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BRITISH COLUMBIA SECURITIES COMMISSION

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DOUG HYNDMAN: Thank you for joining us, many of you having travelled from parts far away, both within Canada and of course our panellists, some of them from around the world. We have got a lot of experience here in the room. Certainly our panellists are very experienced and knowledgeable about the area we are going to discuss today, but the audience is also filled with many people with a variety of experience relevant to the topic of securities enforcement. We have regulators and self-regulators, we have prosecutors, we have police, we have senior industry and professional people, and we have some academics here. I think we have an opportunity today for a great discussion of some very important issues related to the enforcement of securities laws.

You may have noticed that our conference this year is on Halloween. We're not trying to scare you by having the conference today, although we are trying to scare some of the fraud artists who aren't here today, and hopefully they will tune in to what's happening here and see that we are on their trail.

Enforcement is a critical part of what we do as securities regulators. You can have the best rules in the world, but they are no good if you can't enforce them. And enforcement is an issue that is not just of interest to regulators and prosecutors and police, it

is a question that's of interest to everyone in the market, to the industry, the people who are regulated, I think you need to know and have confidence that enforcement is done firmly and fairly, and of course for investors, enforcement is critical. The perception of effective enforcement is very important to the credibility of the market and certainly for market participants to have confidence in the fairness and efficiency of the market. They need to know that there is an effective enforcement regime.

It is also important to recognize, though, that enforcement is only one tool of the many tools that we use as regulators to try and carry out our mandate to ensure that the market operates fairly and efficiently. We have a variety of other tools, including compliance reviews of dealers and issuers, and all companies that raise money from the public. We educate industry on what the rules are and how they should comply with them. We educate investors on how to protect themselves. The best form of investor protection is self-protection and we try to build a strong link between our investor education programs and enforcement, because we see those as very complementary. And of course we have the power and the ability to create new rules or guidance when necessary to clarify or change what conduct is acceptable in order to ensure that the market operates

fairly.

Many people who discuss enforcement in the media and public sphere are actually quite confused about how enforcement works. If you look at the brochure that was sitting on your chair when you came in, look at the back of it, and it has a little section called "Who Does What in Canada?" And what we have tried to do there is explain in relatively simple terms how the enforcement system works in relation to securities laws in Canada, the various laws, the various players in the system and the different roles and responsibilities they have. When you listen to the public debate all those different aspects of enforcement tend to get mushed together into one seamless system and people often do not understand the various roles and responsibilities.

A typical thing that I hear from many people is why doesn't the Securities Commission put more people in jail? If you read this, you will realize that in fact as securities regulators we can't put people in jail; that's other people's job. We have a very important job and we need to coordinate our activities with others, but it is important in discussing this subject to understand the different roles and responsibilities and how the system fits together.

It is also worth noting that in different countries the "who does what" would probably say

different things. The way you divide up responsibilities and the way different authorities work together differ among countries, depending on their legal and cultural traditions. So you need to be careful in drawing comparisons, but also there is an opportunity in talking to regulators and enforcement officials from different countries to share experiences and learn from each other and get ideas about how we might do enforcement better in our country.

All regulators have an aim of protecting investors, but you will see probably from the discussion today the different regulators get there in different ways. And you will hear about some of the similarities and some of the differences among regulation in different countries.

One thing that affects all of us as regulators these days is the globalization of securities markets. It gets to become a trite topic at securities discussions, but it is nevertheless true that the markets are increasingly borderless and as regulators we need to be able to work together to share information in order to enforce our requirements effectively. Certainly at the British Columbia Securities Commission we have very actively engaged with regulators across Canada and around the world to ensure that we do share information. We have a

variety of cases where we have obtained information from foreign regulators using increasingly effective information sharing mechanisms in order to pursue people who cheat investors, both here in British Columbia and around the world.

So we are all here today hoping to learn about some new ideas, new approaches and strategies for more effective enforcement in our globalized world, and I am hoping that we can all learn something from each other, both those of you in the audience and the panellists. We want your participation. People will be wandering around the room with microphones, and if you have a question there will be opportunities for you to ask those questions during the flow of the panel discussion.

We will also be looking for your feedback on today's conference. I think some of you will have already seen them, but in the lobby there are electronic machines for doing a survey, get your feedback on how the process has worked, and I encourage each of you to sign on and provide your feedback as the day goes on. It is very easy to operate and it gives us very useful feedback we can use in designing future conferences.

At the end of the day we will have a session in the morning, a break, carry on, and then at the end of the session at noon we will have a box lunch available

for you in the next room. I would encourage you, if you need to go back to your office you can take it with you, but I would encourage as many of you as possible to stick around and discuss what you have heard with your colleagues during the morning.

I am not going to introduce each of the panellists. You have their pictures and bios in the brochure. You will get to know them as the discussion goes on.

So I am going to begin by introducing our moderator, Ian Hanomansing, who is going to lead the morning discussion. Most of you know Ian. He is an award-winning journalist. You will know him from his CBC work, but he also does many conferences like this and he did our Capital Ideas Conference last year. I think you will enjoy watching Ian as he moderates the session and keeps the discussion going.

So, Ian, I want to thank you very much for being with us today, looking forward to the discussion and invite you to take the podium. Thank you. (Applause).

IAN HANOMANSING: Good morning, everybody. So those of you who were not here last year will maybe wonder a little bit about the way that the chairs are set up. As we found out last year at around ten o'clock you can do the wave when you are like this, if you find your enthusiasm is flagging a little bit. When you see yourself on the jumbo screen you can wave - (laughter)

- and it adds just a little bit of excitement.

All of you will at least have some of the participants kind of looking at you and they can come up and join me now, the speakers who have travelled across oceans and continents to be here today, and dealing with various time zones. I have had the opportunity to have dinner with them last night and breakfast this morning. Come on up, guys and ladies.

They are experts in their field. They are lively in their discussion and they are going to be talking about all kinds of topics. And as Doug mentioned, one of the key things here is that you have an opportunity ask any question you want of any of the people here, to challenge their points of view, to ask for clarification, and we will be coming to the microphones throughout the morning.

The key thing to keep in mind, I found this out a few times moderating various panels, is that early on people are reluctant to go to the microphone because they figure that surely their question isn't the most important question, shouldn't be the first or second, and then towards the end of the sessions they feel like they had missed an opportunity as there are lineups or a lot of questions to deal with. So try to jump in early on, and someone is going to be looking to see when those questions are coming and they will let me know, and we will interrupt the conversation in

order to give you guys a chance to be involved in that dialogue.

So as you heard, the resumes and pictures of all of our panellists are on the brochure that you have in front of you. So I, too, will not take time in reading through the resumes. You can do that as they speak.

We are going to go through sort of six topic areas, and the first one is going to be about how Securities Commission Enforcement staff determine what cases to bring and where to take those cases. And I want to start with the Chair of the Ontario Securities Commission, David Wilson, and ask you, David, as the regulator of Canada's major stock market and largest public companies, what are the OSC's enforcement priorities?

DAVID WILSON: Well, Ian, the OSC established early this year four key priorities, four key goals for the overall Commission for the next four or five years, and one of those four key goals is enhanced effectiveness of enforcement and compliance. So it is one of our four key goals that are intended to motivate everything we do from the top to the bottom of our Commission, and these goals have been endorsed by our Commission and by our government in Ontario. I mention compliance and enforcement, because I think as Doug alluded to in his opening remarks, securities

regulators don't just enforce the securities laws, they also are involved in assuring compliance with the laws by doing reviews.

And so the way we look at it, Ian, is the compliance/enforcement continuum is the core of the goal, and being effective right across the compliance, through to enforcement is a top, top priority for our Commission.

IAN HANOMANSING: All right. Carlos Conceicao, who was the head of Wholesale Enforcement of the FSA. You are in private practice now. You still are an expert very much in the field. The FSA says it has a risk-based approach to enforcement, and how did that affect the kinds of cases that the FSA took on and how they dealt with those?

CARLOS CONCEICAO: Yeah, in a variety of ways. And I think just before answering that, I think one important point to make is that the FSA is, I think I am right in saying, alone amongst European regulators in saying that it has a risk-based approach to enforcement. I think very, very few regulators in Europe certainly put their hands up and admit that is the case. And to some extent it is a case of necessity, although that's actually perhaps underselling it to some extent.

By way of illustration, when I was at the FSA we used to receive around about 120, 150 possible referrals for insider trading cases for Enforcement to

look at. At any given time we had about 30 cases on the go. We had to be pretty ruthlessly selective about the sorts of case that we could take on. And what we began to do was actually more closely align those cases with the FSA's strategic objectives, which are set more or less on an annual basis, actually referring back to its statuary functions and so on.

And if you have, for example, a particular area of focus, like hedge funds, by way of example, then if a possible referral to Enforcement hit a hedge fund, it might be a hedge fund trader, or might have implicated the hedge fund in any other way, then clearly that sort of case would take priority over, perhaps, other cases which were more similar to those that we had already dealt with on the previous enforcements actions. So we had to be pretty rigorous about doing it.

I think one of the issues is that where you have, as you do in Europe now, a similar playing field in terms of the rules and regulations that underpin something like insider trading, the FSA finds itself increasingly in some jurisdictions out of step with the way in which those jurisdictions approach their cases.

And where you have examples of regulators making requests to the FSA for information, sometimes those requests relate to cases which the FSA would not of

itself be taking on because it wouldn't hit the right kind of risk profile, it wouldn't hit the right kind of seriousness which the FSA would need before it would take a case.

IAN HANOMANSING: Mark Steward, you are the Executive Director of the Enforcement Division of the Hong Kong Securities and Futures Commission. You have experience, obviously, in Hong Kong, Australia and the U.K., but let's focus on Australia and Hong Kong now. As you hear the approach in the U.K., how does that compare to your experience?

MARK STEWARD: Yes, I think that, well, firstly, both in Australia and Hong Kong we would certainly support a risk-based approach. But I say that in inverted commas, because it is not always clear exactly what "risk-based" actually means.

I agree with what David said in his opening comments, that the span of responsibilities that regulators have and the continuum between compliance and enforcement is enormously broad, and it is that breadth of responsibility and also the breadth of regulatory sanctions that regulators have, as opposed to police, which I think creates a lot of, you know, tension, but also richness in what regulators are able to do and achieve.

What that means is regulators must be more strategic, and I think when in Australia and Hong Kong

we think about risk-based approaches, what we are really meaning, certainly in both those places, is being more strategic about what we are doing. The selection of cases is a real minefield. I can't tell you the number of times, certainly in Australia, we decided not to investigate something only to find six months later we should have, and it is a very difficult position for anyone to be in.

IAN HANOMANSING: And what changes in those six months that makes you wish you had acted differently?

MARK STEWARD: Well, usually some further information that you didn't know about six months earlier. But you have lost six months. And from the public point of view, it looks like you have sat on your hands, when in fact you haven't; you made a decision in good faith.

And so that brings me, I think, to a real concern I have about risk-based approaches. As valuable and as important as they are, they are really difficult to understand, and the public who are meant to be protected by the work we do, simply don't get it. You know, for them, our job is co-extensive with the job the police have, which is to uphold the law. Where I come from in Australia the police motto is "Tenez le Droit", uphold the law, and people expect regulators to do that, and the fact is no one does it. But explaining why we do what we do and why we don't do

what we don't do is extremely baffling.

IAN HANOMANSING: I will ask you this, but anybody can jump in on this question or any other: Do you have a responsibility to be explaining it better and to whom, the public at large, to investors?

MARK STEWARD: I think we have a responsibility to make sure the choices we make are better ones. Yes. Yes, the answer must clearly be yes.

IAN HANOMANSING: But I mean in a practical way, though. (Laughter). I am not trying to put you on the spot at all. But I am just wondering, it's a baffling concept for a lot of people, and so how do you then - again for any of you - how do you explain that, and do you aim that explanation to the general public or to sophisticated investors, or...

MARK STEWARD: You know, I can tell you, and in fact I just ran into someone I used to work with in Australia who used to do this sort of work. When something is knocked back, enforcement won't take it on, someone in the organization has to confront the complainant and say, "I'm sorry, we're not doing this." So how do you talk to the victim and say "Sorry, your complaint's not good enough, not big enough, not valuable enough, it's not risk-based, whatever it might be." How do you look that person in the eye and say, well, you are performing a public service when their grievance is not important to you? It is very hard to do. And

it's the language of doing that that I think is something we have to really work on. Because there will be cases where the answer is no.

IAN HANOMANSING: Michael Code, you are a Law Professor at the University of Toronto and you have experience on the prosecuting side and on the defence side of criminal law. Give us a sense of how criminal enforcement fits into all of this.

MICHAEL CODE: Well, there is considerable overlap between the criminal law and the regulatory powers of the Securities Commission in terms of the conduct that is being looked at by those two areas of enforcement. In the sense that the criminal law has always provided the three broad crimes of theft, fraud and forgery, which often apply to various forms of securities market misconduct that regulators are looking at, and increasingly over time the federal *Criminal Code* has added very market-specific crimes, such as wash trading, issuing false prospectus, and now most recently in the last couple of years we have finally added a federal crime of insider trading and tipping, which is of course of significant concern to the Securities Commissions.

So the conduct at issue is often the same for the criminal law as it is for the securities regulators, but the difference between the two fundamentally is threefold, it seems to me. First of all, the criminal

law has a much, much higher burden of proof than the regulators ever have to meet. Secondly, the criminal law generally requires a very high mental element or fault element, thus usually a subjective fraudulent intent on the part of the market participant who is the target of the investigation, whereas securities regulators simply have to show an absence of due diligence, a negligence standard. And finally, of course, the consequences are enormously different. The objective of the criminal law is penal and punitive and jail sentences are provided, whereas regulators, of course, do not have access to those kind of penalties. Their penalties are civil in nature, licensing, fines, compliance oriented, preventative kind of sanctions as opposed to punitive sanctions, generally. So there is a considerable degree of overlap but also clear distinctions.

IAN HANOMANSING: What about the decisions on what cases to go ahead with? Here in British Columbia it is the prosecutor's decision whether to lay a charge based on substantial likelihood of conviction and what's in the public interest. In other provinces I guess the police decide whether to lay charges, different provinces have different rules. In your experience when it comes to the criminal law and securities issues, what is it, a risk-based approach? Is it a harm approach? How are the decisions made about

laying criminal charges?

MICHAEL CODE: Well, the police investigate it and work up the investigative brief. And here in British Columbia the Crowns look at the charge prior to the actual laying of the charge and they have this charge approval system, or what we call pre-charge screening.

