

STRATEGIES FOR MEETING INCREASED U.S. AND INTERNATIONAL COMPLIANCE REQUIREMENTS

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I. UNDERSTANDING THE IMPETUS FOR SOX GIVES INSIGHT INTO REGULATORY EXPECTATIONS

Regulatory expectations after the passage of the Sarbanes-Oxley Act of 2002 (SOX) can best be understood in the context of the headline-making financial frauds at Enron, Adelphia, WorldCom and other companies that came to light in the year before SOX's July 2002 enactment. Reports of high-level, wide-ranging misconduct by public companies, their senior management, and their gatekeepers "exceed[ed] anything the U.S. ha[d] witnessed since the years preceding the Great Depression." David Wessel, *Venial Sins: Why the Bad Guys of the Boardroom Emerged en Masse*, Wall Street Journal, June 20, 2002, at A1 (reprinted at www.pulitzer.org/year/2003/explanatory-reporting/works/wsj1.html). That year's newspapers included reports of:

- **Public companies' acknowledgements of gross overstatements of revenues and disclosure failures**

Enron's collapse in late 2001 came after announcements that it would be taking a \$544 million charge to earnings and a \$1.2 billion reduction in shareholders' equity – and that it had used highly complex transactions with Special Purpose Entities to achieve "favorable financial statement results" by keeping assets and liabilities off its balance sheet.

Lucent Technologies announced that it had adjusted its fiscal year 2000 revenues by \$679 million, which jump-started an SEC investigation. The SEC ultimately alleged that, in their drive to realize revenue, meet internal sales targets and/or obtain sales bonuses, senior officers and executives improperly granted and/or failed to disclose various side agreements, credits and other incentives to induce Lucent's customers to purchase the company's products. Lucent eventually paid a \$25 million penalty to the SEC for its lack of cooperation during the SEC's investigation.

In June 2002, with the disclosures by WorldCom of its own major accounting fraud and WorldCom's subsequent bankruptcy filing, WorldCom embarked on what has been described as the ultimate restatement project, uncovering some \$74.4 billion in improper accounting.

- **Self-dealing by senior management**

As the company collapsed, Enron's top executive reportedly made many millions of dollars selling substantial amounts of Enron stock at a time when Enron's employees were blacked out from selling or allocating out of the Enron stock plan.

Post-Enron, Adelphia admitted to making undisclosed loans to its major shareholders. Tyco's CEO was charged with tax evasion and rumors swirled about extraordinary corporate excess within Tyco, culminating in Tyco's release in September 2002 of the findings of its internal investigation that detailed executives taking unreported interest-free loans for a variety of undocumented personal uses and abuses of the company's relocation program, among other misconduct.

- **The complicity of gatekeepers in public companies' frauds, including the auditors' own efforts to evade detection of that complicity by destroying audit documents**

In January 2002, Arthur Andersen, Enron's accounting firm, disclosed to Congressional investigators that it had destroyed "a significant but undetermined number" of Enron-related audit documents in October 2001, around the time of the SEC's first inquiry into Enron's accounting for SPEs and related matters.

In March 2002, the U.S. Department of Justice announced that Andersen had been criminally indicted on a obstruction of justice count based on its destruction of Enron documents. In June 2002, a jury found Andersen guilty of the obstruction charge, and the firm on that same day announced it would close down its operations. [Note that in May 2005, the Supreme Court overturned the conviction, finding that the jury instructions did not properly convey that consciousness of wrongdoing was required to convict.]

II. THE SOX "PARADIGM SHIFT"

SOX, signed into law on July 30, 2002, has been said to "represent the most dramatic change to the securities laws and their administration since the Great Depression," and also to represent a "paradigm shift for all public companies, both domestic and foreign, and their officers, directors and shareholders, as well as market, accounting and legal professionals." Huber and Hoffman, *The Sarbanes-Oxley Act of 2002 and SEC Rulemaking*, printed in THE PRACTITIONER'S GUIDE TO THE SARBANES-OXLEY ACT (ABA 2004) at I-3, I-5 (PRACTITIONER'S GUIDE TO SOX). SOX provisions place unprecedented emphasis on personal accountability of senior management and gatekeepers for public companies, and on the importance of internal controls and the ongoing assessment and enhancements of those controls. Major SOX provisions:

- **Emphasize senior management accountability for financial statement accuracy**

Key provisions require senior management to provide their personal certification to the accuracy of periodic reports filed with the SEC and specify significant criminal penalties for false certifications. See Sections 302, 906.

