be about twenty years behind you here, because—if I understood this correctly—the prosecutions of some of the financial and corporate scandals really got going in about the mid-1980s. So I am very intrigued to see, because, generally, whatever happens over here we eventually catch up. Whether we will go in the same direction I don't know.

The criminal prosecutions by a securities regulator really require huge and significant resources. We have this risk-based approach, where we try to use finite resources to manage our cases in what we consider the most appropriate way. So we are never likely to have the resources to bring a lot of major prosecutions simultaneously.

I think the SEC, and also the fact that the DOJ is a separate prosecuting body, just gives you the greater capacity to bring those sorts of cases.

QUESTION: Could you give us some examples of regulatory responses, where you forgo an enforcement proceeding, how you achieve the regulatory result?

MS. COLE: Yes. Quite a lot gets done through the supervision angle. So cases sometimes don't get referred to Enforcement; they get dealt with by the supervisors of the firm. The majority of the activity that we conduct—we have authorization, we have supervision, and we have enforcement—but the majority of the FSA's resources is in the area of supervision.

So if there is on the retail side, for example, something where customers have been badly affected, by mis-selling or something like that, or they haven't been treated fairly, it isn't essential that the case will come into Enforcement. It may be that the supervisors will agree on a remediation program, for example, with the firm. That could also be done in the enforcement context. But I talked about enforcement just being one of the tools. The supervisors very often do agree on packages with firms that mean that it is not necessary to go to Enforcement.

QUESTIONER: Is that public?

MS. COLE: Is it public that that happens? Yes, because the remediation package very often can become public. But you're right in saying that it's only when you have an enforcement outcome that we are required by the statute to publish.<sup>77</sup> So if the supervisors deal with an issue with a firm, sometimes, very often, it won't become public. Sometimes it will. If we deal with an issue through the Enforcement Division and we have a regulatory outcome, we are required to publish that.

QUESTION: I'm sort of interested in a question that would compare and contrast what is expected of your agency with what's expected of the various levels of enforcement and prosecution in the United States with this example. Let's say somebody in some Midlands city operating a firm that is not regulated—or authorized, in your words—by your agency sells £40 or £50 million worth of investment notes in an enterprise that is held out as being essentially an investment vehicle into up-and-coming businesses. But, after a while, whatever the initial intentions, it sort of degenerates into a Ponzi scheme, and the proprietors essentially are driving around in big cars and buying big houses, but not too much gets invested in companies, and so on and so forth. It may be hundreds of people, or maybe a thousand people, are

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77. See *Delivering Better Regulatory Outcomes: Joint FSA and OFT Action Plan*, available at [http://72.14.209.104/search?q=cache:bmGW5395a\\_0J:www.of.gov.uk/NR/rdonlyres/791987A5-B2F6-460E-91F6-DBA554587854/0/oft838.pdf+british+Enforcement+Division+Outcomes&hl=en&gl=us&ct=clnk&cd=2&client=firefox-a](http://72.14.209.104/search?q=cache:bmGW5395a_0J:www.of.gov.uk/NR/rdonlyres/791987A5-B2F6-460E-91F6-DBA554587854/0/oft838.pdf+british+Enforcement+Division+Outcomes&hl=en&gl=us&ct=clnk&cd=2&client=firefox-a) (last visited Jan. 11, 2007).

out £40 million.

Is it expected that your agency would lead the charge against that type of operation, or would it be the Serious Fraud Office, or would it be some other Crown office?

MS. COLE: We would be very likely to shut them down or injunct them, for example, and take them out, and publicize the fact that we had done so. What we wouldn't be likely to be doing would be helping the individuals pursue their private law rights, if I can put it that way.

As part of an enforcement outcome, we very often do agree on a program of remediation, as I described it before, to give money back to individuals. But in the case you're describing, where we're talking about a completely non-authorized entity that's probably going to run away with the money, we wouldn't be bringing cases against those individuals for restitution of the funds. We could, but we rarely do it that way. We would be focusing more on the bigger regulatory issue. But we would shut it down.

Now, the Serious Fraud Office might bring a criminal prosecution if the fraud was big enough, or the Crown Prosecution Service might in the case of a smaller fraud. But in terms of criminal prosecutions, our remit is in the area of market abuse and insider dealing or in the area of removing unauthorized firms.

Maybe two more questions.

QUESTION: What is the relationship of your organization to the Proceeds of Crime Act?<sup>78</sup>

MS. COLE: Well, as you heard, we have a statutory objective around the subject of reducing financial crime, so we don't have a direct relation with the Proceeds of Crime Act. But, in connection with the financial crime part of what we do, we do look at money-laundering cases, for example, insofar as they fit into that overall objective, and we might bring regulatory action in that area.

QUESTIONER: Where there are financial institutions that are a part of it?

MS. COLE: Yes, indeed.

I think there was one more question.

QUESTION: You said that you don't regulate hedge funds but you do regulate their advisors.

MS. COLE: Yes.

QUESTIONER: In the States, the debate is whether we should

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78. Proceeds of Crime Act, 2002 c. 29 (Eng.).

regulate hedge funds by regulating the advisors. Is there a class of advisors to hedge funds that is not under supervision in the United Kingdom?

MS. COLE: I don't think so. Off the top of my head, I don't know any. I know you are having quite a significant debate about that. I've also read about a legal case where the decision of the SEC to do it in some particular way was overturned?<sup>79</sup> So I know there is quite a lot going on.

At the moment—and who knows what's going to happen next—we are very much steering away from authorizing or regulating hedge funds.

PROF. FISCH: Please join me in thanking Margaret Cole. And let me invite you all to the reception outside.

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79. See *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).