In Ontario and in most other provinces in Canada, Quebec and New Brunswick also have pre-charge screening, but in the other seven provinces of Canada the prosecutor does not screen the charge until after it's been laid and they screen it to generally the same standard of reasonable prospect of conviction or reasonable likelihood of conviction.

So the processes are broadly similar across the country. There is a slight difference between the timing of when you bring the charge. And I wouldn't say that it's based on a risk-based analysis. It's based on the strength of the case, the likelihood of success. If the police have laid a charge, it should be prosecuted if it meets the evidentiary sufficiency standards that it's likely to succeed at trial.

IAN HANOMANSING: Mary Condon, you are a law professor across town from U of T at Osgoode Hall, and securities regulators have delegated certain enforcement duties to SROs and does this delegation make sense to you; is it working?

MARY CONDON: Well, just to pick up on Mark's comment about

overlap, and I guess Michael's comment about overlap between regulatory enforcement and criminal enforcement, I think one of the things that we may need to address a little bit more directly going forward is the fact that there is also overlap between the functions that can be performed in enforcement by government regulators and by self-regulatory organizations, whether that is the Investment Dealers Association, the Mutual Fund Dealers Association, or Market Regulation Services. And, you know, we may pick up on this a little bit later when we bring in the U.S. experience.

But there is research that suggests that there is a bit of a cleaner division of labour between the enforcement function of the government regulator, particularly the SEC in the U.S. and the self-regulatory organizations like the NYSE or the NASD than we have here in Canada. For example, you know, some of the research that I did for the Wise Persons' Committee a few years ago, or more recently shows that certainly government regulators like the OSC do deal with registrant-related misconduct, using their public interest powers under section 127, whereas in the U.S. arguably those government regulators focus pretty heavily on issuer-related infractions, as opposed to registrant infractions. So we do seem to have the situation where there are sanctions, monetary and non-

monetary sanctions, available to self-regulators in Canada as well as to government regulators.

On the other hand, stepping back from the sort of application of sanctions, there is no doubt that the sort of fine-grained type of compliance and supervisory work that's done by self-regulatory organizations in Canada is essential to the integrity of the market, and also something that government regulators themselves would have a great deal of difficulty in doing, sort of monitoring broker/client interactions on an ongoing basis, account supervision, real-time market surveillance, I think it would be really difficult for government regulators to reach on that kind of supervision.

IAN HANOMANSING: So I would remind all of you that you have an opportunity to ask questions and this would be a good time to maybe ask a couple of questions based on what you have heard so far. And remember what I told you, this happens all the time that early on there are few questions, later on there are too many. So do feel free to catch the attention of people who are holding the microphones and they will direct that to me.

Let me just ask the people doing sound. Do you want me to move Mary's microphone, because I heard a little bit of feedback. I wonder if she should put it up a little higher?

A VOICE: That would be great.

IAN HANOMANSING: Yes. Maybe you could just slide it up, yes, about that. That might help out a little bit.

So no questions yet from the floor?

ETHIOPIS TAFARA: Might I say something?

IAN HANOMANSING: Yes, absolutely.

ETHIOPIS TAFARA: On case selection.

IAN HANOMANSING: Yes.

ETHIOPIS TAFARA: From our perspective I think the point of departure for us is really the fact that we believe, it's our view that to inspire investor confidence you have to have an effective enforcement program. And to that end, as one of our chairmen put it, you have to leave everybody with the impression that you are everywhere all the time. And so in any given year, you will see that we have a number of cases in all the various areas of fraud, whether it be pyramid schemes, manipulation, insider trading, or what have you.

What is done on a risk-based approach is the percentage of cases in any given year that focus on a particular area. As you know between 2000 and 2005 we had a number of financial fraud investigations and cases that we brought, and there was a larger number of cases was in that area. Now we are seeing a resurgence of insider trading so there is a larger percentage of cases involving insider trading.

But in any given year we try to touch or have

cases in all the areas that we have traditionally investigated just to leave the market with the impression that we are everywhere all the time.

IAN HANOMANSING: Absolutely.

CARLOS CONCEICAO: Just building up on that. I think, as well, in a perfect world, of course, if you're a regulator you'd have a priority swiftly followed by an enforcement case to make the point against that particular regulatory priority. Unfortunately the world for regulators isn't always well defined and you do have situations where you have a time lag effectively between issues that you have identified as a priority and then the kind of messes that comes out through enforcement cases, where perhaps that priority has moved on, although often that is not the case.

I think the other interesting issue, as well, and related to this, is the extent to which regulators communicate to the world their priorities and what sort of issues you have. And I think the FSA, an interesting illustration, the FSA became a bit unstuck on this particular issue in that it often used to use the phrase "enforcement priorities". And at the beginning of a year I and my colleagues used to sit up with PowerPoint slides at industry gatherings and say "These are going to be the areas of top enforcement action over the coming years" and so on. And, you know, we did that year in, year out. One particular

year the FSA had a case taken to the tribunal, and it was a mis-selling case, and one of the arguments run against the FSA was this case on any ordinary criteria should not have been brought. The evidence was weak. All these things were wrong with it. The only reason it was brought was the FSA had set itself a standard by saying this is a priority area. And once actually a case touched that priority area, it felt that it had to actually bring it, come rain or shine, in terms of the evidence. Now, that wasn't the case, but it was a very powerful argument, one which actually resonated following an enforcement review.

So the phrase "enforcement priorities" has become banned, where in news speak - (laughter) - news speak is "enforcement supporting the FSA priorities" which is, you know, is a distinction without a difference. But I think then you do run the risk, I think, in terms of setting priorities that you do end up having those sorts of arguments made against you.

IAN HANOMANSING: Setting priorities or just making them public?

CARLOS CONCEICAO: Sorry. Well, absolutely right, actually setting priorities is the right thing to do. Making public I think is the right thing to do as well, but you have got to be mindful of the sort of brickbats that can be thrown at you if you do, if you go down that route.

IAN HANOMANSING: Yes, absolutely. And again do feel free to jump in. Yes?

MARY CONDON: Well, just, you know, I don't want to get the discussion derailed on the whole other question about, you know, the structure of regulation that we have in Canada, but I think one of the issues for us in Canada that we need to address, too, is the question of whether enforcement priorities by government regulators are set, you know, provincially, or there are some, you know, more coordination nationally around matters that touch on more than one province. And I think that David may be able to speak to this in terms of task forces and so on that have been set up to try to bring a bit more of sort of a national perspective to enforcement, but I think it is something that a lot of people are interested in.

IAN HANOMANSING: And a continuing topic of discussion here will be different jurisdictions, and so we will definitely get to those issues.

Now, we have a question over on this side. So when you ask the question, let us know who you are and then if you want to direct it to someone or just ask it generally.

CHILWIN CHENG: Hello, my name is Chilwin Cheng, I am with Market Regulations Services. Question for the panel in the issue of priority selection. At Market Regulation Services we are the real time surveillance

regulator of the markets, the equities exchanges, and we often have a challenge in trying to ascertain what cases we pursue that are more technical in nature but have a broad range effect in the cases of, for example, integrity of prices or volume and that type of case, versus where there is an identifiable victim or identifiable loss.

And so a recent example, for example, is in the issue of financial compliance over the Investment Dealers Association. We have the situation of recent credit crises and it may not have been a big issue in terms of whether these -- I am not saying there's an issue in Canada or the IDA was or were not looking at these issues. Certainly, at RS we were not, we were looking at equity issues. But all around the world we were knowing that there were issues relating to financial compliance and value at risk models that may have been deficient, and nothing was said until of course people start losing their homes. Yet it is not the same type of headline-grabbing news for enforcement regulators to be looking at, and I am wondering if those types of issues are those considered by your agencies.

IAN HANOMANSING: Who would like to jump in on that? Carlos, you are nodding, so I am going to point to you. (Laughter).

CARLOS CONCEICAO: I wasn't nodding at the jumping in. No,

I was nodding at the dilemma. On one level it's an easy question, the answer is yes, those are exactly the sort of dilemmas that you face. And I think you start thinking about, you know, the strategic priorities generally.

Plus also something which was raised right at the very start of the conference this morning, that there are more tools available to regulators than just the enforcement tool. And it's quite often -- well, it's not often, but sometimes the case that enforcement is not the most effective tool to address a particular issue.

So if, for example, you have a practice which is wrong but it's a technical breach, then it may be that you can think about addressing it through another route, rather than by taking enforcement action. Now, it seems to me, though, that is where you have issues around investor protection, around people losing money. Regardless of what particular niche, specific priority you have set yourself for this year, that is a very powerful argument in taking that case as an enforcement case, particularly if actually it appears to be widespread. So I think in those sorts of areas you have got to think about what other tools do you have available, how appropriate is the enforcement tool to fix the particular issue that you have and, you know, are there other things that you could do,

perhaps sending out the messages to change market practice in a different way.

IAN HANOMANSING: None of your colleagues is nodding, so I will let them off the hook. I take it you agree, or anybody want to add to that?

MARK STEWARD: I think what Carlos says --

IAN HANOMANSING: Yes.

MARK STEWARD: -- is broadly right. What I thought in listening to the question was something that I could have mentioned earlier about the choice of cases and risk-based enforcement, and it is the fact that the questioner works from an agency that detects its own work, you know, it is not complaints-based enforcement. It is detecting the work through a surveillance system.

In Hong Kong, it is sort of quite unique. The SFC is the day-to-day monitor and surveillor of the market, and so we have all the machines set up and they blink and tell us all sorts of things and they trigger work. And it is a very different mindset compared to Australia, which is very complaints-focused in determining what sort of work you end up doing in enforcement. And I am not quite sure what the right balance is, but I am sure there needs to be a balance for regulators between work that is generated by people who make complaints, and detection, you know, using your experience, your know-

how and your systems to make better choices about where you put your resources.

IAN HANOMANSING: Okay, we are going to move into a second area of discussion now, the extent to which securities regulators in Canada and outside of Canada co-operate with each other, with self-regulatory organizations, with the police and prosecutors. Ethiopis, I would like to start with you. You are the director in charge of international affairs at the SEC. So what kind of assistance do you get from different securities regulators?

ETHIOPIS TAFARA: Oh, it runs the gamut. We on a yearly basis make about 500 requests to our counterparts around the world, we receive about 400 from our counterparts, and our requests range in terms of what we are seeking, bank records, brokerage records, telephone records, ISP records, testimony, what have you. And frequently this assistance is sought, this information is sought through arrangements, whether they be bilateral memorandum of understanding, or now there is this quite well-known multilateral memorandum of understanding that sets forth our expectations in terms of assistance from one another.

I think the prevailing view now out there is that with global markets and national regulation we won't survive unless we can actually help each other out, and that is what has led to the plethora of

arrangements that we have bilaterally and multilaterally.

But ultimately that is not what is most important. Those are just frameworks for assistance. What matters most is that we each have the legal power to actually collect information on behalf of somebody who needs it, even if there is no violation of law in our jurisdiction for us to be able to share it with our counterpart, and for our counterpart to be able to use it for the purposes that the information is sought.

And, you know, we went out and sought this kind of authority back in the early '90s, 21(a)(2) of our '34 *Act* basically empowers us, empowers the Commission to compel information from anybody anywhere in the United States pursuant to a request from a foreign counterpart. We share it with them, have some assurances as to how that information is used, but then they use it for the purposes that are being sought, which are generally enforcement purposes.

We also co-operate, obviously, with authorities within the United States. We co-operate with the PCAOB, the Public Company Accounting Oversight Board, with the self-regulatory organizations that Mary mentioned, and the criminal authorities. Violations of the securities laws generally are both civil and criminal violations, so any given set of facts could

result in parallel proceedings and we work with our criminal authorities to be sure that we are doing it in a coordinated fashion. There are always concerns about that sort of relationship. We have to have an independent interest ourselves when we are working with the criminal authorities. We cannot be used as an agent for the authorities, for the criminal authorities. But to the extent we do have an independent interest, in the interest of making sure that you have efficiency and effectiveness in the enforcement system, there is this co-operation that takes place domestically as well.

IAN HANOMANSING: So give us an example, a concrete example of the SEC working with B.C., for example.

ETHIOPIS TAFARA: Well, there is a lot of co-operation that takes place with the British Columbia Securities Commission, particularly in looking at manipulation involving thinly-traded stocks in the OTC market, the Bulletin Board that we have in the U.S. Frequently the companies and the principals are located in Canada, the promoters of these schemes are located in the United States, and in order to effectively pursue these manipulations, on the B.C. side, there is information that is obtained from the companies and the principals, on our side, there is information that we obtain from the promoters, and together we put together the investigative record.

There was a specific case involving a Nevada company called Greyfield Capital and it was touting the stocks of a dealership here in British Columbia, and B.C. went out and got information from the dealership as to the veracity of the claims that were being made about it becoming the biggest dealership in Canada within a short period of time. We got information from the promoters, the schemers in the U.S., and then, you know, we leverage our resources, put the case together and then at the end of the day there was sanctions that were sought by B.C. and there were sanctions that were sought by the SEC with respect to the activity in the U.S., and we worked very hard to be very sure that what we were doing was complementary and the sanctions that we sought were complementary.

IAN HANOMANSING: And how easy is that? I assume there must be one of these agreements, the MOUs with British Columbia and the SEC, and is it just a matter of making a phone call or is there red tape you have to go through?

ETHIOPIS TAFARA: I wouldn't say it is a phone call, I wouldn't say it is red tape. We actually have had a memorandum of understanding with British Columbia, I think it is one of the first that we signed with the Canadian regulators, generally speaking. And you set forth your concerns and your allegations in a

document, usually a three- or four-page letter, the potential violations of law that you are going to be pursuing and the kind of evidence that you need in order to determine whether or not you have got those violations. And the co-operation is relatively seamless and it happens very quickly. We are able to obtain information and share it within a matter of days and weeks rather than months and years.

IAN HANOMANSING: So perhaps continuing, David, the theme of seamless co-operation or not. We have 13 securities regulatory regimes, I guess, in Canada. How do they work when it comes to enforcement matters; how do they work together?

DAVID WILSON: There is, I don't think it is an overstatement, an intensive communications protocol between all the 13 securities regulators enforcement branches. Each has an enforcement branch or department. There is a CSA Enforcement Committee that formally meets every month, sort of to compare notes and activities in a totally transparent way. And then between those meetings there is a huge amount of informal picking up the phone and calling or e-mailing, and so it is a very, very open co-operative communication between the securities regulators in Canada.