SOX requires that, in the event a company is required to restate its financials due to misconduct, senior management must forfeit to the company bonuses, other incentive-based compensation and profits on any stock sales realized in the twelve months after the filing of the financials requiring restatement. *See* Section 304.

- **Emphasize the critical importance of controls**

Provisions of SOX, as implemented by SEC rules, require signing officers to make broad representations regarding their responsibility for establishing and maintaining disclosure controls and procedures and internal control over financial reporting, and to externally report on their assessment of the effectiveness of controls. *See* Section 404. The Chief Auditor of the Public Company Accounting Oversight Board (“PCAOB”) has said that “the centerpiece of Sarbanes-Oxley is its emphasis on internal control.” Remarks of Dr. Douglas Carmichael and Dan Goelzer at PCAOB meeting on March 9, 2004 (available on the PCAOB website), cited in PRACTITIONER’S GUIDE TO SOX at I-70.

- **Prohibit self-dealing and mandate disclosure of compensation and conflicts of interest**

SOX prohibits insider trades during pension fund blackout periods, bans personal loans to officers and directors and mandates public reporting of codes of ethics waivers for senior financial officers. *See* Sections 306, 402, 406.

- **Seek to restore public confidence in the audit process by:**

Imposing new oversight and independence requirements on public company audit committees: Key corporate governance provisions make the audit committee responsible for the appointment, compensation, and oversight of the company’s accounting firm, and the Act imposes the requirement that each member of the audit committee must be independent (meaning, for purposes of the Act, that a member of the committee may not accept any consulting, advisory, or other compensatory fee from the issuer (other than routine director fees) and may not be an affiliated person of the issuer or any subsidiary) (*see* Sections 202, 301);

Creating the PCAOB, a new public accounting firm oversight entity: SOX established the PCAOB as a new public accounting oversight authority with which public accounting firms must register, and afforded the PCAOB investigative and disciplinary power to establish and enforce auditor independence standards (*see* Sections 101-102); and

Establishing new auditor independence requirements: Other provisions set forth new auditor independence requirements, including bans on certain types of work (such as consulting) unrelated to their audit work, pre-certification by the company's audit committee of all other non-audit work, and an audit partner rotation requirement (*see* Section 202, 203).

- **Ratchet up the duties of gatekeepers**

Lawyers, for example, were given “up-the-ladder” reporting duties, and SOX codified SEC rules requiring minimum standards of professional conduct for lawyers appearing or practicing before the Commission. *See* Section 307, 602.

- **Criminalize destruction of documents and non-cooperation and enhance penalties and enforcement remedies**

SOX makes it a felony to "knowingly" alter, destroy or create documents with the intent to "impede, obstruct or influence" any existing or contemplated federal investigation. SOX also increased the existing criminal penalties and enforcement remedies for violations of the federal securities laws and increased the SEC's budget. *See* Sections 802, 1106, 601.

The Act was followed by dozens of SEC rulemakings and by enhanced SEC enforcement, with a marked increase in the number of actions brought against gatekeepers, and markedly increased Department of Justice interest in prosecutions of white-collar crimes.

III. SENIOR MANAGEMENT'S OBLIGATIONS WITH RESPECT TO DISCLOSURE CONTROLS AND PROCEDURES AND INTERNAL CONTROL OVER FINANCIAL REPORTING EXEMPLIFY THE NEW PARADIGM OF PERSONAL ACCOUNTABILITY AND CONTINUOUS REVIEW OF A FIRM'S CONTROLS AND COMPLIANCE

Senior management's obligations with respect to disclosure controls and procedures and internal control over financial reporting are a “poster child” for the new SOX paradigm of personal accountability of senior management and the expectation that companies will engage in active and continuous review of their controls, and will promptly implement all appropriate enhancements to their controls and ethics and compliance programs. Under Section 404 of SOX, management is required to file with the SEC, as part of each annual Exchange Act report, an “internal control” report. The report must affirm “the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting.” The report must also “contain an assessment, as of the end of the most recent fiscal year of the [company], of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.”

