STATEMENT OF RICHARD D. OWENS

TO THE JOINT PUBLIC MEETING OF THE SEC AND CFTC

ON HARMONIZATION OF MARKET REGULATION

September 2, 2009

Good morning. My name is Richard Owens. I am a partner at the law firm of Latham & Watkins. Thank you all very much for this opportunity to share a few thoughts about ways to better harmonize the enforcement efforts of the CFTC and the SEC. Like a number of other panel participants, I have spent much of my professional life in public service. From 1994 through 2006 I was an Assistant United States Attorney in the Southern District of New York. For ten of my twelve years in the U.S. Attorney's Office I was assigned to the Securities and Commodities Fraud Unit where I investigated and prosecuted violations of the federal securities, commodities and banking laws. From 2002 through 2006 I was the chief of that unit.

In the vast majority of the cases handled in the Frauds Unit we worked very closely with one or more of the federal financial regulatory agencies including most commonly the SEC, the CFTC and the Federal Reserve. During my tenure we were fortunate to have the opportunity to work closely with Division of Enforcement staff at all levels from both the CFTC and the SEC and to work with them on a number of significant matters over which both agencies had jurisdiction. A few examples that will provide some context include the prosecution of Martin Armstrong for a $3 billion ponzi scheme involving futures and securities, a long-term undercover investigation known as "Wooden Nickel" into a group of related boiler-room operations involving forex trading and securities, and the accounting frauds which lead to the collapse of Refco, a large futures commission merchant.

I can report from personal experience that in significant enforcement matters the SEC and CFTC have historically worked together and coordinated their activities to an extent and to a degree that is a model of interagency cooperation.

There is always room for improvement so allow me to offer just a few suggestions for further discussion and consideration. I will try to separate my suggestions, first, into changes which I believe the Commissions may be able to make as a matter of their own policies and practices and, second, changes which would clearly require legislative action.

Suggested Policy and Practice Changes

First, allow me to commend recent efforts underway at the SEC to streamline its internal procedures for initiating investigations and issuing subpoenas. These are in my view important and long needed changes which will help the agency's investigative efforts become more nimble and efficient. I believe this is welcome news for investors. I also want to encourage efforts now underway at the SEC to explore ways to use incentives, such as cooperation and deferred prosecution agreements. These have long been important tools available to the DOJ both to encourage cooperation, to gain speed and momentum in investigations, and to fashion appropriate remedies in cases where discretion suggests that the full weight of the law's available sanctions should not be used. I would like to encourage the CFTC to consider similar changes within its practices, particularly with respect to developing its own analogous cooperation and deferred prosecution agreements.

As I mentioned, in my experience the enforcement staff of both agencies worked very closely in the context of investigations where both agencies had overlapping jurisdiction. Granted, such matters have historically been the exception rather than the norm among the cases on each agency's docket. I believe, however, that as financial products grow more complex and as our financial institutions continue to consolidate and to grow in size and business lines, the number of matters where both agencies have enforcement jurisdiction will grow. Again this year witnessed another example of the sort of case I am referring to when both agencies filed parallel actions involving allegations of a massive frauds at WG Trading. And as the number of such matters grows, it will become increasingly inefficient for each agency to conduct separate investigations. Even if those investigations are closely coordinated or conducted in parallel needless inefficiencies will remain. It will be increasingly inefficient, for example, for each agency to separately staff investigations into the same underlying conduct, to serve similar or duplicative separate subpoenas, take separate investigative testimony and, where appropriate, engage in separate settlement negotiations.

To avoid these inefficiencies, and to minimize the undue burden and confusion that duplicative civil investigations can impose on industry participants, witnesses and even victims, I believe the Commissions should consider conducting truly joint investigations in response to events -- like the collapse of Refco or the allegations concerning WG Trading -- that affect both the securities and futures markets and that fall within each Agency's jurisdiction. What I have in mind is a procedure for cross designating enforcement staff as officers of both Commissions for purposes of conducting investigations. Armed with authority from both Commissions a jointly designated team of staff attorneys would have power, for example, to issue subpoenas, conduct interviews and take testimony in the name of both commissions. The joint enforcement team would also have responsibility to formulate global charging and settlement recommendations. Of course, those recommendations would still have to be separately considered and acted

upon by each Commission. But the investigative component of the enforcement process would be streamlined and harmonized between the Agencies.

On the subject of charging and settlement decisions, I have a further suggestion for greater harmony. I urge the Commissioners to develop and issue a joint policy statement or guidelines setting forth the factors that the Commissions will consider in exercising their discretion and decision making authority in enforcement matters. These guidelines should cover the waterfront so to speak and address the factors to be considered when determining, for example, whether or not to bring charges, what charges to bring, how much credit to give for cooperation and what sanctions are appropriate. I think this would be a worthwhile exercise and perhaps not as much work as one might think. Over the years both Commissions have published guidelines or issued reports which addressed one or more aspects of how each Agency exercises its discretion over enforcement matters. In 1994, for example, the CFTC published its Civil Money Penalty Guidelines which listed factors the CTFC would consider in determining when to seek financial penalties and how large those penalties should be. More recently, the SEC issued its *Seabord* Report which explains how and under what circumstances the SEC gives credit to entities that cooperate. It would be worthwhile now for both Commissions to review their respective public statements and guidance issued over the years with a view to consolidating that guidance into a single statement of principles shared by both Commissions. A shared or joint statement of principles and guidelines would do much to harmonize enforcement efforts by articulating a common framework for thinking about enforcement matters. This would benefit the enforcement staff of both Agencies by giving them both clear and shared guidance. It would also benefit industry participants and the public through greater transparency.

Suggested Legislative Changes

One difficulty that would arise in crafting a joint statement of principles for enforcement matters is the fact that the Commissions do not have the same sanctions powers. There are differences, for example, in each Agency's powers to bar industry participants and, most notably, the SEC does not have the power to seek restitution. I have always found it odd that Sarbanes-Oxley gave the SEC authority to *make* restitution through the fair funds provisions but no power to *seek* restitution, as opposed to disgorgement and fines. Restitution, which is appropriately measured by a victim's losses, and disgorgement, which is measured by a violator's gains, are not the same concepts and do not always yield the same number in any given case. In the criminal context, restitution, with few exceptions, is a mandatory component of any sentence for a conviction involving a financial fraud. It makes little sense to me that DOJ and the CFTC have broader authority to obtain restitution for fraud victims than does the SEC. The SEC needs, and should have, power to seek restitution orders.

This, of course, would require legislative action. And I urge the Agencies to review the differences between their respective powers to seek remedial measures and sanctions and, as part of any effort to seek legislative reform, seek to legislative changes to harmonize their respective powers.

Thank you again for the opportunity to share my views and these suggestions.