You mentioned 13, and of course that is right, Ian. But the major enforcement branches in Canada

really reside in the four large provinces. So those four enforcement heads and their staff, Quebec, Ontario, Alberta and B.C., they all know each other very, very well. They talk to each other all the time. So there is a very, very large amount of communication back and forth across the securities regulatory system, that piece of the mosaic. That is just one piece as speakers have already said today. The enforcement mosaic in Canada is a very complicated broad spectrum. The enforcement piece that the securities regulators are responsible for is only one section of it all.

The other thing I will mention is the reciprocal orders is something that people ask about. If someone is convicted of a *Securities Act* offence in one province, can they just hop across the border and carry on their bad behaviour in another province? So we have a system of reciprocal orders in Canada. There is a Reciprocal Enforcement Committee of the CSA. So this is fairly new, but it is a much more active part of what we are doing, and so when one province has an enforcement action successfully against an individual, a reciprocal order can get issued in a sister province, and so the person is banned from activity or some sanction in that province, too. So it is fair to say that it is highly coordinated across our securities regulatory part of

the system.

IAN HANOMANSING: Mary, tell us about the American situation.

MARY CONDON: Well, Ethiopis has referred to some of this already, but arguably the U.S. dividing up of responsibilities is even a little bit more fragmented than we have in Canada, in the sense that, you know, we mentioned already that there are active self-regulatory organizations like the National Association of Securities Dealers and the NYSE, the New York Stock Exchange. Then there is the government level, which in fact has two components to it, the Securities and Exchange Commission at the federal level, and then a multiplicity of state regulatory agencies, some of which are more active in enforcement than another. And then layered on top of that again there is both federal and state criminal justice authorities, there is the Federal Department of Justice and then state attorneys general. So that in the U.S., you know, there are multiple sources of authority in relation to dealing with infractions of securities norms.

And indeed again, you know, there are various ways of counting up numbers of actions taken and inputs and outputs in enforcement in some of the research projects that have been done. But, you know, some ways of showing the data suggest that in fact state regulatory agencies in the U.S., collectively

speaking, account for more enforcement activity than the federal SEC. So that they remain a key player in enforcement, even where there is, you know, an obvious very active presence by the federal regulator.

IAN HANOMANSING: Are there places in the States that you can run and hide because of all these different jurisdictions, some states that maybe enforcement may be not as vigilant as it is somewhere else?

ETHIOPIS TAFARA: I think it is pretty difficult to run and hide in the U.S. because of the multiplicity of authorities that have enforcement power. And indeed there are many who argue that there is very effective enforcement in the United States because you have this competition among all these enforcement authorities. (Laughter). And so I think it is difficult to run and hide.

Of course, a concern arises when enforcement crosses the line and actually becomes a way of setting policy. And then having a multiplicity of authorities where in essence not simply enforcing the law, but through enforcement action are setting policy, leads to a less than coordinated policy when it comes to securities regulation throughout the country, and that is problematic, and that really is the province of the SEC. But from an enforcement front, I think the number of authorities that you have is not necessarily a bad thing. Indeed, it may result in extremely

effective enforcement by virtue of this competition.

IAN HANOMANSING: Michael, I will bring you back into the conversation and ask you about regulators working with police. Should securities commissions in Canada be working hand-in-glove with police investigators?

MICHAEL CODE: Well, the answer is yes and no. It is a complicated constitutional dilemma. Based on the simple fact that the police, the criminal authorities are in a highly adversarial relationship with the target of the investigation, where their object is to ultimately take away that person's liberty. And so the *Constitution* establishes fairly high standards for police law enforcement evidence gathering activities because of the concern to be very careful about protecting the liberty of the subject and ensuring high standards by police law enforcement evidence collecting initiatives, given that the objective is this criminal objective.

Regulators are not put to such onerous standards because their objectives are not these highly adversarial objectives that seek to take away the liberty of the individual, since they have a regulatory relationship with the person and are seeking to impose civil sanctions that are compliance oriented or preventative. The *Constitution* sets the bar much lower and gives the regulator much broader powers. So the two distinct functions of the police

and the regulator have to be kept separate because their powers are quite separate. So that is the sort of the "no" answer.

Having said that, if the police have looked into a matter and have decided that they are not going to pursue it as a criminal matter and that there are, however, regulatory concerns, there is nothing to prevent the police from sharing the information with the regulator. And conversely, if a regulator looks at a matter and comes to the conclusion that this really is a matter that should be handled by the police, there is nothing to prevent the regulator from sharing that information with the police up to the point where they determine that it is criminal.

What is improper is if everybody agrees this is a criminal matter and then you use regulatory powers and share the fruits of the regulatory investigation with the police at a point where you have determined that it truly is a criminal matter, then you are using regulatory powers for a criminal law purpose and that would be a serious breach of the constitution.

IAN HANOMANSING: So, Mark, the Hong Kong and -- did somebody shout out? Yes?

MARK SKWAROK: Hi, Mark Skwarok, I am a lawyer interested in enforcement and, I guess, primarily enforcees. This is a question primarily directed to Professor Code.

I think everybody in the room is going to concede that an important part of securities regulation is criminal enforcement, and yet in Canada we seem to be woefully behind the eight ball in that area. We have got RCMP who are just as skilled, if not more so, than their counterparts in the U.S. Our Crown counsel are just as good, if not better, than the Justice Department, and in my experience our Superior Courts are at least as skilled as the District Courts in the U.S. So why is it in your view that we have such an inadequate, and woefully so, criminal enforcement history in Canada? (Laughter).

A PARTICIPANT: Good luck! (Laughter).

MARK SKWAROK: I say this to Professor Code, knowing he is one of the best lawyers in Canada. (Laughter).

IAN HANOMANSING: If not the world. (Laughter).

A PARTICIPANT: Certainly better than the U.S. (Laughter).

MICHAEL CODE: Do I have to accept every one of the assumptions in your question before I answer it? (Laughter). It is a hard question to answer because it is loaded with so many assumptions.

I think certainly when I was brought up in the law in Ontario in the late 1970s and early '80s, there was a very strong culture of criminal enforcement of white-collar frauds in the province at that time, and there was a powerful cadre of prosecutors at the Crown law office who did nothing but white-collar fraud.

Clay Powell led this team of superb lawyers who were known as exclusively dedicated to white-collar prosecutions and they built up tremendous expertise working mainly with the OPP and the RCMP, but also with municipal police forces. And there was a lot of white-collar fraud enforcement in Ontario in the late '70s, early '80s and a lot of expertise got built up in police and prosecution offices.

I think undoubtedly there has been a perception of a decline in the expertise and vigour with which white-collar crime is enforced, at least certainly speaking for Ontario, the jurisdiction that I know best. A lot of it had to do with, as we all know, governments in this country, and police departments are funded by governments, went through tremendous budget crises in the 1990s when we finally faced up to budgetary deficits that we were running across the board federally and provincially, and real efforts were made to balance government budgets. And one of the consequences of that, and I watched this happen in the 1990s when I was at the Attorney General's Department, is one of the first priorities that goes when you have to cut budgets is white-collar fraud, because it is felt that it has a lower priority than cases where you have got bleeding victims lying on the streets with crimes of violence.

And so the expertise in the police forces and the

expertise in the prosecution offices that had been built up in the late '70s and early '80s seemed to decline. And what is happening now after we have finally got our fiscal house in order and budgets have been balanced and we are running reasonable surpluses, is we are now starting to fund back up. And so the RCMP has set up these IMET units and there has been attempt to replenish the resources of law enforcement in these areas. And that will take some time to develop a cadre of experts in the RCMP, in the police forces, and in the prosecution offices who do this kind of work. This is specialized work and it requires real expertise. And certainly my hope is that we will re-establish those areas of expertise and skill and become as vigorous as we were 20 years ago.

IAN HANOMANSING: Yes, go ahead.

ETHIOPIS TAFARA: In the interest of debate I wonder whether I might challenge the criminal/civil divide that has been set forth, with the criminal side being responsible for punitive action and the civil side being responsible for compliance. I wonder whether it is not better to think of what regulators do as corrective action, which is obviously injunctions and cease and desist orders. But I think part of corrective action necessarily involves restitution, it involves disgorgement, and because for me corrective action also includes deterrence, I would think that

regulators as part of that should be seeking penalties. And if you divide it that way, might you not get more enforcement actions that are hybrid between the criminal/civil divide that you have set forth? And I wonder whether or not the paucity of cases that is being alluded to has something to do with the divide being as strict as you have set it forward.

MICHAEL CODE: Well, there is no doubt that regulators do have some punitive powers and there being the jurisprudence is getting muddled as to whether the true purposes of the regulators are civil or criminal, and there certainly have been indications in the jurisprudence that deterrence and punishment are intermingled with regulatory powers. But let's be clear, the critical punitive sanction for really serious misconduct is the deprivation of liberty, and that is the exclusive preserve of a criminal prosecution or a quasi-criminal prosecution.

GORDON McRAE: I wonder if I can add a little bit to that. I am Gordon McRae, I am in charge of the RCMP Commercial Crime Section here in British Columbia, and I agree with everything you have said.

I wanted to add another part of it, inasmuch that I have been involved in this kind of work for a long time. You look at my youthful appearance, I am sure a lot of you find it hard to believe. (Laughter). So I

was there in the early '80s and I have seen it when it was good and I have seen it when it was bad, and it is getting better now in terms of funding from government and the rest of it.

The point I want to make is that what we used to be able to do with two investigators in two months now takes us six investigators in six months. And the reason is that in terms of gathering the evidence, in terms of disclosure, in terms of having a regulatory body like the B.C. Securities Commission identify a criminal offence and not have them being able to give the police the evidence, not having subpoena power, not having grand juries like they do in the United States -- we look longingly at our colleagues to the south in terms of their powers. So that is an aspect that when the question was asked about criminal enforcement, it plays a big, big part into it.

And you talk about strategically selecting files, strategically selecting your investigations, you have to determine how many investigators is this going to take and how long is it going to take, because when they are on that file, they cannot be doing something else. So that is one of our challenges. And I would be interested to hear from the other countries whether or not their police have subpoena power much like the grand juries in the United States.

IAN HANOMANSING: Well, Mark, actually, you know what, we

have been interrupting you, Mary, so you jump in.

MARY CONDON: Well, let me just follow up on that, just because the comment I wanted to make does follow, go there, and also responds to the assumption from the earlier question that the appropriate comparator for Canada is the United States. Because I think that that is very much part of the public perception, media perception and so on. And I think that there is really grounds to critique that, in the sense that again, you know, drawing on research that has been done in the academic settings, it turns out that the U.S. is the big outlier in relation to both the use of the criminal law to prosecute white collar crime and, you know, sort of fairly rigorous sanctioning at the regulatory enforcement level as well.

So, you know, just following up on the point that was made, I think in fact it is more appropriate for Canada to look to countries like the U.K. and Australia as the appropriate benchmark for us to ascertain whether we are achieving the appropriate division of labour and enforcement and have the appropriate kinds of powers.

And then on the deterrence front, as Michael said, there is a lot of muddled jurisprudence on this now. And I know I am putting my head into the lion's mouth by criticizing the recent Supreme Court decision in *Cartaway* because it originally emanated from a B.C.

Securities Commission action. But it does seem to me that to say that you can wash punitiveness out of deterrence and that you can see deterrence as only being about being protective and forward-looking is, you know, a very problematic position to take because I think there is no doubt that if you are looking to deterrence in the enforcement area, as opposed to the standards setting area, I think you are almost certainly talking about being punitive as well as being protective.

IAN HANOMANSING: So the questions are obviously great and are creating some interesting answers and discussion. So again if you do have a question, you can signal one of the people in your section who has a microphone and they, in turn, will signal someone who will let me know when to go to those microphones.

So, Mark, this is a good opportunity to go to you. Actually, it isn't a good opportunity to go to you because I need to go to Michael first.

MICHAEL CODE: I just wanted to add a quick note to our questioner to assure him we are not ducking his question about the grand jury subpoena. We are going to come back to that. Sorry.

IAN HANOMANSING: No, absolutely, that is a good point.

MICHAEL CODE: I just wanted to tell him that we will be addressing that issue.

IAN HANOMANSING: At around 1:00 this afternoon.

(Laughter).

So give us the perspective from Hong Kong and Australia in terms of police powers and regulatory agencies.

MARK STEWARD: Well, the differences are quite stark, but I am not sure the position is the same as it is here in Canada. The power of the police in Australia and Hong Kong is the power of the badge, you know, there is no other power. Effectively the police need to secure evidence by finding people who are prepared to give it voluntarily, and that is the same in Hong Kong and Australia.

Like regulators here in North America, the Hong Kong SFC and ASIC in Australia, has the power to compel the production of documents, has the power to compel testimony.

One of the great frustrations, and I am just picking up a point Michael made is that as people both in Hong Kong and Australia will say to me, "Is this investigation a civil investigation or a criminal investigation?" as if there is a difference between the two. Certainly in both Hong Kong and Australia there is no such thing as a civil investigation as opposed to a criminal investigation. There would be nothing to prevent all of the investigatory powers that regulators have being deployed to conduct a criminal investigation and for the product of that

investigation to be given to the police, if that's necessary.

There will be all sort of protections that will ensure that privileged material and things like that are protected and cannot be used in proceedings, but leaving that aside there is no, you know, clear bright line between the two, and the system, in fact, is designed to encourage police and regulators to work together.

That is particularly so in Hong Kong where as a regulator we don't have the power to lay any indictable criminal charge, which ASIC can do in Australia. So that means if we have serious criminal misconduct, say, a serious criminal insider dealing, it is in our jurisdiction, it's our patch, it's our job to investigate that, but given that we can't actually lay the indictable charge, we have to seek the assistance of the police. So, you know, the whole system is designed to make us work together, and we do.

Now, it's not to say there aren't other issues and, you know, avoiding duplication of work and ensuring the relationship between different agencies is a good one, is an ongoing task. So that's basically the position.

I will just add one more comment about the use, about existence of powers to compel. A number of

years ago in Australia - well, not that many years ago - the federal government created a National Crime Commission which was designed to coordinate the different respective roles of each of the state and federal police forces and other law enforcement agencies like the regulator. And so the heads of all those organizations sit on the board of this commission, and they coordinate criminal intelligence and coordinate effort to ensure that the different gaps that might exist between all of the agencies can't be exploited by criminals. Now, that agency does have the power to compel testimony, so that is quite a unique statutory creative body that coordinates police investigation work around the country. And for particular kinds of criminal activity, particularly organized crime, this particular power can be deployed. So it's quite a unique exclusive part of police work in Australia and it works very well.

IAN HANOMANSING: Carlos, the situation in the U.K.?