Section 404 also requires external auditors to attest to, and report on, management's assessment of internal control over financial reporting, and requires the company to file the auditor's attestation report as part of the annual Exchange Act report. The auditor's report must include the auditor's opinion on whether management's assessment of the effectiveness of the company's internal control over financial reporting is fairly stated in all material respects. If the auditor is expressing an adverse opinion because of a material weakness, the report must include a description that "provide[s] the users of the audit report with specific information about the nature of any material weakness, and its actual and potential effect on the presentation of the company's financial statements issued during the existence of the weakness." *See PCAOB, Auditing Standard No. 2 – An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statement*, ¶ 176 at 204. "Materiality" is to be viewed on a qualitative and quantitative basis. *See id.*, ¶ 10 at 149. Further, under SEC Exchange Act rules implementing Section 302 of SOX, senior officers must also provide certifications with respect to their responsibilities for establishing and maintaining "disclosure controls and procedures" and their evaluation and disclosure regarding those disclosure controls and procedures.

The PCAOB has indicated that in approaching their assessment of internal control effectiveness, senior management should use an internal control framework such as that developed by COSO, the Committee of Sponsoring Organizations (COSO) of the Treadway Commission. The COSO framework establishes a common definition of internal control for companies and auditors – the COSO report defines internal control as a process "effected by the board of directors, management, and other personnel [and] designed to provide reasonable assurance" regarding the achievement of three objectives: (1) reliability of financial reporting; (2) effectiveness and efficiency of operations; and (3) compliance with applicable laws and regulations. The COSO framework then describes how to assess the control environment, determine control objectives, perform risk assessments, identify controls and monitor compliance.

Most U.S. companies are applying this COSO framework (foreign companies with securities traded in the U.S. are to begin Section 404 reporting in 2006), an undertaking that, consistent with the expectations embodied in SOX, requires senior management to actively and continuously evaluate the robustness of the company's approach to ethics and compliance, focused on COSO's company-level control considerations such as:

1. The company's tone at the top, as established through its board and management; the extent of management monitoring of the effectiveness of internal control systems; and whether pressure exists to meet unrealistic or short-term performance targets and whether management may be inclined to override established controls;
2. The robustness of the company's codes of conduct and other policies regarding acceptable business practices, the level of employee awareness of

management's expectations, and whether the company makes adherence to the code of conduct a criterion in performance appraisals; and

3. Whether management has established channels for reporting of suspected improprieties and the appropriateness of any remedial action taken in response to violations of the code of conduct.

Because signing officers have ongoing internal controls assessment and reporting obligations, the internal controls evaluation process is by necessity coupled with ongoing consideration of the need for remediation and enhancement. Public companies must take on the obligation to proactively identify management policies and procedures and their consequences that may increase the risk of fraud and other illegality. When the process works effectively, the result will be an environment that emphasizes the value of ethical behavior and compliance with the law throughout an organization, and, ultimately, more reliable financial reporting and greater investor confidence.

IV. THE APPROACH TO ASSESSMENT OF PENALTIES REFLECTED IN THE 2004 AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND THE SEC'S SEABOARD REPORT AND RECENT STATEMENT CONCERNING FINANCIAL PENALTIES LIKEWISE EMPHASIZES THE CRITICAL ROLE OF SENIOR MANAGEMENT IN IMPLEMENTING AND AUGMENTING, AS NEEDED, INTERNAL CONTROLS AND PREVENTING MISCONDUCT

The organizational sentencing guidelines developed by the U.S. Sentencing Commission offer incentives to organizations to reduce and ultimately eliminate criminal conduct. They offer mitigation of penalties to companies that can demonstrate robust internal controls and an ongoing commitment to meeting their compliance responsibilities and to augmenting their controls and procedures as appropriate in response to identified misconduct. The SEC's approach to determining its enforcement response to corporate misconduct, articulated in its Seaboard 21(a) Report,¹ likewise reflects the SEC's expectation that firms that identify misconduct will adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct. The SEC's January 4, 2006 Statement Concerning Financial Penalties² (2006 Statement) echoed the idea, in the context of outlining the considerations that will govern whether and to what extent the Commission will impose civil penalties against a corporation, that the presence of remedial steps by the corporation will weigh against use of a corporate penalty. In these respects the organizational sentencing guidelines and the SEC's Seaboard 21(a) Report and 2006 Statement mirror the SOX expectation that companies and their senior managements will work tirelessly to identify and

¹ *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement of the Relationship of Cooperation to Agency Enforcement Decisions*, Exchange Act Rel. No. 44969, Accounting and Auditing Enforcement Rel. No. 1470 (Oct. 23, 2001) (available on the SEC website).