CARLOS CONCEICAO: The situation in the U.K. is actually quite simple and straightforward in a sense, in that the Financial Services Authority is the single financial services regulatort regulates the whole gamut of financial services, and it also is a prosecutor for various offences, including insider dealing and other forms of market manipulation. So at

a stroke you can cut through some of the issues that have been discussed already, although that in itself raises other issues.

In terms of dealing with the police and other regulators, there is no real challenge in the U.K. towards the FSA disclosing information to the police, subject to the points that were made earlier on about the extent to which that may be an abuse of its regulatory powers, if it's in reality a police investigation, but that doesn't really tend to be much of an issue.

The key focus, I think, in terms of controversy, is around disclosure by the FSA to overseas regulators, and in particular I think overseas regulators which are then under some duty or some obligation to pass that information to their criminal prosecuting authorities. And it is a very real issue for the FSA at the moment.

And there was a sort of high-profile example which involved disclosure to the SEC by material obtained by the FSA in relation to an aspect of the *Enron* case. That information then found its way into the Department of Justice, the Department of Justice extradition request to the U.K. in relation to the three individuals who had provided information to the FSA. And that raised the whole spectre of the use to which regulatory information that's obtained in the

course of regulatory investigation can be put in criminal proceedings. But, you know, by and large that's not really an area of controversy.

I think the other aspect, though, is actually how regulators work together and the different aspects of disclosing information for their own investigations, and there are some good examples and bad examples that perhaps we can touch on later on.

I just want to pick up a couple of points in relation to the effectiveness of the U.K. regime, in particular picking up something that Mary said in relation to what is the right comparator. And it may be good news for regulators here in Canada to know that in the U.K. the FSA is regularly beaten around the head for its paucity of its enforcement actions as compared to the SEC.

And in fact actually at breakfast we were talking today about an example even when the FSA did take action, some of you may remember the Shell misreporting world reserves case. It was a joint FSA-SEC investigation. Fines were issued on the same day. The FSA fine, which I was responsible for levying, was £17 million, the SEC fine at the exchange rate in those days, although things have changed a bit now - (laughter) - but exchange rate in those days was £66 million. And my postbag was full of issues such as letters from disgruntled people saying, "This just

shows what a toothless watchdog the FSA is. (Laughter). Even when you take action, your fine is a fraction of that which the SEC has fined. Kindly explain." (Laughter). And the answer, of course, no one's interested in the explanation. (Laughter).

But I think it is a point worth repeating. The sort of prosecution record on fraud in the U.K. generally on the police side is patchy. There are some good examples and there are some bad examples. So some of the reasons that we have rehearsed already in terms of funding, in terms of priorities, and police targets, and so on.

Now, the criminal prosecution record on insider dealing is, and I use this word advisedly, and actually I can use this word because I was responsible for doing this work, woeful - (laughter) - in a sense. And, you know, there are a lot of reasons behind that, but I think it's not always right to necessarily compare yourself to the U.S. I think it's a very, very valid point to make that actually these cases, insider dealing, is very, very difficult to bring as a criminal charge. You know, there is a whole raft of reasons why that is the case. And, you know, good luck in the U.S., they have managed to have a system where they have managed to cut through that. But a lot of regulators, a lot of prosecutors are searching for answers for those sorts of issues. It is not an

easy exercise.

DAVID WILSON: Ian, could I just make a comment, a little different angle on something that Michael Code said when he walked us through the history of the decline of expertise and resources dedicated to the pursuit of white-collar fraud. The sad part of Michael's little history lesson is the government's cutback, the first priority of cutbacks was in the area of white-collar fraud enforcement because it was perceived by governments to be less important than crimes involving people lying bleeding in the street.

The reason for mentioning what Michael said is I think it is incumbent on securities regulators, prosecutors, and anyone who has an opportunity to shape public opinion, governments, to educate the voters which influence governments, that this is not victimless crime. These crimes are terrible crimes against peoples who have saved money and have lost it. So a little bit of motherhood speech there, but I think it's appropriate to observe the sadness of that decline in funding.

But as Michael said, the pendulum has swung and the money seems to be coming back again, but the cuts were based on a misperception of the severity of the crime by government.

MICHAEL CODE: And the police forces themselves have got to make it a priority. I mean, the budget setting is

done by the government, but the priority setting within the police department is done by the police. And the police have got to commit themselves to allowing a cadre of investigators to stay in these specialized squads and develop expertise and promotion through the ranks by working as white-collar fraud investigators. And we all know the way you get promoted in a police department is by going to the homicide squad, and there has got to be a culture within police departments that encourages the best and the brightest of our officers to stay in white-collar fraud, to make it a career to be a white-collar fraud investigator and develop that expertise.

IAN HANOMANSING: Well, to close off this section, Mary, let me ask you about the constraints in co-operation to the extent that they exist between police and regulatory bodies, do they make sense, those constraints?

MARY CONDON: Well, I think as Michael said earlier they would make sense if we, you know, maintained our commitment to this division of labour between the purposes of criminal justice sanctions and the purposes of administrative sanctioning, and that if we had this idea that, you know, criminal justice was sending people to jail, you know, monetary fines, and regulatory sanctioning was about something else, it was about attempting to, you know, get inside

organizations and produce better behaviour on an ongoing basis and better cultures of compliance within organizations and the individuals working for them, then it might work.

But what has happened, I think in part for some of the reasons that Michael articulated, is that in Canada regulatory agencies have tried to step into the shoes of criminal justice authorities, not that they can send people to jail yet, but that in terms of seeking and obtaining the ability to levy monetary penalties, which are not fines, they are administrative penalties, you know, they have tried to make up for what is perceived to be shortcomings in the ability of the criminal justice authorities to deal with this. And so obviously in order to step back and try to make that division of labour work better, we need to have activity and political support on the criminal justice side as much as on the regulatory side.

IAN HANOMANSING: All right. We are a few minutes away from our midmorning break. Let's go on to one more topic before we get to that break, and it is one that we have touched on a few times in the last ten or 15 minutes, and that is police compelling evidence, having the power to compel evidence in their investigations. And, Michael, I will begin with you. Is your view that that is a good thing or a bad thing?

MICHAEL CODE: Well, this is an important and difficult topic, and I am glad the questioner raised it, because we wanted to deal with it. The simple state of the law in this country is that the regulatory authorities have powers of compulsion. They have subpoena powers at the investigative stage prior to commencing a proceeding before a tribunal or a court. The police do not have powers of compulsion. They do not have subpoena powers to compel witnesses to testify at the pre-charge stage. The earliest time you compel a witness is after you have laid a charge and court proceedings are underway.

So at the investigative stage the issue is should we be extending subpoena powers, powers to compel witnesses to the police at the pre-charge investigative stage? And the peculiar thing why this issue arises so starkly in the area of white-collar fraud is that white-collar fraud is the one crime where most of your witnesses, the people in the know about the allegedly fraudulent transaction, will fear civil liability.

In a homicide or a bank robbery or a break and enter, your witnesses are generally not worried about civil liability. The witnesses don't go out and retain lawyers. And so if the police come to somebody who has been the victim of a break and enter or a robbery or a homicide, generally the witnesses will

co-operate. They are not going to be worried about co-operating with the police.

Whereas in the area of white-collar fraud, if our colleague walks into the office of the accountant or the broker or the lawyer or the audit committee member or the board of directors member who has some peripheral involvement in the fraudulent transaction in order to try to solve the crime, that witness will likely say "Thank you very much, Officer. I'd like to go speak to my lawyer." And the lawyer will very quickly tell him to keep his mouth shut because he's at some risk of civil liability or potentially even criminal liability.

So this is the one area where the police arguably need subpoena powers in order to get the co-operation of witnesses at the investigative stage, and remarkably this is an area where the interests of the witness are somewhat consistent with the interests of the police. The witness needs subpoena powers in order to give them protections against self-incrimination, because the deal we made in this country, unlike in the United States, is we did not accord witnesses the right to remain silent, the right to claim the protection of the *Fifth Amendment* against self-incrimination. We compel witnesses in this country and we offer them use immunity or derivative use immunity for their compelled testimony.

So the subpoena power is a useful solution to the difficulties the police have, and is a useful solution to the difficulties the witnesses have, because it allows the witnesses to co-operate with the authorities, to tell their story, but not to fear that it's going to be used against them in subsequent proceedings.

So that's a long answer, Ian, to say that, yes, I think the subpoena power especially in this area would be useful.

And curiously we have a situation right now where the subpoena power has been extended to one narrow species of crime, crimes of terrorism. It was controversial when it was legislated and so a sunset clause was put on it. The sunset clause expired last year and the current government has now reintroduced the legislation to give the police subpoena powers in terrorism cases. And that is an issue you are acutely aware of in this city because the *Air India* case was the one case where that power was used and where the police are on record as saying they would like to use it in that particular investigation.

So it may well be that the door has been kicked open a little bit because of the government's initiative to legislate these powers in the area of crimes of terrorism and now the arguments need to be made by law enforcement that that power needs to be

extended to white-collar fraud as well.

MARY CONDON: Can I just jump in quickly there and ask Michael a question, which is that, you know, you mentioned that, you know, giving the subpoena power will solve the problem for the professional witness in terms of their own personal immunity. But, you know, my speculation would be that professional groups like lawyers and accountants are going to resist the idea of a widespread subpoena power applying to them in terms of what it will do to their ongoing relationship with their clients. I mean, it's going to produce a more adversarial relationship with the client if -- you know, if down the road it is perceived that these professionals could be required to give testimony against their will. And so it's different from the terrorism example, right, in the sense that there could well be a kind of pushback from those that would be subject of those subpoena powers to not have it apply to them.

MICHAEL CODE: I am sure there will be pushback, but I don't see any constitutional impediment to it. And when the subpoena powers in the terrorism context were challenged all the way up to the Supreme Court of Canada in the *Air India* case, the Supreme Court of Canada upheld the constitutionality of those powers. And the law, the court noted in its judgment that the law of privilege still applies and obviously the

police could not compel privileged information. So I don't think lawyers would have anything to worry about in relation to privileged information.

But if a lawyer is using his or her trust account to funnel the proceeds of fraudulent activity through their trust account, or if a financial transaction has gone through the law firm, none of that information is privileged and lawyers should be compellable to disclose the public information about financial transactions that they happen to be witnesses to. None of that is privileged, and the fact that lawyers are not going to like it is no answer to a public policy argument that this kind of information should be compellable. The police can seize it with a search warrant, but what they can't do with the search warrant is connect the dots, which they need the lawyer to do to explain why this money is going through their trust account.

IAN HANOMANSING: Carlos, in the U.K. do police have the power to compel witnesses during the investigation?

CARLOS CONCEICAO: Well, generally the police don't, apart from terrorism is the exception. But the key, going back to something I said earlier, in securities is that the FSA is both regulator and prosecutor. And the FSA does have the power to compel testimony and obtain documents from, well, from anyone in connection with insider dealing and other types of market

misconduct as well.

However, in terms of the use that the FSA can make of that compelled testimony, that's been very, very heavily circumscribed by the European Convention of Human Rights, by the European Court of Human Rights interpreting the Convention. And effectively the position is that you cannot use compelled testimony - documents are a different issue - but you cannot use compelled testimony in relation to any criminal charge, or regulatory proceedings for insider dealing. That's a twiddle which we can come to and explain, but that's effectively the position we have ended up in.

Has it proved useful? Two answers. I think in terms of people who are witnesses, and again picking up a point that we have just heard discussion on in terms of industry professionals and so on, bankers and so on like it, actually, because they can put their hands up and say "I had no choice, client. I had to give this information. The FSA compelled me." And there we are. And in fact quite often you find yourself in a curious situation as a regulator where you'd ask for information from the bank and they'd write back and say, "Well, we have to give it to you, but can we be compelled, please?" (Laughter). And, you know, that's obviously reasons why they were doing it.

In terms of actual suspects, people that you

think have committed an offence, has it proved useful? No. Precisely because of the reason which I just outlined, you can't use their testimony against them.

Different ways of cracking the problem have been tried. The Department of Trade and Industry, when it was investigating insider dealing, used to have a two-staged investigation, one using compulsory powers so it compelled the suspects to incriminate themselves, and then try and find that evidence again using voluntary powers. That didn't work. Effectively all that happened was the suspect had a dry run at the questions - (laughter) - and you couldn't use the original compelled interview in evidence.

The FSA's approach is a different one. It will compel or not as the case may be. In practice it doesn't compel suspects because it's just felt not to be worth it.

MICHAEL CODE: If I could add another point, in that this power where it does exist, and it exists in regulatory investigations, is a power that has to be used carefully. First of all it's very unwise to use it to compel a target of the investigation because obviously it can never be used against that person. But also you risk serious constitutional difficulties. But even when you're using it against a pure witness, the power has to be used with caution and it should not be seen as a panacea. I have seen securities cases in

Ontario where the OSC has this power, where the investigators have gone in and used their powers of compulsion with witnesses too soon in an investigation, where they're not really ready for the witness. And so you create a transcript record where the witness says the story is "X", and then as the investigation moves along and you acquire more information and better documentation, and you go back to the witness a second time and confront him or her with the documents that you have now got, and then they change the story, and now the story is "Y". And then the investigation carries on and you get some more information and better documentation and you go back and take a third crack at the witness and now the story is "Z". And when you end up in court prosecuting that case and try and put that witness up on the stand, and you have now got three prior sworn records of that witness's prior testimony in which he or she has told three different stories, the witness's evidence is essentially valueless at that point.

So if we give this power to the police it has to be used very cautiously and only after very thorough preparation, because what you often end up doing is creating a record that destroys your case at trial with a whole bunch of nice prior inconsistent statements.

IAN HANOMANSING: Ethiopis, we heard from a senior RCMP

officer here in British Columbia who articulated what I think is a widespread view in Canada, is envy towards the grand jury system. What is your view of how useful that system is when it comes to securities and accounting fraud investigations?

ETHIOPIS TAFARA: I think it is hard to argue that it is not useful and hasn't been successful for the criminal authorities in the United States. They have the ability to search and seize on the *Fourth Amendment* and, of course, they can compel testimony under grand jury subpoena, keeping in mind that we do have the *Fifth Amendment* that prevents us from compelling testimony if it would amount to self-incrimination by the individual. It has certainly been very successful for our criminal authorities, and been the basis of the cases that they have built in *Enron* and the like.

From our perspective it is not something we necessarily like because if it is a federal grand jury, once it is empanelled and information is collected under that grand jury proceeding, we do not get access to it. We can't get access to it until after the criminal proceedings. So frequently the empanelment of a grand jury results in us, the SEC, having to stop our investigation for a period of time because of federal grand jury secrecy.

IAN HANOMANSING: And how long a period of time would that be?

ETHIOPIS TAFARA: It depends on how long it takes for them to...

IAN HANOMANSING: Yes. So roughly, I mean, is there an average time, or not?

ETHIOPIS TAFARA: It depends on the case.

IAN HANOMANSING: Yes.

ETHIOPIS TAFARA: You know, different cases take different periods of time to actually investigate and bring to trial. Now, this is not always a problem because many states either don't have the secrecy provision or don't use grand juries. But it is a problem with federal cases for us. But in terms of its utility for the criminal justice system, the federal criminal justice system? Hard to argue that it hasn't worked well.

MICHAEL CODE: Can you not parallel subpoena powers, though, of a federal criminal investigation going on before a grand jury and an SEC investigation going on with your own powers of regulatory compulsion?

ETHIOPIS TAFARA: In principle, yes. We have distinct investigative power and distinct subpoena powers. We ourselves can subpoena information from anywhere in the U.S. from anybody. Once a grand jury is empanelled we generally get a call from the U.S. Attorney saying "Stand down for a little while."

MICHAEL CODE: Back off.

ETHIOPIS TAFARA: Yes.

IAN HANOMANSING: And, David, let's close this section off with you unless we get questions, and we are happy to entertain some questions, as well, but you have been listening to all of these views about giving police the power to compel witnesses. What's your view of that?

DAVID WILSON: Well, as has been said the securities regulators in Canada do have the compulsion power, so we're in a sense spoiled with the luxury. But the sanctions, as Michael pointed out, that securities regulators have are significantly less than the sanctions under the criminal justice system. But I can certainly understand why the police would like to have powers of compulsion similar to the ones that we securities regulators have. But as has been said, recognizing that it's a power that has to be used very, very carefully because in the criminal world, as Michael said earlier, you are talking about taking away the liberty of the accused, and that is very different than the kind of sanctions that we securities regulators can impose.

So from my perspective it would be nice to see our colleagues in the police that work on securities market fraud cases have an ability to get witnesses to testify and help them, but I recognize that there have to be pretty careful constraints on how that power is used, because it is a change in the relationship

between the state and its citizens.

IAN HANOMANSING: All right. Yes, Carlos.

CARLOS CONCEICAO: Can I jump in on that as well, and it's quite, if we think about some experiences that the FSA has had when investigating people, and the kind of some of the frustrations. As I said, the FSA has the power to compel suspects and witnesses. And there have been plenty of examples where the FSA has wanted to interview someone as a suspect and they have said "I'm not coming along to be interviewed by you unless you compel me," knowing full well, of course, that the product of that can't then be used against them in a proceeding, if it's insider dealing regulatory, but criminal proceedings, as well. And the FSA's answer to that is always - well, generally - "No, actually, we want you to come in and we'll caution you, but we are not going to exercise our compel powers against you."

It's quite interesting to see how a law of unintended consequences can apply. The FSA recently took an insider dealing regulatory case to the Financial Services and Markets Tribunal, and the tribunal didn't really understand the relationship between the compel powers and non-compel powers, and so on, and the tribunal actually criticized the FSA for not exercising its compelled power in relation to interviewing the person concerned. The person

concerned did not, unsurprisingly, choose to give themselves a voluntary interview to the FSA and therefore the FSA were thought incriminate themselves, but the tribunal actually said that the FSA should have persisted and should have compelled interview from someone and that was a reason why the FSA investigation was flawed.

MICHAEL CODE: One further point here that provides sort of an interesting irony, is that many of these cases now, securities fraud cases are trans-national or international and I know we're going to go on to talk about that after the break. But where you have an international element to the case, and a foreign authority is investigating, or we're investigating but we need witnesses from abroad, you can get subpoena powers in this country through the Mutual Legal Assistance Treaty that provides for Canadian police forces to go abroad and subpoena foreign witnesses, or for foreign authorities to come to Canada and subpoena witnesses in Canada.

So you are actually better off in an international case because you have got subpoena powers. And we even provide assistance to countries on the continent who have inquisitorial systems where you'll get an investigating magistrate who, as I understand the inquisitorial system, it's all about compulsion. And they do nothing but compel witnesses

all day long and they come to Canada and compel witnesses in our country pursuant to MLAT procedures.

So it doesn't seem right from a very simple fairness perspective that you can compel a witness in France if you have got a multinational investigation, and then bring the evidence back to Canada for a Canadian investigation, but you can't compel a witness in Toronto on the very same fraud that happens to have these trans-national aspects to it.

ETHIOPIS TAFARA: Let me just add to that from the SEC's perspective under the authority we have we can compel testimony in connection with a case that we're investigating, but we also can compel testimony on behalf of a foreign counterpart who needs that testimony as part of its case, without there needing to be a separate violation of U.S. law, and we do that quite frequently.

IAN HANOMANSING: So as Michael suggested, the future of globalized enforcement is one of the topics that we're going to discuss after the break, also what success in enforcement looks like.

A couple of quick bits of housekeeping. One is keep some questions in mind for the second half of this. We'll be coming back at about quarter to 11:00.

You are also asked to do the survey. I saw some people doing the survey actually before the session ever began, so I hope you gave us great reviews.

(Laughter). And here's an incentive to do the survey. You can win a $150 gift certificate to Harry Rosen, to Holt Renfrew, a donation to charity of your choice. So a reason, and of course as you saw, a mechanical little system there, very quick and easy to do.

The panellists will be talking to the media for about ten minutes after we break, and then after that they will be mingling with all of you, so feel free to ask them any questions one-on-one, but give them about ten minutes first to deal with some of the media who are here.

So see you about 25 minutes time back in here. Thank you.

--- PROCEEDINGS ADJOURNED FOR MID-MORNING BREAK

--- PROCEEDINGS RECONVENED

IAN HANOMANSING: Well, welcome back, everybody. I hope you are enjoying the sessions and, as I say, I encourage you to ask questions as we get into the second half. And in fact we are going to kick off with a question from behind me. Yes, sir.

IAN RUSSELL: I have a question I would like to ask. I was most interested in the presentation this morning and a lot of the discussion around the effectiveness of enforcement. I would like to shift the focus a little bit here and pick up on what David said at the beginning of his remarks. Backing up from enforcement, there is also the process of compliance,

which is an important component of the market, and the monitoring of market activity. And when I stand back and look at the major problems that we have had in our capital markets over the last recent ten, 15 years, the regulators generally have been inadequate in anticipating how market players take advantage of poorly written rules, gaps in regulation, and will often breach their duty of care to client, and will end up creating huge losses in the marketplace.

And I am thinking of a couple of examples, in particular. One is the whole credit derivatives problem that happened in the summer, but it just didn't happen in the summer. It was a five-year situation where we saw this proliferation of credit derivatives and we saw rating agencies move away from rating on fundamentals to rating on models. In Canada we had a situation where there was only one credit rating agency that was prepared to rate ABCP paper, and that indeed was on liquidity backstop that turned out not to really be there.

But I could go on and on, I mean, I could talk about the tech bubble, the conflicts of interest between investment banking and research, the corporate accounting scandals. And I would be interested in hearing the panel's views on how they can improve their ability to anticipate these problems in the marketplace and deal with them before they become

really serious market issues.

And a supplemental question I'd like to ask to Mary Condon, is do you feel that Canada is perhaps more handicapped than other jurisdictions to the extent that we have a regulatory structure that really doesn't take a national perspective to our marketplace.

MARY CONDON: Do I go first?

IAN HANOMANSING: Sure.

MARY CONDON: Well, let me address the first issue, because I think that, you know, you have really hit on something extremely significant. My own personal view is that the balance of resources in relation to regulatory activities should be much more on the standard setting side, should be much more on the upfront compliance side than it should be on backend enforcement. Because it just seems to me that if the ultimate outcome that you are looking for is, you know, changing cultures of compliance in organizations, and requiring organizations to be more attentive to the detail with which they interact with clients, or make their disclosures, then you've really got to be doing that by way of standard setting and you've got to be doing it by way of sort of ongoing monitoring, rather than the sort of one-shot sanction.

I mean, as you know, the difficulty is what about new issues that, you know, haven't yet been considered

by regulators. And I don't think that I have the ultimate solution for that, except that, you know, that I think that regulators need to be looking at multiple sources of intelligence for emerging issues in the market. And it's a little bit self-serving of me to say this, because I sit on one of the OSC's advisory committees. But I think that regulators advisory committees, where they bring in players from a wide range of market participants, are a very good way if they are used sort of intelligently as a way of gathering intelligence about, you know, new transactions, new products that may pose a problem and sort of may become systemic issues.

Now, on the other question about national regulation, you know, I think that certainly there are, you know, very definitive views on this question, both for and against around the country from regulators, from the members of the public and so on. I mean, my worry about the focus on the structure of regulation is that it does take away from really dealing intelligently with the substance, and that what you really want is to figure out better ways of doing regulation at all levels, rather than really focusing on whether it's one national regulator or a series of provincial regulators. I think that there are certainly places where more coordination would be good, more discussion of upfront enforcement

priorities would be good, and I think some of that is happening.

But, you know, again and Michael may want to weigh in on this, I think the big problem for national regulation in Canada is going to be the constitutional situation. I'm not a constitutional lawyer, but, you know, there have been 70 years of constitutional decisions that have accorded the provinces power to regulate and it will take a really significant move away from that position to really give, you know, a federal regulator in Canada substantive powers to regulate. So I think that we might want to just see how we can do provincial coordination better than we currently do it, rather than sort of holding out for the nirvana of a big constitutional sea-change.

IAN HANOMANSING: David.

DAVID WILSON: I think Ian Russell's question was focused with some sharp criticisms of the Canadian regulators, so I guess I am obliged to respond to part of it, and not in a defensive way by any means, Ian. I agree with what Mary said, the balance of resources is something that should be rigorously thought about and consciously thought about between policy setting, compliance and enforcement. Those are the three big pieces of what securities regulators do. I think it's fair to say that in the case of the Ontario Securities Commission we are focusing on enhancing the

effectiveness and resources in the compliance part of the spectrum, not diminishing the enforcement resources, but focusing on that piece of the compliance/enforcement continuum I spoke to earlier, and I acknowledge looking at many of the things the FSA has done in that balance that has influenced our thinking. Because I think the FSA seems to have a different balance in those two areas than maybe the SEC does.

A second comment on the compliance piece of what you spoke about, Ian Russell, I certainly agree with you that people behave differently when someone is looking over their shoulder. And so rigorous compliance activity can be effective in changing compliance cultures, changing behaviour and spotting trouble before it happens. So it sounds like motherhood, but I think it's a very important thing for regulators to focus on.

A third comment on your criticisms. I think we have delegated, the statutory regulators, to the IDA in Canada much of the activity for intermediary regulation. And so there are things that they could do to reorder their priorities, which I believe they are doing with new leadership, that to do a better job on the compliance/enforcement continuum.

IAN HANOMANSING: All right, thank you. Now we are going on to a topic that we have touched on before, and that

is the compare and contrast question regarding Canadian securities enforcement and enforcement in other countries, and Ethiopis, I'll start with you. You deal with Canadian regulators all the time, so based on your work and what you have heard us discuss here so far, tell us some of the differences between the systems that strike you as interesting.

ETHIOPIS TAFARA: There is one way in which we are very envious of the Canadian regulatory system, and that's with respect to the ability to freeze assets administratively. It is a pretty powerful tool, one we would like to have in our arsenal, because a good part of enforcement is taking the profit out of crime.

We, of course, can obtain freezes through the District Court. We can't do it administratively, but what I find most appealing from our perspective about the Canadian system is that you can do it on behalf of a foreign counterpart. We have come to our colleagues and counterparts in Canada seeking that they invoke the ability to freeze assets administratively when those assets are related to an investigation or fraud that we're looking at in the United states. So much so that we are considering going to our legislature to seek a similar power, and that is the ability to freeze assets on behalf of foreign counterpart. We wouldn't be able to do it administratively. We can't do it for ourselves. But I expect we would be able to

do it through a court, at least that's what we would be suggesting.

And our hope is that that would lead to others actually doing the same around the world. We spend an enormous amount of resources now trying to keep assets frozen while we get to final disposition of a case, and these assets are now all around the world. Criminals are not fools. The money never stays in the U.S., it always leaves and ends up somewhere else. So if we're able to freeze assets on behalf of our counterparts and our counterparts are able to do the same for us, it will make all of our jobs easier and we very much look to Canada as a leader in this area.

The other major difference is both a major difference and a difference at the same time, and I will explain the paradox in a little bit. And here I'm referring to the right against self-incrimination. When Canadian regulators compel testimony, and we have had discussion about this earlier, the witness can't refuse to speak, whereas in the United States where we compel testimony, if it's self-incriminating, then they can refuse to speak. Yet at the same time we both basically are seeking to achieve a particular objective, and that is not allowing somebody to self-incriminate as part of a criminal trial, so in that sense we are similar.

And I think there is this misunderstanding with

respect to what may happen in a cross-border case where we've sought the assistance of a Canadian counterpart in taking somebody's testimony under compulsion, that once he comes to the United States the difficulty will be other troubles that they'll find themselves in if they won't be limited to SEC use, it will be passed on to the criminal authorities, and that in essence they will have lost that right against self-incrimination. We're trying to make clear to the world that that is actually not consistent with the jurisprudence in the U.S. There is jurisprudence that makes quite clear that it doesn't matter where the testimony was taken or how it was taken, if it was compelled you can't use it in a criminal trial in the United States. And we think it's pretty important for that message to actually travel, because the system that you have is also shared by the U.K. and by Australia, and we're finding increasingly when we need the help in taking testimony, but there are concerns about how that testimony may be used in the United States and particularly in the criminal context.

IAN HANOMANSING: All right. Mary, explain a couple of things to us, deferred prosecutions in the United States and in Australia enforceable undertakings.

MARY CONDON: Sure. These are innovations that we have seen developing in other jurisdictions. Basically the

idea is that it's a kind of pre-trial diversion, pre-trial probation, where the regulator or the prosecutorial authorities enter into an enforceable agreement with an organization or an individual, that in return for not going forward with the prosecution or the regulatory matter, certain undertakings will be made by that individual or by that organization. Often it includes an admission of wrongdoing. It includes some sort of compensatory element if there are victims involved. But the most, the biggest part of it is a kind of agreement that revolves around prevention that the individual or the organization undertakes to introduce. If it's an organization, new compliance programs, more rigorous internal supervision of client accounts, or supervision around the requirements to make various kinds of disclosure of information to the regulators. If it's an individual, it may have to do with an undertaking to voluntarily suspend themselves from activity in the markets. And so the regulator achieves the outcome that they are looking for. They've also got the stick that if that undertaking is breached, that they can then go to court for breach of the undertaking or resume the original prosecution. So the regulator achieves the result they are looking for without the time and the delay associated with an actual prosecution or a regulatory hearing, and of course the

respondent, the organization or the individual, you know, has to conform to the terms of the undertaking, but the publicity of a trial or the publicity of a regulatory proceeding is put to one side.