² *Statement of the Securities and Exchange Commission Concerning Financial Penalties*, Press Rel. No. 2006-4 (Jan. 4, 2006) (available on the SEC website).

remediate management policies and procedures and their consequences that may increase the risk of fraud and other illegality.

- **Federal sentencing guidelines for organizations**

In 2004, following on the increase in the number of white collar prosecutions and Congress's directive in SOX that the Sentencing Commission review and amend the guidelines to implement SOX's provisions, the Sentencing Commission elevated the criteria for an effective ethics and compliance program into a stand-alone guideline and thereby highlighted the importance of prevention of organizational criminal misconduct. At that time the Sentencing Commission also revised and strengthened the criteria. Among the key changes was to place significantly greater responsibilities on an organization's governing authority, such as its board of directors and its senior executives.

In order to have its sentence mitigated under the Guidelines, an organization must show that it promoted "an organizational culture that encourages ethical conduct and a commitment to compliance with the law" and needs to establish that it devotes adequate resources for and gives authority to its compliance program, and has in place:

1. Standards and procedures to prevent and deter criminal conduct;
2. A program that places responsibility for compliance on all levels of the organization and provides compliance training to all levels of personnel;
3. Personnel screening related to program goals (*e.g.*, that it uses reasonable efforts and exercises due diligence to exclude individuals from authority positions who have engaged in illegal activities or other conduct inconsistent with an effective ethics and compliance program);
4. Effective auditing, monitoring, and evaluative programs;
5. Non-retaliatory internal reporting systems;
6. Incentives and discipline to promote compliance; and
7. A compliance program by which reasonable steps are taken to respond to and prevent similar offenses on detection of a violation (including a commitment to making necessary changes to the ethics and compliance program).

- **SEC Seaboard 21(a) Report**

The SEC’s seminal Seaboard 21(a) Report, which arose out of an investigation into financial reporting by issuer Seaboard Corporation, stated that the Commission, in its discretion, may focus on the accountability of senior management and may credit remediation – along with self-policing, self-reporting, and cooperation – in determining the appropriate enforcement response against a company. Among other questions the Report indicates the Commission may ask in making a particular enforcement decision are:

1. Where in the organization did the misconduct occur? How high up in the chain of command was knowledge of, or participation in, the misconduct? Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct? How systemic was the behavior? Is it symptomatic of the way the entity does business, or was it isolated?
2. Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct? Did the company provide our staff with sufficient information for it to evaluate the company’s measures to correct the situation and ensure that the conduct does not recur?

In declining to take action against Seaboard Corporation, the SEC pointed out that the wrongdoer within the company was a former controller of the public company’s subsidiary and that the misconduct – causing the parent company’s books and records to be inaccurate and its periodic reports misstated, and then covering up those facts – was not known to the parent company and its senior management. The SEC also emphasized that the public company “strengthened its financial reporting processes to address [the wrongdoer’s] conduct – developing a detailed closing process for the subsidiary’s accounting personnel, consolidating subsidiary accounting functions under a parent company CPA, hiring three new CPAs for the accounting department responsible for preparing the subsidiary’s financial statements, redesigning the subsidiary’s minimum annual audit requirements, and requiring the parent company’s controller to interview and approve all senior accounting personnel in its subsidiaries’ reporting processes.”