IAN HANOMANSING: So do you think we should have these mechanisms here?

MARY CONDON: Well, I think that, as I say, from a regulator's point of view it has certain advantages. Sort of it's a very outcome-based approach, and it certainly accords with the sort of compliance approach that would look for, you know, for underlying compliance to be a bigger issue, rather than sort of one-shot monetary penalties, which arguably could be seen as just the cost of doing business. I think that there are some concerns about how you organize these undertakings in the sense that there are going to be concerns about accountability, consistency across a number of undertakings. That's the kind of concern you also get in relation to settlements and in relation to, you know, even in the criminal justice context the plea bargain. So I think that with careful structuring of how this process occurs, I think it's something that we should really look at.

ETHIOPIS TAFARA: If I might say something about the context in which it's been used in the United States, and this is on the criminal side because we don't do deferred prosecutions, I think I agree with Mary that

the interesting thing about deferred prosecutions is it achieves many of the objectives of a prosecution, yet it's been used in the United States where you have concerns that a prosecution could actually lead to the demise of an institution, which may be critical to the infrastructure, and this you saw in the *KPMG* case a couple of years ago, where there was potential criminal activity, and there would have been grounds for prosecution, the concern being that in prosecuting KPMG it may have resulted in the complete and total failure of KPMG and we would have been left with three accounting firms, global accounting firms, a situation which would be very difficult for the global capital market. So it's interesting the context in which you may be thinking about deferred prosecutions, whereas in other circumstances we may have prosecuted, or the criminal justice department may have decided to prosecute.

IAN HANOMANSING: Mark, let me ask you the question that I asked Ethiopis, except obviously from the Australian and Hong Kong perspective, one or two key differences between the systems you know and the system here.

MARK STEWARD: I mean, the major one which really struck me this morning, is an obvious one, is the structure. In Australia there's a single regulator, a national regulator. There is in Hong Kong, as well, but Hong Kong and Australia are polar opposites in terms of

size and so it is a different proposition, so that's, you know, a very clear difference between the two.

Secondly, you know, the Australian regulator is an all-purpose regulator that -- who can prosecute civilly, criminally, has administrative remedies across the corporate landscape, securities landscape and the financial services landscape, with all of the normal sort of regulatory responsibilities that that entails, together with a consumer protection focus. Again that is, you know, designed to create a one-stop shop, which I think is a difference between Australia and Hong Kong, as well. In Hong Kong the SFC is a securities regulator with some financial services functions, and that's an enormous responsibility in a market the size of Hong Kong that is growing as quickly as Hong Kong's market is.

A key difference in the SFC and one of the great attractions for me about the SFC is something I mentioned earlier. It's the fact that it carries the responsibility to do the day-to-day surveillance work of the market. And so we have the machinery and the systems in place to monitor trading as it occurs. And that is a very unique function which most, I mean, all exchanges have this function around the world, but not too many regulators do. And I think that puts us at some advantage in regulating the market, you know, trying to tackle the question that was raised at the

start of the session about trying to anticipate what's going on. You need to have a lot of information, a lot of data and intelligence at your fingertips to really anticipate what might happen tomorrow.

IAN HANOMANSING: All right, thank you. Any questions on this topic area before we move on to our next one? No? All right.

MARK STEWARD: If I could just add one more comment to follow on from Mary’s description of the enforceable undertaking regime in Australia. What she said is completely correct, and as someone who in Australia used these routinely and with a lot of enthusiasm, the key benefits for the regulator was being able to get something finished reasonably quickly and to get outcomes that weren't necessarily outcomes that were prescribed by the legislation or within the court's power. So, for example, getting compensation for third parties is not something that is typically something regulators can do. You can trigger circumstances that might lead to third parties bringing their own action, but to actually directly ensure there's a process for third-party victims to get compensation is something that can be achieved through the enforceable undertaking mechanism.

The big difference between what happens in Australia and the U.S. practice of deferred prosecutions is in Australia the enforceable

undertakings are never used in place of criminal proceedings, and I think that is very important. It avoids some of the traps that I think Mary was implying. It means, as well, it is very clear that where there is criminal misconduct the criminal process is the best place for that to be dealt with and you don't get, you know, the appearance of sweetheart deals being done, you know, with big corporations. So I just wanted to add that further comment.

IAN HANOMANSING: All right. Our next topic area is again something that we have touched and that is globalization and the impact it has and the implications for securities enforcement. So, Ethiopis, I will begin with you. You see, apparently, all the requests that the United States makes to other countries and all the requests made to the United States for sharing of information for securities law enforcement. So give us a sense of what you are seeing out there.

ETHIOPIS TAFARA: I think Doug Hyndman started the conference by noting that, you know, globalization is here and, you know, we can make all sorts of trite comments about globalization and what it means. But it is having a huge impact in terms of the kinds of cases we are seeing. And the technology that has made globalization possible is also being used by

fraudsters in quite innovative ways.

What we are seeing a lot of is what I call disaggregation of fraud. Where you will have the mastermind in one jurisdiction, those involved in perpetuating the scheme in a second, using servers that are located in a third, routed to look like the calls are coming from a fourth jurisdiction with the victims in a fifth jurisdiction, and the proceeds of the fraud in the sixth, and so on and so forth. And by disaggregating the fraud, taking away the incentive of any one regulator or any one law enforcement authority to actually pursue it and successful investigation and prosecution is impossible without cooperation. Technology is also being used in interesting ways such as intrusion into people's accounts. We have seen a number of cases where through the use of technology, fraudsters have been able to access some other individuals' accounts, clean it out, but more interestingly use that account to actually manipulate a particular stock. That's the way in which we are seeing technology change, the kinds of cross-border enforcement cases we are bringing.

IAN HANOMANSING: So I am going to ask many of you basically the same question, and David, I'll start with you, and that is what do you see as the future of globalized enforcement?

DAVID WILSON: Well, Ethiopis said it very well. It's a fact. It's here to stay. We can make many trite statements. The world is flat, et cetera, but it's true. A contemporary example of how true it is, not really to enforcement specifically. The Asset-Backed Commercial Paper crisis that began in August of this year is a classic example of the global ripple effects of one piece of the financial system. It turns out to be mortgages in the U.S. of a certain narrow category, have had ripple effects around the globe. It is an amazing lesson in how interconnected we all are. That's not an enforcement example, but it is an example.

On the enforcement front I think globalization is forcing national regulators and, in the case of Canada, provincial regulators to face the fact that they have to get better at mutual reliance on each other, country-to-country. And I know the U.S. is looking at a mutual reliance system, not just embracing enforcement of it, but embracing other things. But that is what's happening, is we are all going to have to get to know each other, assess each other and rely on each other more if we are going to be effective in dealing with what's happening in global misbehaviour.

IAN HANOMANSING: All right. For people asking questions, let us know who you are and if you would like to

direct that question to a particular person. Yes.

CHILWIN CHENG: Chilwin Cheng from Market Regulations once again. A question specifically for Messrs Tafara, Steward and Conceicao. Often when we talk about globalized criminal law enforcement we are speaking of these globalized criminal enterprises that, you know, front all their money around the world and manipulate. A trend, an issue that has emerged is the rise of the sovereign wealth funds, but also the rise of any kind of pool of capital with a significant tie to a political sovereign will. And some of these capital pools, namely sovereign wealth funds, are tied to countries with less than stellar records and areas of human rights or military interventions, and et cetera, et cetera, where that may be the Congo or Sudan or any newly emerging resource-rich states, and they are intervening in the markets. Do you see any particular nuances or challenges to securities regulation or enforcement when dealing with these entities that also have a political dimension, not only an economic and financial one?

ETHIOPIS TAFARA: I guess I will go first. (Laughter). A lot in the press as of late with respect to sovereign wealth funds, and I think this has to do with the fact that these funds now increasingly, rather than invest in what they traditionally invested in, which is sovereign bonds, are investing in equity markets. And

I guess part of the concern that is articulated and a lot of the press reports is that -- or it is motivated by the fact that sovereigns don't always act simply out of economic interest. They sometimes act out of national interests. And so you wonder whether or not in any given transaction what they are doing is related to a national interest or an economic interest.

I think as a regulator what we focus on is transparency, and we have rules in place with respect to acquisitions of public companies, whereby once you hit a certain threshold you have to provide information as to whether it is a passive investment or an active investment, and if it is an active investment, what your objectives are, and it gives you some sense of what the objectives of that particular sovereign may be with respect to a particular company. We, I think are pretty unique in the United States in having an additional disclosure requirement related to your entire portfolio. So if you are an institutional fund and you hold more than 100 million in equity assets in the United States in a given year, you have to report. So we have some sense of the degree to which a sovereign may be invested in the U.S. market. We think that transparency is probably, or at least from speaking for the SEC, and by the way these are my views, but... (Laughter). From our perspective as a

regulator, that transparency is what really, really matters.

Now, there is the enforcement concern in that should there be any wrongdoing by this particular sovereign wealth fund, the question will always arise if you need the assistance of the government will you get it? And it is an open question. I don't know. I don't know because we haven't had to face that yet, but certainly we will be thinking about.

IAN HANOMANSING: Anybody else want to jump in on that? Yes.

MARK STEWARD: I think that's a pretty good answer. I mean, clearly the - (laughter) - different approaches in each jurisdiction will be, you know, slightly different, but transparency is very important and the, you know, disclosure of interest regime is extremely important to facilitate, that’s the market can see what is going on, the market will make its own judgment as long as the disclosure is made.

I think the disclosure of interest regime differs around the globe I think is something that regulators need to talk about and I think it is something that a lot of large market participants are very keen for regulators to talk about and harmonize the requirements that exist around the world, and maybe this phenomenon, this recent phenomenon is a good reason or a good excuse to prompt that along.

CARLOS CONCEICAO: If I can just add to that. I mean, I agree wholeheartedly with Mark and Ethiopis have said. The problem as such isn't altogether a new one, and nor is it obviously confined to sovereign funds. And a particular example which I am thinking of which raises very, very similar issues.

In the U.K. we have had a very successful market. We had the AIM market, kind of junior, the junior exchange to the London Stock Exchange, and one of the key areas of its success has been attracting listings from companies, you know, dotted all around the globe. And for a lot of the companies, complying with the regulatory standards that apply to this sort of market, even though the AIM market standards are different from the main exchanges, has proved quite challenging. And the sort of issues that you have around co-operation and investigation, and so on, where companies don't comply with regulatory standards on those markets, and the sort of challenges it poses for the regulatory authorities to investigate those sorts of cases are very similar to the sorts of issues that you identified in the context of sovereign funds.

I think it is an open question about how successful you are in any particular jurisdiction. I think the trend is that regulatory co-operation is undoubtedly getting better and getting deeper across a broader spectrum of regulators. Are we at a perfect

position yet? I don't think so. But I think it is a problem that is being addressed now for some time, albeit in a slightly different context.

ETHIOPIS TAFARA: If I could pick up on that and tie this back to something David Wilson said earlier about the importance of cooperation, and I don't think we should discount how critical it becomes as the markets globalize that you get this kind of co-operation that you need in connection with activity in your market. It sounds like motherhood and apple pie, but you know, we are starting to hear noises about, well, if you can't get the kind of co-operation necessary to take action from a particular jurisdiction, should we allow market participants from that jurisdiction to be in our market? And that is, I don't think a desirable result. There is a lot of benefit to the globalized market, but unless we are careful that we actually can help one another out, it is going to lead to a situation where people are going to call for a certain kind of fragmentation. So we don't just say co-operation is great because it sounds good. It really is fundamental to continuing with the system that we have in place.

IAN HANOMANSING: So co-operation is fundamental. Mark, you'll probably refer to that as I ask you about the future of globalized enforcement.

MARK STEWARD: Yes, I think we've talked about the sharing

of information that occurs amongst regulators, and I think, you know, that more or less works reasonably well. But I am not sure with the amount of convergence in the world it is going to be sufficient for the 21st Century. I think we need to actually think about pooling resources as well as information. We need to think about sharing intelligence and data so that we can detect together. We need to think about ways in which we can set some priorities together. Now, some of that is happening, but it is not happening in a particularly organized kind of way, in the same way that the information sharing now occurs between regulators, particularly signatories to the multilateral MOU. Sharing resources is quite tough. Not every regulator is as resourced as some other are.

But nonetheless, I think that, you know, the experiences I have had working now in three different places around the world for regulators, and talking to many regulators around the world, the thing that I always come away with is the fact that we have so much in common and it is so valuable to have the time to talk to one another and try and, you know, talk about and solve these problems that we have. I think if we could harness that, you know, and get some of our operational people together far more frequently than we are able to, then I think we could do a lot more.

So that's what I think is what confronts us, but again it's very much a personal view.

MARY CONDON: Can I just ask Mark if you think that IOSCO could be a forum for that kind of thing? I mean, obviously we know that --

MARK STEWARD: Well, I mean, clearly it's the starting point. It's there already and it is a good forum. But I suppose what I am really saying is that from an enforcement point of view we have the information sharing, we don't have any pooling of resources, data, intelligence. We don't have any sort of global mindset. We are not strategizing the global enforcement space, to use a bit of jargon. And I think every regulator has its own agenda, perhaps even its own global agenda, but it is not necessarily one that is common and I think developing that sort of common approach, particularly for enforcement is going to be very significant.

IAN HANOMANSING: Carlos.

CARLOS CONCEICAO: Yes, well, I think I would actually take Mark's point further, in a slightly different direction perhaps, even. But I think he's absolutely right. The information-sharing mechanisms are getting there. The corporation mechanisms are getting there. I think Mark is highly right in terms of resources.

I think there is another dimension to this as well, which is, and perhaps this is too ambitious when

one is still grappling with these other basics, but I think it's around the idea of coordinated enforcement action in particular instances of malpractice. So that sort of action, regulators working together across boundaries is the sort of thing that can send very, very powerful messages.

An example of that I faced when I was at the FSA was in 2004 Citigroup took an action out of its London offices, which affected something like 13 different European bond markets. Several regulators, not all 13 by any stretch, but a large number of them were obviously very interested in this and there was a very successful approach towards coordinating the investigation. The FSA took the lead in information requests and interviewing and getting material, helped, assisted by regulatory input from the other regulators who cared about the issue.