- **2006 Statement Concerning Financial Penalties**

Just days into this new year the SEC issued a statement concerning financial penalties to “provide the maximum possible degree of clarity, consistency, and predictability in explaining the way that its corporate penalty authority will be exercised.” The 2006 Statement identified two principal considerations – the presence or absence of a direct benefit to the corporation as a result of the violation, and the degree to which the penalty will recompense or further harm the injured shareholders – and then went on to identify additional factors that will be considered in corporate penalty determinations. Among those additional factors are “[w]hether complicity in the violation is widespread throughout the corporation . . . [and] [w]hether the corporation has

replaced those persons responsible for the violation,” as well as the “presence or lack of remedial steps by the corporation.” The SEC elaborated on its view of remediation as follows:

Because the aim of the securities laws is to protect investors, the prevention of future harm, as well as the punishment of past offenses, is a high priority. The Commission’s decisions in particular cases are intended to encourage the management of corporations accused of securities law violations to do everything within their power to take remedial steps, from the first moment that the violation is brought to their attention. Exemplary conduct by management in this respect weighs against the use of a corporate penalty; failure of management to take remedial steps is a factor supporting the imposition of a corporate penalty.

V. INTERNATIONAL REGULATORY CONVERGENCE AND ENFORCEMENT COOPERATION

SOX applies to all public companies in the U.S., to global companies that have SEC-registered equity or debt securities, and to all such companies’ auditors. SOX has spawned reviews of regulations and standards governing accounting, financial reporting and corporate governance throughout the world and is viewed as benchmark legislation by non-U.S. regulators, playing a key role in spurring on what already had been significant efforts at regulatory convergence. Going forward, a multinational firm should expect that U.S. standards will increasingly be applied internationally whether because the firm has substantial contact with the United States or because of convergence. Accordingly, best practice should be to “aim high” and fashion the multinational firm’s controls and compliance systems against the highest standard to which the firm is subject, as that standard may be fast becoming that to which the firm’s operations are subject. Moreover, whether or not such convergence occurs in the near term, because international enforcement cooperation is on the rise – securities regulators are helping each other now more than ever and, as a result, information about a multinational firm’s activities may be readily shared among regulators – the ability of the United States to look beyond U.S. borders in enforcing SOX is greater than ever.

The SEC has always worked proactively in the international area. Other countries’ securities regulators now are increasingly focusing their own international efforts through the International Organization of Securities Commissioners (IOSCO). IOSCO is a non-profit international organization whose members are securities regulators and other relevant national bodies from more than 100 countries. Its objectives are to cooperate to promote high standards of regulation in order to maintain just, efficient and sound markets; to exchange information on members’ respective experiences in order to promote the development of domestic markets; to unite members’ efforts to establish standards and an effective surveillance of international securities transactions; and to provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offenses. The

SEC plays an important part in the IOSCO dialogue and work, which can be seen on review of IOSCO's website: <http://www.iosco.org>.

- **Convergence of accounting and disclosure standards**

One of IOSCO's high-level priorities has been convergence of accounting and disclosure standards.

Accounting. International accounting standards have always existed as an alternative to U.S. GAAP and GAAS, but until the 1990s were not considered a credible alternative. IOSCO has played a leading role in this evolution.

In 1990, IOSCO endorsed the development of internationally acceptable accounting standards that would facilitate evolution of a single disclosure document for cross-border offerings and listings. By 1994, IOSCO completed a review of the accounting principles issued by the International Accounting Standards Committee (IASC). IOSCO then worked with IASC to develop a core set of accounting standards that might become a framework for financial reporting in cross-border offerings. The "core standards" project resulted in fifteen new or revised International Accounting Standards and was completed in 1999, followed by IOSCO's May 2000 recommendation that all its members allow multinational issuers to use IASC standards, as supplemented by reconciliation, disclosure, and interpretation where necessary to address outstanding substantive issues at a national or regional level. The SEC responded by amending its requirements for financial statements of foreign private issuers to permit use of three certain IASC standards without reconciliation to U.S. GAAP. These were: (1) use of International Accounting Standard (IAS) 7, Cash Flow Statements; (2) acceptance of portions of IAS 22, Business Combinations; (3) and acceptance of portions of IAS 21, The Effects of Changes in Foreign Exchange Rates.