Towards the end of the investigation the question then became, well, so what? What do we do? And the FSA was very keen to see if we could work out some kind of global enforcement, some kind of penalty between the regulators that were interested. Not a dissimilar model from the one which worked in relation to Shell between the FSA and the SEC. This was actually potentially more ambitious because it involved more regulators. It stumbled on a variety of legal and cultural issues despite the best efforts of

the FSA.

The end product was that some 11 months after the events in question the FSA was able to issue its final notice with a £14 million fine levied on Citigroup. Other regulators in a kind of piecemeal way still proceeded with their investigation. In fact, for some regulators that investigation is still ongoing.

I think, you know, it would be a far more powerful message to the market if the regulators concerned could have got together and could have as a group have said "This is why these issues are wrong; this is why they breach regulatory standards; this is a global fine." Particularly now in Europe where one's talking about effectively a set of regulatory standards that are, you know, harmonized would be too strong a word, but certainly consistent across all 27 EU jurisdictions. And, you know, as regulatory standards converge globally, they will never be the same, but there will be certainly a degree of convergence around certain key principles. I think that's a sort of challenge for regulators. I would see, crystal ball gazing in the next few years, if regulators can achieve that, I think it will very much enhance the power of their messages.

IAN HANOMANSING: Ethiopis was just going to jump in when I went to Carlos, and, yes?

ETHIOPIS TAFARA: I am going to look through that crystal

ball for a minute and agree with Carlos that the future necessarily is going to require that we consider as a community of regulators how we work on cases that violate different sets of laws in multiple jurisdictions. I think the *Shell* case is a great example of it, whereby we leveraged resources. We actually divvied up the investigation, took advantage of the resources we each had, not duplicating efforts, and then for me the most important piece of it was at the end where we actually got together and talked about the sanctions we would be seeking to make sure that the sanctions were complementary and not duplicative. I can see this as a model for the future.

What I would caution against, however, is the expectation that we may get to a world whereby we rely on the enforcement action that is taken by a counterpart, particularly when they are victims in our jurisdiction. I spend enough time on the hill to know that there frequently is not a lot of sympathy for the answer that, "Well, we are letting somebody else take care of this." And so I can see more coordinated collaborative enforcement exercises. And indeed we always have the discretion to rely on somebody else's investigation and prosecution if we can demonstrate that they are addressing the U.S. constituency but more frequently than that I think you should expect

that there will be two actions, coordinated rather than a single action where one party is relying on the other.

IAN HANOMANSING: Mary.

MARY CONDON: I just wanted to jump in and connect up this series of fascinating comments about the future of global regulatory enforcement with some of the discussion we had earlier about the role of criminal justice, because we identified a whole range of shortcomings in the criminal justice approach to sanctioning. Criminal justice is the ultimate exercise of domestic sovereign authority, and I wondered to what extent insofar as the extent to which if we are moving towards a sort of a global enforcement type approach, whether it renders criminal justice as a tool even less relevant, because, as I say, clearly, you know, the norms of criminal justice emanate and are pursued domestically.

And the other thing is, you know, we also talked about spectacular failures in relation to insider trading earlier in the session and, you know, in Ontario we have got our own case of a spectacular failure of insider trading prosecution in *Felderhof* earlier this year and just sort of making the point that it is an example of a case that may demonstrate the insuperable difficulties of doing criminal justice type enforcement in a globalized context, you know,

the difficulty in *Felderhof* of connecting up patterns of trading that were taking place offshore with material information that was being generated also in a far-flung location turned out to just be too much for a successful prosecution. So the way forward might actually end up diminishing even further the role of criminal justice as a tool of enforcement.

IAN HANOMANSING: So until or unless that happens, Michael, let me ask you about the ability of the criminal justice system to keep up with these trans-national, you know, transactions, deals that are made instantly electronically. Can the criminal justice system keep up?

MICHAEL CODE: Yes. My view actually is this is one area where we have done a relatively good job on the criminal side, and the law is pretty straightforward and clear and has not put any great impediments in the way of enforcement authorities.

There is two issues that arise in the context of international transactions or cross-border transactions that have been litigated in the criminal context. The first question is the question of jurisdiction, can Canada take jurisdiction over a trans-border case of the kind that Ethiopis was describing earlier. And the court has done a very good job here of establishing a clear simple test that is called the real and substantial link test. You

have got to show that some portion of the criminal activity took place in Canada, but certainly not all of it. You simply need some part of the conduct that constitutes the criminal offence to be grounded in Canada.

And the leading case is a case involving exactly the kind of operation Ethiopis was talking about, a case called *Libman* where we had a boiler room operation in Toronto where Libman had sales staff making telephone representations entirely to U.S.-based residents. There wasn't a single Canadian victim in the case. They were all American residents. Telephone representations would go out from Toronto to the United States residents. The stock they were pumping was a Costa Rican mining company, so the Americans would be buying shares in a Costa Rican mining company and the revenue, the purchase price, the purchase funds for the transaction were being sent to Panama. So there were four different jurisdictions involved. The crime was nicely divided up over four separate jurisdictions, clearly with a view to creating these kind of trans-border complexities. And the Supreme Court of Canada had no difficulty whatsoever in saying that there was an obvious link to Canada in the case and Canada successfully prosecuted the case. So the jurisdictional problem I don't see as a significant one.

The more significant issue, and I think the issue Mary is raising in relation to *Felderhof* is the evidence gathering issue: do we have the tools to collect the evidence in these trans-border international cases? And here again I think the law has done fairly well in this area, and having been involved in the *Felderhof* case and having a bit of a conflict of interest in discussing it, I don't think we had any problems getting the evidence against Felderhof, and the prosecution was able to put forward a case based on a lot of evidence that was gathered in Indonesia of records that were being stored offshore.

And the Supreme Court of Canada has recently pronounced on this issue, as well, in a case called *Hape* that was just released this year where the RCMP went down to the Turks and Caicos in a money-laundering case. And appear, the record is somewhat unclear, but they appear to have simply entered the offices of a financial investment house down in the Turks and Caicos with the local constable standing by outside the door one night, very unclear whether they had a warrant of any kind, what the judicial supervision of this search was. But in any event they went into the investment company's offices, seized all of Hape's records to trace the proceeds of the money laundering through the Turks and Caicos' company.

There would be huge problems in Canada for that

kind of search and seizure that would clearly violate our Section 8 *Charter* standards. And the Supreme Court of Canada again had no trouble whatsoever in saying that the *Charter* does not reach the Turks and Caicos and the question is whether they were proceeding in accordance with Turks and Caicos procedures. And since the chief constable was standing outside the door and - (laughter) - he didn't seem to have a problem with it - (laughter) - the court wasn't troubled by this in the slightest. So Hape got convicted as well, just like Libman did.

So this is an area in which I think the law has cut through the complexities of the trans-border transactions and has developed relatively clear simple rules and has made the job of the police relatively easy. And indeed, as I said earlier, it is ironic that the police are in fact better off in a trans-national case because they can resort to MLAT procedures. And MLAT procedures do allow for compulsion. They allow for the gathering of documentary evidence through subpoena or search warrant powers and they also allow for the compelling of witnesses. So the police are in a stronger position in an international case, it seems to me, than they are in a purely domestic case. And, you know, we may want to talk more about judicial competence in this area, it seems to me, than about

investigative competence in gathering the evidence. Have we really developed a cadre of judges who are skilled and sophisticated in handling big complex securities cases?

IAN HANOMANSING: And you pose that as a rhetorical question? (Laughter).

MICHAEL CODE: I do. (Laughter).

IAN HANOMANSING: We are in the home stretch now, so we are getting towards the end of your window for asking questions, so again if you have a question on any of the sections here, identify yourself to the person who is standing in your section and I will be told that there is a question to be posed to our panel.

So our last topic here is "What success looks like in securities enforcement" and it is a question that I will ask all of you and let me begin with David.

DAVID WILSON: The measurement of success in any regulatory activity, let me be completely bluntly honest, is very difficult. This is not an easy thing, but that doesn't mean you don't try and do it, by any means. But let me illustrate why it is difficult.

We spoke earlier today about the compliance/enforcement continuum, so if an enforcement body, a securities regulator, for example, is doing a superb job on compliance, then the number of enforcement cases will go down, not up. So keeping

track of how your enforcement caseload is changing over time in the conventional commercial world, you are supposed to have numbers going up every year. But in fact if you are doing a really good job at enforcement, the numbers should go down every year. So it's very difficult to measure. That's just an illustration of how difficult it is to measure. But we do have to try very hard to measure it.

At the CSA we have been talking about developing Canada-wide measures for the Canadian Securities regulators to measure the effectiveness of our enforcement activities, given the spotlight that is on that activity. Malcolm Sparrow is a name that some of you in the room will know. He is a guru on regulatory advice, or advice to regulators, and by coincidence he is meeting with the staff at the Ontario Securities Commission Enforcement Branch next week to talk about how to measure success in enforcement. So ask me next year, Ian. (Laughter).

IAN HANOMANSING: All right. We have a question -- whereabouts, over here, I think. Right? Yes.

MARTIN CORDELL: I am Martin Cordell, I am with the Washington State Department of Financial Institutions. And I was wondering whether any of the panellists had any ideas on where the most serious areas of potential fraud are going to be in the future. Is it the lack of transparency in hedge funds; the integrity of the

markets; computer systems? I am just interested in what thoughts you might have on that.

DAVID WILSON: Well, I'll take the first shot at that and it fits with what Ethiopis said earlier today about technology in the world of securities fraud. The use of technology is increasing; the cross-border pump and dump schemes, et cetera, et cetera. So we the regulators have to stay at least on top of that, if not ahead of it to try and protect the investors from scams. And that isn't going to go away, so I am not really answering your question about the future, but that is certainly with us in spades. I think there was an SEC case of cease trading 23 different broker dealers in one fell swoop, so that's the kind of activity on a micro scale per offence, but on a big scale for all those affected parties.

ETHIOPIS TAFARA: I think it's virtually impossible to predict. I think you just need to be vigilant. It's unclear where the next raft of enforcement cases is likely to lie. And you look at insider trading, for example, we brought some insider trading cases, quite a few as of late, and there was no way of knowing that that would be the trend for the past couple of years.

Some speculate that what has happened is that we have a new generation in the market that don't remember Boesky and Milken and then that's the reason we're seeing insider trading cases. But I think it's

virtually impossible to predict where enforcement is going to need to focus it's attention, but that's why you have to be vigilant and you have to be on the lookout for wherever it may crop up.

IAN HANOMANSING: All right. Another question? Over here.

JOHN McCOACH: Thank you. My name is John McCoach, I work for the Toronto Stock Exchange and the TSX Venture Exchange. My question is directed to Ethiopis.

The B.C. Securities Commission have publicly stated that disreputable bulletin board company issues are a top priority for this commission, and my question is where those lie in the SEC's priority list?

ETHIOPIS TAFARA: We share the priority. That's a short answer. It is certainly something that the relationship we have with the British Columbia Securities Commission revolves a lot around the co-operation that is exchanged between the two Commissions, with respect to bulletin board trading. And it is, it has been a tough issue for us and we recognize that B.C. is working on ideas to try and improve the situation and we are doing the same. I expect we will be talking to them quite a bit over the course of the next month and weeks.

IAN HANOMANSING: And just in case people didn't hear it before your microphone was turned there, you were mentioning that the SEC shares that priority.

ETHIOPIS TAFARA: Yes.

IAN HANOMANSING: So just for people who didn't hear that. Let's go back to our summing-up question about measuring, recognizing, quantifying success in terms of security enforcement. Mary...?

MARY CONDON: Well, I am only being partly facetious when I say that if everybody is unhappy, then it could be that the regulators are getting the balance right in terms of doing enough of the right things. If, you know, one constituency is very happy, then it could be that there is something amiss.

But, you know, leaving that aside, you know, one of the things that I mentioned earlier is that you know because of the current concern around effectiveness of enforcement, there's a lot of attention both jurisprudentially and sort of rhetorically by regulators, a lot of spotlight on the issue of deterrence and the question of whether the various kinds of levels of sanctioning that we have available to us achieve deterrence. And I worry that that emphasis is a little bit misplaced because, as I mentioned earlier, it seems to me that sort of standard setting and compliance and fine-grained supervision of organizations and individuals proactively is ultimately going to serve us better than sort of sanctioning that is harsh in order to achieve deterrent-type goals. Because, you know, my

other comment here would be that I don't think we really know enough about whether deterrence works as a strategy to warrant the kind of emphasis that we're placing on it. So I think in terms of our ability to measure -- to use that as a measure of success, I would really -- I would really caution against that.

IAN HANOMANSING: All right, thank you. Carlos...?

CARLOS CONCEICAO: I share the comments that were made, I think, earlier on about how extremely difficult it is to have some kind of accurate measurement about what success as a regulator looks like. But I also share the comment that actually that shouldn't deflect us from trying to. It's very, very important that we do that and there are some practical benefits that can be derived from that.

I think one of the issues that you tend to see with this sort of measurement is there are too many quantitative-type measurements, numbers of cases, dollar value, et cetera. And I think that gives you some measurement, but I'm not entirely sure what it measures as such. I'm not entirely sure that it measures the success of what regulators are doing. And I think some of the answer, I think, goes back to the point that we were having, the discussions we were having earlier on about risk-based approaches and so on, and particularly thinking about outcomes. What are the outcomes that a regulator is trying to achieve

through taking enforcement action or other action? And, you know, what you need to do is somehow hit that and try and measure those sorts of outcomes. Now, there are some soft measurements that I have heard bandied around, and one of the amusing ones I have heard, I think it's from someone from the SEC, actually, may even be you Ethiopis... (Laughter).

But it was said facetiously, but it was actually illustrative of a point which is that look at the salary offered to compliance officers. If the salary goes up, it kind of indicates there's more risk associated with that post and a greater degree of responsibility accorded to that post. So therefore it might mean that actually the regulator doing a better job. And I think I said, it was said to some extent, I think, facetiously, but there is a point there about what are the resources being devoted to compliance in particular firms. If there is evidence that they are increasing, then that's something.

The FSA had tried in relation to market cleanliness, insider trading, a novel approach and it involved a lot of sort of mathematical formula and Greek letters, but effectively - (laughter) - which the distillation of the issue was it looked at announcements that were made in relation to takeovers, but other announcements that are required to be made by issuers, and then looked at the degree of trading

ahead of those announcements and whether they followed a predictable pattern looking at the deals that have been going on in those stocks over a period of time beforehand. And if there was a sort of outlying graph, that was termed an informed price movement, and the numbers of informed price movements were suggestive, and no more than that, suggestive of insider trading.