The European Parliament's and the Council of the European Union's subsequent decision to require that all EU-listed companies prepare their consolidated financial statements in accordance with International Financial Reporting Standards (IFRS) beginning in 2005 created even greater momentum. Indeed, in April 2005 the SEC indicated that, as early as 2007, it might allow foreign companies to use IFRS to raise capital in the United States, eliminating the current requirement that they reconcile their statements to U.S. GAAP.³ The thinking is that hundreds of filers will now be using IFRS in the U.S. market and, as a result, SEC staff review of these filings, and the included reconciliations of IFRS reports to U.S. GAAP, will give the SEC sufficient comfort with IFRS-based accounting to eliminate the reconciliation requirement. The SEC is devoting its resources to the project – as one of the Commissioners noted in a recent

³ Donald T. Nicolaisen, *A Securities Regulator Looks at Convergence*, 25 Nw. J. Int'l. L. & Bus. 661 (Spring 2005) (available on the SEC website).

speech, the SEC's Office of Chief Accountant has designated a senior official, who is charged specifically with international issues, to lead this filings review and standards evaluation project.⁴

Non-financial disclosure standards. In 1998, IOSCO adopted non-financial disclosure standards for cross-border offerings and initial listings of equity securities by foreign issuers.⁵ IOSCO thereby promoted the use of a single disclosure document that would be accepted in multiple jurisdictions.

The next year, the SEC fully implemented the IOSCO standards by amendments to SEC Form 20-F, which governs offering, listing and annual reporting requirements for foreign public issuers.⁶ In October 2005, IOSCO followed its 1998 efforts with a Consultation Report that sets forth principles for disclosure documents used in public offerings and listings of “plain vanilla” corporate debt securities.⁷ According to IOSCO, this is “another significant step in enhancing cross-border disclosure regulatory frameworks.”

- **Increasingly robust cross-border enforcement cooperation**

IOSCO's Role; Multilateral Arrangement. An increasingly influential IOSCO has established a further goal of “building a strong network for cross-border cooperation between national regulators on matters of enforcement.”⁸ IOSCO's member coverage is now more than 90% of the world's securities markets, and growing. As a result, the ability of the United States to look beyond U.S. borders in enforcing SOX is increasing as well.

In May 2002, just ahead of SOX's enactment, IOSCO adopted a Multilateral Memorandum of Understanding (MOU), which is the first global multilateral information-sharing arrangement among securities regulators. Pursuant to the MOU, signatories agree to provide certain information, to permit use of that information in enforcement and regulatory matters, and otherwise to keep the information confidential. International securities regulators have high expectations for the MOU: as IOSCO's Executive Committee Chairman posited, “With the internationalisation of economic activity and the growth of cross-border capital flows, the MOU will become the single most important tool available to national securities regulators, if it is not so already.”⁹

⁴ Paul S. Atkins, Commissioner, SEC, *Remarks before the European Institute of the University of Gent, Brussels, Belgium* (June 23, 2005) (available on the SEC's website).

⁵ IOSCO, *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers* (Sept. 1998) (available on the IOSCO website).

⁶ *International Disclosure Standards*, Securities Exchange Act Rel. No. 34-41936 (September 28, 1999).

⁷ Technical Committee of IOSCO, Consultation Report: *International Disclosure Principles for Cross-Border Offerings and Listings of Debt Securities by Foreign Issuers* (Oct. 2005) (available on the IOSCO website).

⁸ Speech by Jane Diplock AO, Chair, IOSCO Executive Committee, *IOSCO Strategies & Regulatory Issues for International Banks* (3 May 2005) (available on the IOSCO website).

⁹ *Id.*

Since 2002, 28 countries have signed the MOU, and in April 2005, IOSCO announced that all member regulators will be asked to sign the MOU by January 1, 2010. This push for a truly global adoption of the arrangement stemmed from a key finding in IOSCO's Report on Financial Fraud, issued in 2004, that a critical weakness of the international regulatory system was that regulators and law enforcement agencies were hampered in their enforcement actions by the inability to exchange information and coordinate investigations across borders.

IOSCO already had stepped up its push for international cooperation in February 2005, in response to "recent financial scandals [that] have highlighted the need for more urgent action towards a multilateral solution" to cooperation.¹⁰ At that time IOSCO announced that it is beginning the process of identifying under-regulated or uncooperative jurisdictions that create the most problems for cross-border enforcement, and is pursuing follow-up work with these jurisdictions. IOSCO has indicated that it plans to engage in a confidential dialogue with the identified jurisdictions to "develop a mutual understanding of their ability and willingness to engage in co-operation and assist them in resolving problems."¹¹ To address under-funding and other issues, IOSCO also has indicated that it will provide the identified jurisdictions with technical assistance as needed.

Bilateral Mechanisms for Information Sharing and Ad Hoc Arrangements. Over the past 15 years, the SEC has signed over 30 bilateral information-sharing agreements with non-U.S. regulators, and, according to the SEC, these arrangements "have proven crucial to investigations undertaken by the Commission's enforcement staff."¹² The SEC also relies on ad hoc arrangements with foreign regulators with whom it has no MOU, and makes information requests to foreign criminal authorities through mutual legal assistance treaties administered by the U.S. Department of Justice.

Enforcement cooperation is among the top priorities of the SEC's international program, and an activity to which the SEC is devoting substantial resources. In fiscal year 2005, for example, the SEC reports that it made 461 requests to foreign authorities for enforcement assistance and was responsive to 368 requests from abroad.¹³ As a result, firms must anticipate that reliance on the MOU, the international campaign to bring "outlier" jurisdictions into the regulatory mainstream, and the SEC's commitment to cross-border enforcement cooperation will make their operations increasingly transparent to the SEC and to the world's regulators.

¹⁰ IOSCO Media Release, *IOSCO Launches Initiative to Raise Standards of Cross-Border Co-operation Among Securities Regulators* (3 Feb. 2005) (available on the IOSCO website).

¹¹ *Id.*

¹² SEC Website, International Enforcement Cooperation (available at www.sec.gov/about/offices/oia/ois_crossborder.htm).

¹³ *Id.*

VI. TEN STRATEGIES FOR MEETING INCREASED U.S. AND INTERNATIONAL COMPLIANCE REQUIREMENTS AND EXPECTATIONS

Global firms should ensure that their strategies for meeting increased U.S. and international requirements and expectations begin with the role of senior management and with ensuring a compliance-focused “tone at the top.” They would benefit from adopting an approach to regulatory compliance by which they:

1. Assess and address regulatory exposure on a global basis so that there are no “surprises.” What may be transparent to the firm’s regulators should be well-known to the firm’s senior management.
2. Establish centralized control/reporting in order to ensure a rational and consistent response to issues, and place ultimate responsibility for compliance on senior management to foster accountability, promote a compliance culture, and help ensure that regulatory compliance is given the proper level of attention within the organization.
3. Keep current on applicable regulations and informed regarding new business initiatives that may expose the firm to new regulatory risks or require compliance with new obligations.
4. Establish relationships with each of the regulatory authorities that may directly affect its business. Personal rapport remains an important business asset.
5. Identify potential conflicts and address these with the relevant regulators. Outreach and advocacy to regulators may persuade them of the need to talk regulator-to-regulator to overcome the conflict where possible, provide relief outright where possible, reduce the potential conflict or limit a firm’s regulatory exposure.
6. Formulate compliance standards against the most stringent regulations to which the firm may be subject. Convergence of regulations is underway at the highest level of practice, and the increased focus on regulatory cooperation. Accordingly, the firm may well find itself answering questions posed by its strictest regulator.
7. Look to COSO’s internal control framework components, and the guidance provided by the Seaboard 21(a) Report and the SEC’s 2006 Statement Concerning Corporate Financial Penalties to assure that the firm has established an effective ethics and compliance program on a global basis that is focused on ongoing assessment of effectiveness and on remediation as appropriate.
8. Assess (and adjust as necessary) the firm’s approach to ethics and compliance against the U.S. Sentencing Guidelines criteria. Given their comprehensiveness, a program that

meets these requirements should be viewed as robust, regardless of the jurisdiction in which that program is reviewed.

9. Train employees so that they understand that all personnel are responsible for communicating upward all failures to comply with the code of conduct, other policy violations, and illegal actions.
10. When issues are identified, RESPOND – correct problems before they become endemic through appropriate remediation, and create auditable trails documenting these efforts.

VII. CONCLUSION

To meet U.S. and international compliance regulatory expectations a multinational firm needs to have robust systems in place that look forward in anticipating issues and backward in confirming that the firm's controls in fact operated effectively. The successful firm will be one with pragmatic management that can both adjust assumptions based on a dynamic marketplace and proactively address weaknesses when and if they are identified.