And actually I think something else is very, very interesting. The results from that seem to indicate that over the years in which the FSA had had powers to take action against insider trading, the level of informed price movements hadn't gone down at all in relation to takeovers and mergers. Now, they had actually gone down quite substantially in relation to common or garden announcements, but there may be other explanations for that. But in relation to takeovers, there seemed to be no discernible improvement. And actually that methodology has gained some ground. A Dutch regulator followed it and analyzed its own stock market and so on. But why it's important to do that is that nowhere is it suggested at the FSA that that is actually the reality and that you rely solely on that measure. But it has informed a lot of thinking about how the regulators should deal with those sorts of issues. And in particular it's informed something which the FSA terms as the kind of partnership

approach with the industry, a kind of realignment with the industry about how you look at preventing leaks of inside information, in particular getting them to see that it's actually in their interests long-term and short-term, that they safeguard confidential information in the same way that it is a regulatory interest.

It also actually has led to a spate of enforcement actions on firms that don't safeguard their information appropriately. So rather than just go for the insider dealers, go for the firms that have made that possible. And I think that came as a direct result of the results of the survey, plus the market reaction to the survey. And I think that's one issue, that's one reason why it's very important that as regulators we strive to make these sorts of measurements.

IAN HANOMANSING: All right, thank you. We have a question on this side of the room, I think.

BRENT MUDRY: Yes, hi. This is Brent Mudry from RCMP IMET, just a quick question. If the stats themselves are hard to give a realistic measure, is anyone doing systematic surveys of the various stakeholder groups over time to see what the perception is? I mean, obviously if the street thinks that enforcement is a joke, there's no deterrence; if they are pretty scared, then there will be.

CARLOS CONCEICAO: To answer the question, in a sense it's certainly something the FSA is doing quite frequently in terms of, in fact, actually there's a project going on at the moment where the FSA is talking to the various stakeholders involved and asking them about their perceptions as to how the markets developing the effectiveness of enforcement and other regulatory tools, and whether they perceive there's been an increase in the cleanliness of the market and general compliance standards.

IAN HANOMANSING: And in Canada?

MARY CONDON: And if I could just add to that. I think that's an excellent point because I think it's actually a real gap in our knowledge in Canada about trying to assess the extent to which different strategies work or don't work, and I think it would be really important to ask stakeholders not just whether their perception of, you know, the rigour and enforcement has changed over time, but also how their own practices and procedures internally have changed because of things that they have learned about different sanctions that have been levied, and so on. So I absolutely agree that that would be something that would be really valuable to know more about.

IAN HANOMANSING: Ethiopis -- oh, sorry, go ahead.

DAVID WILSON: I agree with Mary that we could use those sort of surveys to definite advantage. There was a

survey as recently as three weeks ago on investor views of the enforcement landscape in Canada and how they felt they were protected or not from scams. But I think the question is a little differently focused. It's on the stakeholders, those that are regulated by us, how do they feel? And it's a very good suggestion, I agree.

IAN HANOMANSING: So let me ask you what success looks like, how one measures it.

ETHIOPIS TAFARA: I agree with everybody that's said it's virtually impossible to measure. I think we spend a lot of time trying to measure it, and sometimes because we're required to by law and we have a list of the number of cases or investigations that we've brought, and Mark and Carlos and I have been to conferences where we've debated this issue and tried to learn from one another as to how one measures it, and I think ultimately concluding that it's virtually impossible to measure. But I think there's one thing that is absolutely important for successful enforcement program and that's visibility. And that's visibility vis-à-vis the regulated community as well as the public, and I think the regulated community in the way that David was saying, you know, that visibility is achieved through your compliance efforts or your examination efforts. Seeing that you're there, you're looking over their shoulder, that's

certainly an important aspect to successful enforcement system.

And then, you know, visibility vis-à-vis the public. The public wants to know that there's a cop on the beat, that somebody's looking. How you communicate that, I mean, there are a variety of metrics you can use to communicate that. But for me it's all about visibility to these two constituents.

IAN HANOMANSING: So it's brutally unfair of me, but after everyone else has had a chance to answer this question, let me ask it of the man for whom it's almost three o'clock in the morning local time.

MARK STEWARD: Well, look, I -- when I -- when I -- I'll start again. (Laughter).

When I thought about this question I really thought about it quite differently to, I think, everyone. I didn't think in terms of measurement. I think long ago it just accepted that measurement was just too hard in this space. The sort of things I think, like, may think we're starting to get things right would be, you know, the speed at which we do our investigation work and achieve the results that we achieve. You know, the way in which we do it is our decision-making, you know, more likely or not to be, you know, the right kind of decision-making. Is it the right case to pursue? These are the things that really matter to me in what I do on a day-to-day

basis, and I think that if the man in the street who is being surveyed really understood that we are making progress in speeding up what we're doing, and making the right decisions, you know, they would think that we're doing the right thing. Even if we're still using the same old remedies and sanctions that everyone, you know, knows that we perhaps don't use enough of.

For example, you know, regulators often look at one another and say, "Well, look, the SEC has done 50 insider dealing cases in the last two years, why can't you?" Which is a silly question. The benchmark for me is not what the SEC is doing. It's where can I get the best investigators who can investigate fairly, properly and quickly, because unless I can do that, I can't achieve anything. So that's what success really means to me, it's getting the process of enforcement efficient, lean and mean and, you know, it's a very difficult thing to do, but that's really what I think success will look like.

IAN HANOMANSING: Eloquently put, as all of you were. It has been a pleasure for me to sit here and listen to people who are obviously expert at what they do speaking candidly and in an entertaining way. So thank you, I hope all of you enjoyed it as well, and I think Doug is going to conclude this session.

DOUG HYNDMAN: Well, Ian, thank you very much and thanks

very much to all of our panellists and members of the audience who participated in the debate today.

There was far too much in this morning's discussion for me to summarize it in any way adequately. But I thought I would just offer a few somewhat random observations from what I heard this morning in the hopes that that might be helpful. Others may have different observations.

First of all I think everyone agrees that securities violations are an important public policy concern, an important concern of the public that securities fraud is not a victimless crime, as some might have thought in the past. David made reference to a recent survey that the Canadian Securities Administrators did and published a few weeks ago, where we surveyed people across Canada who had been victims of investment fraud of various types. And, you know, what we discovered in that survey was that the effects on people of being defrauded are quite serious and quite severe and very similar in many ways to being a victim of violent crime: marriage breakdowns, health deterioration and those kinds of things. Because when you lose your life savings, and particularly when it's shortly before you expected to retire, it's a life-changing event that is very serious and that our society needs to take seriously.

And the other thing we found from the survey was

that investors generally had no confidence that the legal/regulatory system as a whole adequately dealt with securities fraud. They didn't think they had a chance of getting their money back. They didn't think the perpetrators were being severely enough dealt with. And I think there's a message in there for all of us who have any involvement in, or interest in, this area, that this is something we need to work harder on to get it right.

We heard today that the system is very complex. It involves, of course, regulators, self-regulators, criminal authorities in different configurations, in different countries, some countries you have full scope financial services regulators, in other countries we're sort of broken up into securities regulators, separate from other financial regulators, the divide between criminal and regulatory and civil varies somewhat among jurisdictions, all of which makes it very challenging to compare jurisdictions, but also challenging for jurisdictions to co-operate with each other.

But nevertheless I think you heard that there is a good deal of co-operation. We have, you know, written memoranda of understanding, certainly among all of the regulators who are here today, and many more around the world which provide the infrastructure for co-operation, but more important there are the

personal relationships and discussions that many of our panellists talked about that go on and, you know, how do we share information, how do we work together on these cases. You know, we need to be aware of differences in constitutional protections and make sure that those aren't violated when we're investigating across jurisdictions.

But I think, you know, some of the comments that Ethiopis Tafara made about how the *Fifth Amendment* rights in the U.S. and the *Charter* protections in Canada can interact and protect the rights of people and let us get on with the job of gathering the kind of evidence we need to pursue these matters. That, you know, maybe we don't need to worry about those quite as much as we have, because, you know, even though there are differences, generally certainly our countries represented here today, we have a basic underlying similarity in what the system is trying to achieve.

We talked about and this was a theme running through to some extent case selection and the idea of risk-based regulation, and I think, you know, the challenge that you heard about is the need to balance kind of a strategic approach to regulation, choosing cases on the basis of risk. I'm not sure it was said quite this way, but, you know, no matter how many resources you have, they are limited. They are not as

many as you could use if you wanted to investigate everything. So whether you admit to being a risk-based regulator or not, you have to make choices of which case to pursue and you can do that by dropping them at the outset and saying this one is not going anywhere, or you can, you know, put it in the back of your fridge and wait until it goes fuzzy and then throw it away. (Laughter).

But regulators, police, anybody involved in investigation make choices about where to devote their resources and a risk basis, strategic basis is obviously an important way to do that, but I think, you know, we also heard, and Ethiopis particularly articulated this, the need to be seen to be everywhere all the time. And I think it's an important message to people in the market that, yes, we are not going to pursue every case, but you can't count on your case not being one of the ones we'll pursue, no matter what you're doing and no matter whether that's one of our specific priorities, if we spot you and we catch you, we might very well go after you, and there is a significant probability and you won't like it if we do. That's certainly the message we need to get out there. That's the cop on the beat message.

We talked about an issue that is of significant interest to the criminal authorities here in Canada and whether criminal investigators should have the

power to compel the production of evidence at the investigative stage. And, you know, we had quite a long discussion about that and I think, boiled down, I think there was a sense that this could well be a very useful tool for the criminal authorities in Canada to have. You know, and different countries again differ in how they approach this issue, but certainly they have it in the United States, and, you know, the world hasn't come to an end and it's been used in other areas in Canada or another area and found to be consistent with our Constitution and certainly a sense here that there is no reason we shouldn't try that in the securities sphere.

We heard about possible new approach we might think more about in Canada, the deferred prosecution idea as a way of being more economical in the use of prosecution resources, and yet getting a positive result, which, you know, in many ways may be better than what you can get by pursuing a case through the full prosecution route. And I think Ethiopis described one of the reasons you might want to do that because of consequences to the infrastructure or the system that, you know, there are also other reasons to get that off the table, move towards improvement in that area and move on to other cases.

After the break we talked a lot about globalization, and I started this morning mentioning

the importance of globalization and the fact that, you know, if our globalized securities market is to be seen as fair and efficient and a market in which investors worldwide can have confidence, that we need to have effective regulatory co-operation and coordination. Now, this is something that as a Canadian regulator is an old song, because we are doing that within Canada. It is very easy for us to kind of move that kind of thinking and working into the international sphere as well.

You know, some of the kinds of problems that regulators are faced with in a globalized market were mentioned by people, the sovereign funds issue and some of the conundrums that raises, you know, how fast these things can move through the problems in the asset backed commercial paper market and, you know, something that if somebody had asked us ten months ago, you know, what are the big issues coming up, I bet that wouldn't have been mentioned as something. So as Ethiopis said, it is very hard to predict that kind of thing, but moves through and all of a sudden everybody is talking about it and trying to figure out how to deal with it.

Ethiopis described the disaggregation of fraud, which is something that as regulators we see all the time, this little piece of the fraud is here but, you know, it's in South Africa, it's in Europe, it's in

South America, and it's Asia, the U.S., all over the place and how do we as regulators bring that together and make sure that we have an adequate deterrent to that kind of activity and are able to pursue it and in the interests of investors around the world who get caught in those schemes.

You know, we have certainly been working closely with the SEC on our own kind of particular disaggregated fraud problem in the over the counter markets in the U.S. and people in our jurisdiction here playing in those markets and trying to use the international border to their advantage. We're trying to make sure that they can't do that and we've been doing various things. And as many of you in the room will know, I made an announcement a few months ago about a new effort that our Commission is putting on that, and just as a little plug, we published just very recently more specific policy proposals for dealing with both the issuers and the dealers who participate in that market and we'll be looking forward to your comments on those proposals. We think they will be important tools to help us get at this problem. But no matter what tools we have, you know, like other areas of globalization it's going to require us to co-operate and coordinate with the SEC, sharing information back and forth and, you know, coordinating our efforts as we work on particular

cases.

I think there was an excellent discussion of the fact that at the global level we've got pretty good relationships among regulators and good information sharing, but, you know, maybe we need to think about how do we take that further in coordinating our actual actions, coordinating the investigations, coordinating settlements and proceedings and so forth, and maybe some limits to how far we can take that. But, you know, again this is something we have been talking a lot about within Canada. We have done some of it internationally and I think it's something you can expect more of as regulators focus their intention on these issues.

There was some debate about, you know, whether the criminal law is kind of the poor cousin in international co-operation and coordination, but certainly the message Michael Code left us with is that, you know, in Canada at least the law is up to it. Is the system up to it? Not sure, but between the Supreme Court interpretations of Canadian law and the MLAT system, we have got the tools we need to co-operate internationally on the criminal side. Probably the work needs to be done on the people side to make sure that that kind of co-operation happens and we get effective enforcement at the criminal level.

And we concluded with a discussion of how do we know when we're doing a good job in enforcement? How do we measure success? I think everyone agreed that measuring success in this area, as in many areas of regulation and public policy, in fact, you know, it's very difficult to measure. How do you know whether your enforcement has gotten ten percent better in the last year. Is it, you know, you do ten percent more cases, does that mean you got better or does that mean you got worse? And there are a variety of those kinds of problems. Some creative ideas about how we can drill deeper into kind of the outcome side and look at what's happening in the market, and I think that's something as regulators you'll see us focusing more on. But there's no simple answer to this issue. You know, it's important to be visible and effective and seen to be good and, you know, surveying the market participants to see what they think is certainly a fruitful area to look at in measuring success.

But Mary alluded to something which reminded me of a comment that our Director of Enforcement said a while ago about how do you know whether we're doing a good job? He used the term "equalized unhappiness". If everybody out there is equally mad at us, then we're probably doing a good job as regulators. And I guess maybe that's something we could survey for to figure out whether that's where we've gotten to.

(Laughter).

So again thank you all very much. I think it was a great morning, a very good discussion. I hope you all enjoyed it as much as I did.

I will just remind you that we have the machines out there for the electronic survey and encourage you to fill that in.

We have, as I mentioned earlier, box lunches in the room next door. Please stay and chat, you know, with the panel members and each other about what you have heard this morning, and help yourself get more out of the day.

And as a final note you can help save the planet by recycling your name badge if you want to leave that with us before you go, rather than throwing it in the garbage somewhere.

So thank you all very much for coming today, I very much enjoyed it and I hope you did, too. Thank you. (Applause).

--- PROCEEDINGS CONCLUDED

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